

COMMENTARIES
on
THE TRANSFER OF PROPERTY ACT
IV of 1882
as modified upto 1st April 1930

By
DARASHAW JIVAJI VAKIL, B.A., LL.B.
Advocate (O.S.), Bombay High Court

FIRST EDITION.

1938

(All rights, including those of translation, reserved by the author)

Rs. 14/- nett.

246-0436
V 2222

2101 DATE 15-22001

Printed by F. Borton for G. Claridge & Co., Ltd., at the
Caxton Printing Works, Fort, Bombay,
and Published by Darashaw J. Vakil,
Chamber No. 7, P. & O. Bank
Building, Fort, Bombay.

Dedicated

To

The memory of my father.

Nemo unquam judicet in se

PREFACE

THE harnessing of the Transfer of Property Act, 1882, by the hitherto commonly adopted method of adjusting and grouping the decisions of Courts in this country and in England under the relative sections, commendable in many respects, did not in my experience lend sufficient assistance to the conveyancer, and business lawyer not finding his difficulties solved.

Hence I have broken the tradition of conventional commentators. This work was undertaken by me many years ago at the suggestion of my father, a leading lawyer in the Central Provinces and Author of the C. P. Digest. The accomplishment of this task took several years as there were many pauses. My idea was not merely to deal with the sections and the principles established by authoritative decisions but to lay before practitioners and their clerks a book dealing with the solution of problems arising at the desk and in Court and also indicating to them how to proceed in drafting and disentangling vexed questions on conveyancing. To the task I have brought my experience as a very busy solicitor for over 25 years during which I have perused more than 12,000 deeds and instruments, not to speak of the several suits and summons relating to title attended to by me in the course of my practice.

The special features of this essentially practical work, besides a full discussion of the English and Indian Case Law, are :—

- (a) An easily read summary of the Act.
- (b) Changes made by the Transfer of Property Amendment Act, 20 of 1929.
- (c) Pitfalls to which a conveyancer is exposed.
- (d) Information on matters not usually connected with a book dealing with authoritative case law

such as a stock mortgage, power-of-attorney income-tax payable by a mortgagor, broker's position in the transaction, conditions on a sale by auction, transfers by limited holders, remedies of vendor and purchaser on breach, etc., etc.

- (e) Hints on drafting and the various stages through which a draftsman has to pass in the preparation of a conveyance, mortgage, lease, licence for transferring a leasehold property, creation of a charge, assignment of a chose in action, or of a policy of insurance, instruments of gift and exchange.
- (f) Requisitions on title.
- (g) Parallel references of old English cases from the English Reports.
- (h) Table of Cases with reference to alphabetical footnotes.
- (i) A copious and exhaustive index with cross references.

Quotations of decisions and dicta have been avoided to limit bulk, save where found necessary for the mofussil lawyer who has not at his disposal a large library. All the decisions down to the end of 1937 are incorporated.

For reading the proofs I am indebted to Mr. J. S. C. Davar of the Middle Temple, Barrister-at-Law, and Mr. P. P. Khambatta, Advocate (O.S.), and I take this opportunity of thanking them for the care and industry with which they have done their work.

DARASHAW J. VAKIL.

Chamber No. 7,
P. & O. Bank Building,
BOMBAY, 14th March, 1938.

CONTENTS.

| | PAGES |
|------------------------|-------|
| PREFACE | vii |
| TABLE OF CASES | xv |
| PREAMBLE | 1 |

CHAPTER I.

PRELIMINARY.

SECTIONS

| | | |
|----|---|----|
| 1. | Short title | 8 |
| | Commencement | 9 |
| | Extent | 9 |
| 2. | Repeal of Acts | 11 |
| | Saving of certain enactments, incidents, rights, liabilities, etc. .. | 11 |
| 3. | Interpretation clause | 18 |
| 4. | Enactments relating to contracts to be taken as part of Contract Act .. | 47 |

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) *Transfer of Property, whether Moveable or Immoveable.*

| | | |
|-----|--|-----|
| 5. | “ Transfer of Property ” defined | 50 |
| 6. | What may be transferred | 53 |
| 7. | Persons competent to transfer | 83 |
| 8. | Operation of transfer | 115 |
| 9. | Oral transfer | 124 |
| 10. | Condition restraining alienation | 125 |
| 11. | Restriction repugnant to interest created | 134 |
| 12. | Condition making interest determinable on insolvency or attempted alienation | 136 |
| 13. | Transfer for benefit of unborn person | 139 |
| 14. | Rule against perpetuity | 142 |
| 15. | Transfer to class some of whom come under sections 13 and 14 .. | 154 |
| 16. | Transfer to take effect on failure of prior interest | 156 |
| 17. | Direction for accumulation | 157 |
| 18. | Transfer in perpetuity for benefit of public | 164 |
| 19. | Vested interest | 169 |
| 20. | When unborn person acquires vested interest on transfer for his benefit. | 177 |
| 21. | Contingent interest | 177 |

| SECTIONS | PAGES |
|---|-------|
| 22. Transfer to members of a class who attain a particular age | 182 |
| 23. Transfer contingent on happening of specified uncertain event .. | 183 |
| 24. Transfer to such of certain persons as survive at some period not specified | 185 |
| 25. Conditional transfer | 186 |
| 26. Fulfilment of condition precedent.. .. . | 192 |
| 27. Conditional transfer to one person coupled with transfer to another on failure of prior disposition | 194 |
| 28. Ulterior transfer conditional on happening or not happening of specified event | 196 |
| 29. Fulfilment of condition subsequent | 203 |
| 30. Prior disposition not affected by invalidity of ulterior disposition .. | 204 |
| 31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen | 205 |
| 32. Such condition must not be invalid | 206 |
| 33. Transfer conditional on performance of act, no time being specified for performance | 207 |
| 34. Transfer conditional on performance of act, time being specified .. | 208 |

Election.

| | |
|-------------------------------------|-----|
| 35. Election when necessary | 209 |
|-------------------------------------|-----|

Apportionment.

| | |
|---|-----|
| 36. Apportionment of periodical payments on determination of interest of person entitled.. .. . | 218 |
| 37. Apportionment of benefit of obligation on severance | 220 |

(B) Transfer of Immoveable Property.

| | |
|--|-----|
| 38. Transfer by person authorized only under certain circumstances to transfer | 224 |
| 39. Transfer where third person is entitled to maintenance | 225 |
| 40. Burden of obligation imposing restriction on use of land, or of obligation annexed to ownership, but not amounting to interest or easement | 229 |
| 41. Transfer by ostensible owner | 242 |
| 42. Transfer by person having authority to revoke former transfer .. | 255 |
| 43. Transfer by unauthorized person who subsequently acquires interest in property transferred | 257 |
| 44. Transfer by one co-owner | 272 |
| 45. Joint transfer for consideration | 278 |
| 46. Transfer for consideration by persons having distinct interests .. | 281 |
| 47. Transfer by co-owners of share in common property | 282 |
| 48. Priority of rights created by transfer | 282 |
| 49. Transferee's right under policy | 284 |
| 50. Rent <i>bona fide</i> paid to holder under defective title | 286 |
| 51. Improvements made by <i>bona fide</i> holders under defective titles .. | 289 |
| 52. Transfer of property pending suit relating thereto | 304 |
| 53. Fraudulent transfer | 317 |
| 53A. Part performance | 341 |

CONTENTS.

xi

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

| SECTIONS | PAGES |
|--|-------|
| 54. "Sale" defined | 364 |
| Sale how made | 364 |
| Contract for sale | 364 |
| 55. Rights and liabilities of buyer and seller | 379 |
| 56. Marshalling by subsequent purchaser | 459 |

Discharge of Incumbrances on Sale.

| | |
|--|-----|
| 57. Provision by Court for incumbrance and sale freed therefrom .. | 462 |
|--|-----|

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

| | |
|---|-----|
| 58. "Mortgage," "mortgagor," "mortgagee," "mortgage-money," and "mortgage-deed" defined | 465 |
| Simple mortgage | 465 |
| Mortgage by conditional sale | 465 |
| Usufructuary mortgage | 466 |
| English mortgage | 466 |
| Mortgage by deposit of title-deeds | 466 |
| Anomalous mortgage | 466 |
| 59. Mortgage when to be by assurance | 516 |
| 59A. References to mortgagors and mortgagees to include persons deriving title from them | 526 |

Rights and Liabilities of Mortgagor.

| | |
|--|-----|
| 60. Right of mortgagor to redeem | 526 |
| Redemption of portion of mortgaged property | 527 |
| 60A. Obligation to transfer to third party instead of retransference to mortgagor | 564 |
| 60B. Right to inspection and production of documents | 566 |
| 61. Right to redeem separately or simultaneously | 568 |
| 62. Right of usufructuary mortgagor to recover possession | 576 |
| 63. Accession to mortgaged property | 580 |
| Accession acquired in virtue of transferred ownership | 580 |
| 63A. Improvements to mortgaged property | 587 |
| 64. Renewal of mortgaged lease | 589 |
| 65. Implied contracts by mortgagor | 591 |
| 65A. Mortgagor's power to lease | 599 |
| 66. Waste by mortgagor in possession | 603 |

Rights and Liabilities of Mortgagee.

| | |
|---|-----|
| 67. Right to foreclosure or sale | 604 |
| 67A. Mortgagee when bound to bring one suit on several mortgages .. | 610 |
| 68. Right to sue for mortgage-money | 611 |

| SECTIONS | PAGES |
|---|-------|
| 69. Power of sale when valid | 626 |
| 69A. Appointment of receiver | 643 |
| 70. Accession to mortgaged property | 647 |
| 71. Renewal of mortgaged lease | 649 |
| 72. Rights of mortgagee in possession | 651 |
| 73. Right to proceeds of revenue sale or compensation on acquisition .. | 656 |
| 74 and 75. (Repealed). | 660 |
| 76. Liabilities of mortgagee in possession | 661 |
| Loss occasioned by his default | 662 |
| 77. Receipts in lieu of interest | 677 |
| <i>Priority.</i> | |
| 78. Postponement of prior mortgage | 678 |
| 79. Mortgage to secure uncertain amount when maximum is expressed .. | 684 |
| 80. (Repealed). | 685 |
| <i>Marshalling and Contribution.</i> | |
| 81. Marshalling securities | 686 |
| 82. Contribution to mortgage-debt | 689 |
| <i>Deposit in Court.</i> | |
| 83. Power to deposit in Court money due on mortgage | 700 |
| Right to money deposited by mortgagor.. .. . | 700 |
| 84. Cessation of interest | 706 |
| 85 to 90. (Repealed). | 707 |
| <i>Redemption.</i> | |
| 91. Who may sue for redemption | 708 |
| 92. Subrogation | 716 |
| 93. Prohibition of tacking | 738 |
| 94. Rights of mesne mortgagee | 739 |
| 95. Right of redeeming co-mortgagor to expenses | 740 |
| 96. Mortgage by deposit of title-deeds | 741 |
| 97. (Repealed). | 741 |
| <i>Anomalous Mortgages.</i> | |
| 98. Rights and liabilities of parties to anomalous mortgages | 741 |
| 99. (Repealed). | 742 |
| <i>Charges.</i> | |
| 100. Charges | 742 |
| 101. No merger in case of subsequent encumbrance | 760 |
| <i>Notice and Tender.</i> | |
| 102. Service or tender on or to agent | 777 |
| 103. Notice, etc., to or by person incompetent to contract | 779 |
| 104. Power to make rules | 780 |

CONTENTS.

xiii

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

| SECTIONS | PAGES |
|---|-------|
| 105. "Lease" defined | 781 |
| "Lessor," "lessee," "premium," and "rent" defined | 781 |
| 106. Duration of certain leases in absence of written contract or local usage | 809 |
| 107. Leases how made | 816 |
| 108. Rights and liabilities of lessor and lessee— | |
| (A) Rights and liabilities of the lessor | 820 |
| (B) Rights and liabilities of the lessee | 821 |
| 109. Rights of lessor's transferee | 880 |
| 110. Exclusion of day on which term commences | 882 |
| Duration of lease for a year | 882 |
| Option to determine lease | 882 |
| 111. Determination of lease | 884 |
| 112. Waiver of forfeiture | 896 |
| 113. Waiver of notice to quit | 899 |
| 114. Relief against forfeiture for non-payment of rent | 900 |
| 114A. Relief against forfeiture in certain other cases | 903 |
| 115. Effect of surrender and forfeiture on under-leases | 904 |
| 116. Effect of holding over | 905 |
| 117. Exemption of leases for agricultural purposes | 908 |

CHAPTER VI.

OF EXCHANGES.

| | |
|--|-----|
| 118. "Exchange" defined | 911 |
| 119. Right of party deprived of thing received in exchange | 913 |
| 120. Rights and liabilities of parties | 914 |
| 121. Exchange of money | 915 |

CHAPTER VII.

OF GIFTS.

| | |
|---|-----|
| 122. "Gift" defined | 916 |
| Acceptance when to be made | 916 |
| 123. Transfer how effected | 925 |
| 124. Gift of existing and future property | 928 |
| 125. Gift to several, of whom one does not accept | 928 |
| 126. When gift may be suspended or revoked | 929 |
| 127. Onerous gifts | 931 |
| Onerous gift to disqualified person | 931 |
| 128. Universal donee | 932 |
| 129. Saving of donations <i>mortis causa</i> and Muhammadan law | 934 |

CHAPTER VIII.

| SECTIONS | OF TRANSFERS OF ACTIONABLE CLAIMS. | PAGES |
|--------------|---|-------|
| 130. | Transfer of actionable claim | 936 |
| 131. | Notice to be in writing, signed | 941 |
| 132. | Liability of transferee of actionable claim | 942 |
| 133. | Warranty of solvency of debtor | 943 |
| 134. | Mortgaged debt | 943 |
| 135. | Assignment of rights under marine or fire policy of insurance | 944 |
| 136. | Incapacity of officers connected with Courts of Justice | 944 |
| 137. | Saving of negotiable instruments, etc. | 946 |
| THE SCHEDULE | | 949 |
| <hr/> | | |
| APPENDIX | | 951 |
| INDEX | | 955 |

TABLE OF CASES.

A

Abadi Begam *v.* Mohammad Khalil, 366 (*v*), 367 (*h*).
 Abbakee Heggadthi *v.* Kerihiamma Shetty, 479 (*g*), 479 (*h*), 479 (*i*), 614 (*i*).
 Abbas Ali Shikdar *v.* Karim Baksh Shikdar, 366 (*n*).
 Abbas Khan *v.* Ram Das, 469 (*a*), 469 (*b*).
 Abbey *v.* Gutierrez, 801 (*h*), 803 (*c*).
 Abbott *v.* Abbott, *re.* Abbott, 859 (*h*).
 Abdid Husain *v.* Kaniz Fatima, 516 (*m*).
 Abdool *v.* Goolam, 56 (*c*).
 Abdool Hoosein *v.* Goolam Hoosein, 63 (*u*), 176 (*a*), 181 (*s*).
 Abdul Aziz Khan *v.* Appayasami Naicker, 120 (*g*).
 Abdul Aziz *v.* Mahomed Baksh, 435 (*r*).
 Abdulbhai *v.* Kashi, 468 (*u*).
 Abdul Cader *v.* Turner, 919 (*c*).
 Abdul Fata Mahomed *v.* Rasamaya, 141 (*v*).
 Abdul Hamid *v.* Abdul Ghani, 367 (*e*).
 Abdul Hashim *v.* Aman Krishna Saha, 86 (*m*).
 Abdul Hashim *v.* Amar Krishna Aama, 366 (*g*).
 Abdul Hossein *v.* C. A. Turner, 679 (*k*).
 Abdul Hye *v.* Mir Mohammed, 318 (*s*), 320 (*j*).
 Abdul Iasalam *v.* Mt. Rafiat, 622 (*x*).
 Abdul Kadir *v.* Ali Mia, 328 (*u*).
 Abdul Karim *v.* Abdul Qayum, 924 (*d*).
 Abdul Karim *v.* Karmali, 84 (*q*).
 Abdul Karim Khan *v.* Abdul Qayum Khan, 136 (*y*), 181 (*s*).
 Abdul Karim *v.* Saliman, 754 (*j*).
 Abdul Khader *v.* Chidambaram, 100 (*e*).
 Abdullah *v.* Ahmad, 279 (*z*).
 Abdullah Khan *v.* Mt. Bundi, 246 (*f*).
 Abdulla Khan *v.* Abdul Rehman Beg, 398 (*c*).
 Abdulla Khan *v.* Musammat Bundi, 247 (*w*), 249 (*y*).
 Abdulla *v.* Ismail, 365 (*i*),
 Abdulla *v.* Mammali, 441 (*w*), 442 (*f*).
 Abdulla *v.* Mammud, 854 (*o*).
 Abdul Latif *v.* Debi Mahton, 456 (*w*).
 Abdul Majeeth Khan *v.* Krishnama-chariar, 100 (*e*).

Abdul Majid *v.* Arunachala, 767 (*f*), 769 (*r*).
 Abdul Majid *v.* Nageshwar Dat, 781 (*w*).
 Abdul Mannap *v.* Sheikh Muslim, 799 (*w*).
 Abdul Muhamad *v.* Seethalakshmi, 757 (*y*).
 Abdul *v.* Noor Mahomed, 530 (*k*), 532 (*o*).
 Abdul Qayyum *v.* Sadar-ud-din Ahmad Khan, 653 (*d*), 726 (*n*).
 Abdul Rahim *v.* Abdul Hussein, 694 (*c*).
 Abdul Rahim *v.* Kirparam Daji, 327 (*q*).
 Abdul Rahiman *v.* Uthumansa, 129 (*x*).
 Abdul Rahim *v.* Madhavray, 488 (*k*).
 Abdul Rahim *v.* Raghunath Sukul, 496 (*v*).
 Abdul Rahman *v.* Gaya Prasad, 115 (*b*), 924 (*s*).
 Abdul Rahman *v.* Mt. Inayati Bibi, 310 (*o*).
 Abdul Rahman *v.* The Secretary of State for India, 416 (*k*).
 Abdul Rajak *v.* Jai Jimbabai, 100 (*b*).
 Abdul Rakmian *v.* Mahomed, 574 (*j*).
 Abdul Razak *v.* Abdul Rahiman, 734 (*t*), 735 (*h*).
 Abdul Rehman *v.* Phiroze Settna, 858 (*z*).
 Abdul Rehman *v.* Vinayak, 543 (*q*), 563 (*k*), 659 (*c*).
 Abdul Saffur *v.* Hamida, 666 (*d*).
 Abdulsakur *v.* Abubakkar, 168 (*n*).
 Abdul Valid Khan *v.* Mussumat Naran Bibi, 62 (*t*).
 Abdul Wahid Khan *v.* Mussumat Nuran Bibi, 175 (*e*), 181 (*s*).
 Abdul Wahid *v.* Nuran Bibi, 174, (*f*).
 Aberaman Ironworks *v.* Wickens, 393 (*a*), 456 (*u*).
 Aberdeen *v.* Chitty, 511 (*g*).
 Abhachari *v.* Ramachendrayya, 931 (*e*).
 Abhiram Goswami *v.* Shyami Charan, 113 (*g*).
 Abhiram *v.* Shyama Charan, 138 (*o*), 894 (*r*).
 Abhoya Charan *v.* Hem Chandra, 799 (*e*).
 Abhoy Churn *v.* Attarmoni Dasse, 294 (*a*).

- Abid Husain *v.* Kaniz Fatima, 666 (*i*), 666 (*l*).
 Abid Husain *v.* Munno Bibi, 317 (*r*).
 Abid Husain *v.* Ram Nidh, 935 (*e*).
 Abinash Chandra *v.* Dasarath, 523 (*c*), 523 (*i*), 524 (*w*).
 Abinash *v.* Dasarath, 521 (*l*).
 Abkan Sahib *v.* Soran Bivi, 753 (*q*).
 Abrahams *v.* Mac Fisheries Ltd. 855 (*t*).
 Abraham S. S. Co. *v.* Westville Shipping Co., 64 (*h*).
 Abubekar *v.* Maibibi, 132 (*s*).
 Abu Mahomed *v.* S. C. Chunder, 76 (*m*).
 A. C. Dastoor *v.* H. A. Kandawalla, 751 (*a*).
 A. Debtor, *Re.* 7 (*b*).
 Achal Ram *v.* Kazim Husain, 191, (*n*), 192 (*q*).
 Achhaibar *v.* Rajmati, 593 (*f*), 594 (*o*), 599 (*g*).
 Achhutanand *v.* Ram Nath, 448 (*d*).
 Achilli *v.* Tovell, 237 (*f*).
 Achobandil Kuari *v.* Mahabir Prasad, 368 (*x*).
 Achodbandil *v.* Manhabir, 440 (*b*).
 Achutan Nambiar *v.* Koman Nair, 357 (*h*).
 Achutaramaraju *v.* Subbaraju, 483 (*p*).
 Achut *v.* Hari, 653 (*a*).
 Ackland *v.* Lutley, 883 (*s*).
 Ackroyd *v.* Smith, 65 (*l*), 421 (*p*).
 Acland *v.* Cuming, 426 (*z*).
 Adakkalam *v.* Theethan, 375 (*g*).
 Adams *v.* Angell, 763 (*s*), 766 (*k*), 768 (*h*), 768 (*k*), 771 (*o*), 772 (*f*), 772 (*h*), 773 (*v*).
 Adams *v.* Gray, 170 (*b*), 170 (*v*), 180 (*j*).
 Adams *v.* Scott, 639 (*z*).
 Adam *v.* Bapu, 269 (*w*).
 Adames *v.* Hallett, 324 (*p*), 338 (*w*).
 Adari Sanyasi *v.* Nookamma, 451 (*a*), 456 (*x*), 734 (*v*).
 Addison *v.* Dawson, 93 (*x*).
 Adhibai *v.* Cursandas, 226 (*j*).
 Adhirance Narain *v.* Shona Malee, 227 (*r*).
 Adikesavan Naidu *v.* Gurunatha Chetti, 383 (*e*), 432 (*v*), 459 (*l*).
 Aditya Prasad *v.* Parmananda Patel, 271 (*j*).
 Aditya Prasad *v.* Ram Ratan, 571 (*o*), 576 (*f*), 756 (*l*).
 Adjudhia Baksh *v.* Rakhman Kuar, 195 (*u*).
 Adjudhia *v.* Rakhman, 184 (*k*).
 Administrator General of Bengal *v.* Aghore Nath Mookerjee, 391 (*e*).
 Administrator General of Bengal *v.* Asraf Ali, 906 (*q*), 909 (*g*).
 Adolphe Strager *v.* Emma Price, 814 (*z*).
 Advocate General *v.* Karmali, 156 (*q*).
 Advocate General *v.* Vishvanath, 167 (*c*), 169 (*t*).
 Afatbuddin *v.* Basanta, 329 (*m*).
 Afzal Begam *v.* Akbari Khanum, 316 (*c*).
 Afzal Husain *v.* Chhedi Lal, 497 (*d*).
 Aga Mahomedally Beg *v.* Venkatapayya, 578 (*s*), 579 (*x*).
 Aga Muhammadally *v.* Venkatappayya 546 (*w*).
 Agarchand Gumanchand *v.* Rakhina Hanmany, 681 (*c*).
 Agarchand *v.* Rakhma Hanwant, 816 (*n*).
 A-G. *v.* Copeland, 65 (*k*).
 A. G. *v.* Cummins, 207 (*m*).
 A. G. *v.* Dowtie, Dowtie's case, 415 (*c*).
 Agra Bank *v.* Barry, 683 (*d*).
 A-G. *v.* Great Eastern Rly., Co., 4 (*b*).
 Aghore Nath Chuckerbutty *v.* Ram Churn, 945 (*l*).
 A-G. *v.* Lamplough, 5 (*m*).
 Agnew *v.* King, 565 (*u*), 567 (*h*).
 A-G. *v.* Pougett, 7 (*c*).
 A. G. *v.* St. John's Hospital Bath, 816 (*t*).
 A-G. *v.* Theobold, 7 (*d*).
 Ahaley *v.* Bagnel, 360 (*j*).
 Ahamadar *v.* Jaminiranjan, 825 (*j*).
 Ahamad *v.* Kallu, 320 (*u*), 321 (*w*).
 Ahearn *v.* Bellman, 814 (*p*).
 Ahimsa Bibi *v.* Abdul Kader, 540 (*i*).
 Ahindra *v.* Twiss, 902 (*i*).
 Ahmad Ali *v.* Dhendba, 118 (*l*).
 Ahmad Ali *v.* Raihan Raza, 442 (*g*).
 Ahmad Azim *v.* Safi Jan, 129 (*u*), 205 (*g*).
 Ahmad Husain *v.* Muhammad Qasim, 560 (*a*).
 Ahmad Husain *v.* Riaz Ahmad, 903 (*w*).
 Ahmad *v.* Kunhamed, 513 (*r*).
 Ahmad-ud-din *v.* Ilahi Baksh, 55 (*q*), 58 (*c*).
 Ahmad-ud-din *v.* Majlis Rai, 58 (*v*).
 Ahmad Ullah *v.* Abdul Rahim, 703 (*m*), 705 (*o*).
 Ahmadullah *v.* Abdul Rahim, 704 (*j*).
 Ahmad-ul-lah Khan *v.* Salar Baksh, 622 (*b*).
 Ahmad Yar Khan *v.* The Secretary of State for India in Council, 301 (*x*).
 Ahmed Ali *v.* Abdul Majid, 327 (*n*).
 Ahmedbhoy Habibbhoy *v.* Sir Dinshaw N. Petit, 406 (*l*).
 Ahmedbhoy *v.* Vallibhoy, 305 (*y*), 308 (*b*).
 Ahmed Hassan *v.* Hassan Mahomed, 353 (*p*).

- Ahobilachariar v. Thulasi Ammal, 353 (q).
 Ainslie v. Goodwin, *Re. Goodwin*, 198 (k).
 Ainsworth v. Wilding, 674 (c), 675 (i).
 Aisha Bibi v. Mahfuz-un-nissa Bibi, 261 (b), 263 (s), 266 (h).
 Aislabie v. Rice, 193 (y).
 Aiyappa Reddi v. Kuppusami Reddi, 603 (e), 603 (z).
 Ajagar Hazar v. Annammah, 924 (u).
 Ajijuddin Sahib v. Sheik Budan Sahib, 269 (x).
 Ajijuddin v. Sheik Dudan, 366 (i).
 Ajjuddin v. Sheik Budan, 648 (b).
 Ajodhya v. Indra, 584 (y), 586 (t).
 Ajudhai Nath v. Sital, 122 (i).
 Ajudhia Prasad v. Mansingh, 266 (i), 478 (u), 648 (s).
 Akbar Husain v. Shahanshah Begum, 731 (t).
 Akhara Panchaiti v. Suba Lal, 723 (k).
 Akhoy Kumar Banerjee v. Corporation of Calcutta, 748 (s), 749 (o), 751 (v), 751 (w), 753 (u).
 Akhoy Kumar v. Haridas, 947 (y).
 Akhtar Beg v. Haq Nawaz, 74 (l), 945 (m).
 Akkawa v. Syadkhan, 62 (n).
 Akkawa v. Sayad Khan, 104 (b), 104 (c), 106 (c).
 Akram Ali v. Durga, 891 (r).
 Akram Ali v. Durga Prasanna, 133 (c).
 Akram-un-Nissa v. Mustafa-un-Nissa, 17 (g), 319 (e), 320 (q).
 Akshayalingam v. Avayambalammal, 458 (d).
 Akshoy Kumar Mitra v. Gopal Kamini Debi, 862 (l).
 Alabai Koya v. Mussa Koya, 928 (u).
 Ala Baksa v. Mahabhat Ali, 924 (b).
 Alagappa v. Dasappa, 330 (v).
 Alagiriswami Mudali v. Akkulu Naidu, 724 (r), 727 (r), 731 (u), 753 (v).
 Alakhan v. A. R. A. Arumugam Chettyar, 819 (u).
 Alakhan v. Arumugam Chettyar, 819 (v).
 Alamanayakunigari v. Murukuti, 268 (t).
 Alamdar Hussain v. Moti Ram, 367 (g).
 Alamelu Ammal v. Balu Ammal, 6 (t).
 Alam Mulla v. Surendra Kumar, 817 (c).
 Alangaran Chetti v. Lakshmanan Chetti, 769 (y), 771 (p).
 Alangaran Chetty v. Lakshman Chetty, 768 (h).
 A. L. A. R. a firm v. Maung Thwe, 309 (f).
- A. L. K. P. V. Chettyiar v. Maung The Su, 434 (n).
 Alauddin v. Aziz Ahmad, 819 (u).
 Alden v. Foster, 676 (l).
 Alderman v. Neate, 786 (c), 786 (v), 788.
 Alderson v. White, 481 (x), 483 (q), 483 (u).
 Aldin v. Latimer Clark, 828 (n).
 Aldrich v. Cooper, 686 (t).
 Alexander v. Brown, 532 (f).
 Alexander v. Mansions Proprietary, Ltd., 802 (o).
 Alexander v. Rayson, 336 (y).
 Ali Ahmad v. Bansidhar, 757 (s).
 Ali Ahmad v. Rahmat-ullah, 480 (q), 486 (d), 486 (z).
 Aliba v. Nanu, 750 (r).
 Alice Mary Hill v. William Clark, 190 (h).
 Ali Foon v. Hoe Lai Pat, 320 (k), 329 (h), 329 (k), 329 (n).
 Ali Hasan v. Dhirja, 764 (m).
 Ali Hossain v. Jonabali, 817 (e).
 Ali Husain v. Nillakandan Nambudri, 491 (q).
 Ali Jan v. Majid-ud-din, 561 (l).
 Ali Jan v. Manian Bibi, 727 (q).
 Ali Jan v. Mariam Bibi, 599 (u).
 Ali Kazemini v. Manik Chandra, 301 (x).
 Alikeshi Dassi v. Hare Chand Dass, 452 (i).
 Alimahmad v. Vadilal, 86, (w).
 Ali Mahomed v. Lalta Baksh, 541 (d).
 Ali Muhammad Khan v. Sheik Maharaj Bepari, 719 (t).
 Alisaheb v. Mohidin, 23 (d).
 Ali Saheb v. Shabji, 48 (u).
 Ali Shah v. Husain Bakhsh, 308 (w).
 Ali Quadar Hossain v. Jogendra Narain Roy, 121 (v).
 Allah Rakha v. Ali Muhammad, 924 (u).
 Allan v. Bryan, 797 (k).
 Allcard v. Walker, 57 (m).
 Allen (A. H.) & Co., Ltd. v. Whiteman, 376 (s).
 Allen v. Bennett, 359 (p).
 Allen v. Flicker, 5 (n).
 Allen v. Seckhan, 34 (d), 34 (f), 46 (z).
 Alli Hasan v. Mt. Rashidan 367 (b).
 Alliance Bank v. Broom, 330 (z).
 Allibhai v. Dada Alli, 150 (c).
 Allibhai v. Dada, 129 (w), 129 (z).
 Allisaheb v. Shesho, 764 (u).
 Allkins v. Jupe,
 Alokeshi Dassi v. Hara Chand Dass, 454 (h).
 Alms Corn Charity, *Re.*, 42 (l), 46 (t).

A. L. R. M. Firm *v.* L. P. R. Chettiar Firm, 38 (*d*).
 Alsop *v.* Bell, 766 (*p*), 766 (*r*).
 Altaf Ali Khan *v.* Lalta Prasad, 492 (*y*), 492 (*z*).
 Altaf Begam *v.* Brij Narain, 73 (*u*), 749 (*o*).
 Altapali Khan *v.* Uzirali Khan, 483 (*p*).
 Altof Begam *v.* Brij Narain, 74 (*k*).
 Alton *v.* Harrison, 325 (*w*), 326 (*e*), 326 (*z*), 329 (*d*) 337 (*j*).
 Alwar Chetty *v.* Chidambara Mudali, 83 (*i*).
 Aman Alli *v.* Azgar Ali Mia, 489 (*c*).
 Amarchand *v.* Gokul, 329 (*o*), 331 (*m*), 331 (*n*).
 Amar Chand Roy *v.* Prasanna Dasi, 4 (*x*).
 Amar Chandra Kundee *v.* Roy Goloke Chandra Chowdry, 768 (*i*), 774 (*b*).
 Amar Chandra Kundu *v.* Roy Goloka Chandra Chowdhuri, 773 (*t*).
 Amar Dayal *v.* Har Parshad, 276 (*c*).
 Amarendra *v.* Monimunjary Debi, 922 (*r*).
 Amarendra Nath *v.* Kashi Nath, 523 (*a*).
 Amar Nath *v.* Har Prasad, 82 (*a*).
 Amar Singh *v.* Bhagwan Das, 648 (*a*), 659 (*i*).
 Amatoo *v.* Sheikh Muksud Ali, 764 (*r*), 886 (*p*), 886 (*t*).
 Amatoo *v.* Sheikh Muksid Ali, 886 (*m*).
 Ambabai *v.* Bhau, 15 (*g*).
 Ambalal *v.* Narayan, 751 (*a*).
 Amba Prasad *v.* Wahid-ullah, 56 (*j*), 588 (*b*).
 Ambica Prasad *v.* Baldeo Lal, 854 (*j*), 855 (*d*).
 Ambika Prasad *v.* Beni Madho, 909 (*y*).
 Ambrose Summers, In the matter of, 472 (*j*).
 Ameeroonissa Khatoon *v.* Abdeoonissa Khatoon, 924 (*v*).
 Ameeroonissa *v.* Mooradoonnissa, 714 (*f*).
 Amerchand Madhowji, *Ex-parte*, 85 (*d*).
 Amina Bibi *v.* Katja Bibi, 10 (*b*).
 Amina Bi Bi *v.* Khatija Bi Bi, 934 (*d*).
 Amina Bibi *v.* Rama Shankar, 654 (*b*).
 Amir Bibi *v.* Arokiam, 6 (*t*).
 Amir Bibi *v.* Aziazabibi, 141 (*x*).
 Amir Chand *v.* Bukshi Sheo Pershad Singh, 700 (*n*),
 Amir Hasan *v.* Mahomed Nazir, 30 (*k*), 945 (*v*).
 Amir *v.* Indar Singh, 490 (*j*).
 Amir Jahan *v.* Khadim Husain, 247 (*p*), 252 (*e*).
 Amir-ul-lah *v.* Rasul Baksh, 619 (*k*).

Amjad Khan *v.* Ashraf Khan, 924 (*e*).
 A. M. K. M. Chettiyar Firm *v.* A. K. M. L. Chettiyar Firm, A. I. R. 713 (*s*).
 Ammani Ammal *v.* Ramaswami Naidu, 733 (*n*), 734 (*u*).
 Amma Bibi *v.* Udit Narain Misra, 454 (*h*).
 Ammanna *v.* Gurumurthi, 16 (*p*), 489 (*b*).
 Ammayee *v.* Yalumalai, 523 (*o*).
 Ammayya *v.* Narayana, 307 (*j*), 315 (*a*).
 Amna Bibi *v.* Najmun-Nissa, 79 (*s*).
 Amolak *v.* Dhondi, 890 (*o*).
 Amolak Ram *v.* Chandan Singh, 595 (*r*), 659 (*i*), 693 (*u*).
 Amratlal *v.* Keshavlal, 28 (*v*), 755 (*x*), 760 (*e*).
 Amritlal *v.* Kantilal, 312 (*k*), 316 (*j*).
 Amrita Lal *v.* Pratap Chand, 249 (*z*).
 Amrita Narayan *v.* Gaya Singh, 60 (*q*).
 Amrito Lall Dutt *v.* Surnomoni Dasi, 159 (*w*).
 Amrito Lall *v.* Surnomoyee, 159 (*y*).
 Amtul Nissa *v.* Mir Nurudin, 924 (*c*), 928 (*z*).
 Amulya Charan *v.* Kali Das, 197 (*d*).
 Ananda Mohan Roy *v.* Gour Mohan, 260 (*r*).
 Ananda Mohan Saha *v.* Gobinda Chandra Ray, 15 (*j*).
 Ananda *v.* Parbati, 244 (*j*), 244 (*n*), 255 (*h*).
 Ananda *v.* Uttamrao, 714 (*z*).
 Anand Chandra Ghose *v.* Prankisto Dutt, 135 (*u*).
 Anandi Devi *v.* Mohan Lal, 919 (*a*), 919 (*z*).
 Anandi Prasad *v.* Krishna Chandra, 737 (*s*).
 Anandi Ram *v.* Dur Najaf Ali Begum, 655 (*f*), 701 (*p*), 702 (*a*), 702 (*z*).
 Anandrao *v.* Bhikaji, 536 (*f*).
 Anandrao Vinayak *v.* Administrator General of Bombay, 202 (*m*).
 Anandrav *v.* Ravji, 488 (*k*).
 Anantapadmanabhaswami *v.* Official Receiver, 757 (*o*).
 Anantapadmanabhaswami *v.* Official Receiver of Secunderabad, 9 (*h*), 242 (*u*).
 Anantarama *v.* Yussifji Oomer Sahib, 749 (*c*).
 Anantha Tirtha *v.* Nagamuthu, 136 (*z*).
 Anantha Tirtha *v.* Nagamuthu Ambalagaren, 129 (*v*).
 Anant Ram *v.* The Collector of Etah, 225 (*b*), 225 (*y*), 261 (*z*).
 Anakaran *v.* Saidamadath, 469 (*n*), 470 (*q*).
 Anar Dayal *v.* Har Prasad, 261 (*z*).

Anath Nath Maitra *v.* Kumar Keshav Chandra, 152 (*m*).
 Anatt Natt *v.* Kumar Keshav, 145 (*d*).
 Anchor Trust Co. *v.* Bell, 663 (*a*).
 Ancona *v.* Rogers, 826 (*r*).
 Anderson *v.* Dickie, 230 (*o*).
 Anderson & Milner's Contract, 891 (*t*).
 Anderson *v.* Oppenheimer, 831 (*e*), 832 (*v*), 835 (*j*).
 Anderson *v.* Radcliffe, 191 (*h*).
 Andrew's Case, 929 (*e*).
 Andrews *v.* City Permanent Benefit Building Society, 571 (*h*).
 Andrews *v.* Joakim, 167 (*f*).
 Andrews *v.* Paradise, 830 (*p*), 832 (*i*), 834 (*e*).
 Angallam *v.* Aslami Sahib, 847 (*d*).
 Angammal *v.* Aslami Sahib, 851 (*q*), 858 (*r*).
 Angammal *v.* Venkata, 251 (*x*), 253 (*w*).
 Angannayya *v.* Narasayya, 268 (*p*).
 Anglo-India Jute Mills Co. *v.* Omademull, 947 (*e*).
 Anisle *v.* Goodwin, *Re.* Goodwin, 187 (*e*).
 Anjaneyalu *v.* Sri Venugopala, 67 (*l*), 79 (*b*).
 Anker *v.* Franklin, 427 (*f*).
 Ankinedu *v.* Subbiah, 579 (*w*).
 Annada Mohan Roy *v.* Gour Mohan Mallick, 59 (*l*), 61 (*b*).
 Annadaprosad Adak *v.* Mihilal Adak, 114 (*t*).
 Annada Kumar *v.* Indra Bhusan, 104 (*x*).
 Annada Mohan Roy *v.* Gour Mohan, 268 (*r*).
 Anandi Ram *v.* Dur Najaf, 653 (*j*).
 Annaji *v.* Ragubai, 48 (*k*).
 Annamalai Chettiar *v.* Malayandi Appaya, 308 (*z*).
 Annapuna Co., Ltd., in the matter of, 758 (*b*).
 Annapurnabai *v.* Durgopa, 93 (*c*).
 Anon *v.* Leon, 876 (*a*).
 Annu *v.* Shripati, 60 (*u*), 62 (*q*), 73 (*r*).
 Anon, 667 (*c*), 668 (*h*), 676 (*c*).
 Anrudh Kumar *v.* Lachmi Chand, 933 (*k*), 933 (*m*).
 Ansell *v.* Baker, 765 (*b*).
 Anstruther-Gough-Calthorpe *v.* McOscar, 865 (*t*), 865 (*x*), 866 (*d*), 866 (*e*), 869 (*m*).
 Anund *v.* Boykantnath, 70 (*y*).
 Anundo Moyee Dossee *v.* Dhonendra Chunder Mookerjee, 311 (*f*).
 Anworth *v.* Johnson, 864 (*g*), 864 (*h*).
 Aparna Debi *v.* Shri Shri Shiva Prasad, 219 (*z*), 220 (*m*).

A. P. Bagchi *v.* F. Morgan, 812 (*p*).
 Apharry *v.* Bodingham, 320 (*v*).
 Appa Dhond *v.* Babaji Krishnaji, 248 (*k*), 254 (*c*).
 Appaji Bhivrao *v.* Kavji, 730 (*h*), 763 (*q*).
 Appalarajee *v.* Krishna Murthy, 331 (*k*).
 Appala Raju *v.* Krishnamurthy, 769 (*q*).
 Appalaraju *v.* Krishnamurthy, 323 (*x*).
 Appa Rai *v.* Somer, A.I.R., 704 (*d*).
 Appasami Thevan *v.* Virappa Thevan, 619 (*l*), 620 (*r*).
 Appasami *v.* Veerappa, 626 (*o*).
 Appayasami Naicker *v.* Midnapore Zamindari Co., Ltd., 67 (*k*), 68 (*o*).
 Appayya Chetty *v.* Mahammad Beari, 908 (*q*).
 Appleton *v.* Campbell, 190 (*j*), 801 (*a*).
 Appoovier *v.* Rama Subba, 99 (*t*).
 Arakal *v.* Domingo, 918 (*m*).
 Arakal Joseph Gabriel *v.* Domingo Inas, 279 (*x*).
 A. Rama Rao *v.* Mandachalugai, 769 (*s*), 772 (*c*), 772 (*h*).
 Arbib and Class's Contract, 414 (*l*).
 Arbutnot *v.* Norton, 78 (*k*).
 Arden *v.* Pullen, 868 (*z*).
 Ardeshir Cowasji *v.* K. D. & Brothers, 666 (*m*).
 Ardeshir *v.* K. D. & Bros., 856 (*k*), 860 (*p*), 860 (*z*), 958 (*y*).
 Ardesir Bejonji *v.* Sirdar Ali Khan, 943 (*t*).
 Arding *v.* Bonner, 3 (*e*).
 Ariff *v.* Jadu Nath, 353 (*h*), 355 (*r*), 357 (*h*), 362 (*u*).
 Ariyaputhira *v.* Muthukomaraswami, 366 (*x*).
 Ariyaputri *v.* Alamelu, 561 (*f*).
 Arjun *v.* Narayan, 902 (*r*).
 Arjun Singh *v.* Mahesha Lal, A.I.R., 714 (*l*).
 Arkwright, *Ex parte*, *Re.* Ravenscroft, 503 (*n*).
 Arkwright *v.* Newbold, 679 (*j*).
 Armstrong, *Ex-parte*, *Re.* Gilchrist, 50 (*z*).
 Arumugam *v.* Muthiah Chetty, 674 (*y*).
 Armugham Chetty *v.* Muthu Koundan, 110 (*z*), 111 (*h*).
 Arnold *v.* Arnold, *Re.* Arnold, 386 (*k*).
 Arnold *v.* Cheque Bank, 681 (*k*).
 Arumugam *v.* Sivagnana, 618 (*y*).
 Arumuga Sundare *v.* Narasimha, 774 (*e*).
 Arunachala Aiyar *v.* T. Ramasami Aiyar, 432 (*u*).
 Arunachalam *v.* Ayyavayyan, 624 (*z*).
 Arunachalam Chetti *v.* Ayyavayyan, 621 (*q*), 621 (*r*).

- Arunachalam Chetty Firm *v.* Ko Po Yan,
 Arunachalam *v.* Madaswami, 939 (*n*).
 Arunachalam *v.* Pratapasimha, 312 (*l*).
 Arunachalam *v.* Ramasamy, 435 (*r*), 609 (*c*).
 Arunachella Chettiar *v.* Ramiah Naidu, 811 (*d*), 818 (*p*).
 Arunachella Chetti *v.* Sithayi Ammal, 585 (*c*), 653 (*g*).
 Arunchellam Chetti *v.* Subramanian Chetti, 123.
 Arunchellam *v.* Subramaniam 942 (*r*).
 Arunachella *v.* Rangiah, 447 (*z*).
 Arunachella *v.* Sithayi, 588 (*x*).
 Arunchellam Chetty Firm *v.* Ko Po Yan, 947 (*z*).
 Asa Beevi *v.* Karuppan Chetty, 63 (*u*).
 Asad Ali *v.* Haidar Ali, 72 (*f*), 73 (*n*).
 Asa Ram *v.* Kishan Chand, 496 (*v*).
 Asa Singh *v.* Nanbat, 312 (*t*).
 Asghari Begam *v.* Moula Baksh, 128 (*j*).
 Asghar Reza Khan *v.* Mahomed Mehdi Hoosein Khan, 117 (*f*), 122 (*g*).
 Ashaaf Ali *v.* Chandrapal Singh, 756 (*l*).
 Ashabai *v.* Haji Tyeb, 921 (*m*).
 Ashburton (Lord) *v.* Nocton, 796 (*o*).
 Ashgar Ali *v.* Delroos Banno, 920 (*w*).
 Ashiq Husain *v.* Chatarbhuji, 38 (*d*), 38 (*y*), 39 (*h*).
 Ashloke Singh *v.* Bodha Ganderi, 23 (*z*).
 Ashton *v.* Dalton, 506 (*l*).
 Ashutish Bannerjee *v.* Lukhimoni Debya, 757 (*v*).
 Ashutosh *v.* Behari Lal, 563 (*f*).
 Ashutosh Rai *v.* Babu Lal, 659 (*g*).
 Ashutosh Sikedar *v.* Chidam Mandal, 102 (*y*).
 Ashwin *v.* Burton, 942 (*p*).
 Ashworth *v.* Lord, 674 (*d*), 675 (*s*).
 Aspdin *v.* Austin, 914 (*p*).
 Astor *v.* Astor, *In Re.* Astor, 180 (*i*).
 Asutosh Dutt *v.* Doorga Churn, 129 (*v*).
 Asutosh Sikdar *v.* Behari Lal, 563 (*e*).
 Askaran *v.* Gobordhan, 615 (*j*).
 Assam Local Rules and Orders, 9 (*h*).
 Assanullah *v.* Mohini Mohan Das, 836 (*i*).
 Assanulla *v.* Tirthabashini, 797 (*c*).
 Astley *v.* Essex (Earl), 198 (*l*) 200 (*z*).
 Atab Pramanik *v.* Arif Tarafdar, 569 (*z*), 574 (*l*).
 Ata Mohammad *v.* Official Receiver, 332 (*z*).
 Athakutti *v.* Govinda, 794, 816 (*y*).
 Athill *v.* Athill, *In re.* Athill, 697 (*q*).
 Athlumney, *Re.*, 7 (*a*).
 Atkinson *v.* Grey, 721 (*g*).
 Atkinson & Horsell's Contract, *Re.*, 90 (*s*), 409 (*o*), 409 (*q*), 411 (*r*).
 Atlaf Begam *v.* Brij Narain, 21 (*v*).
 Atma Ram *v.* Kehar Singh, 79 (*v*).
 Atmaram *v.* Doma, 24 (*r*).
 Atmaram Sakham v. Vaman Janardhan, 918 (*r*), 927 (*d*), 927 (*f*).
 Atmaram *v.* Vaman, 314 (*j*).
 Atrabanessa Bibi *v.* Safatullah Mia, 51 (*h*).
 Attar Chand *v.* Chandu Lal, 820 (*h*).
 Atterbury *v.* Wallis, 42 (*r*), 683 (*d*).
 Attorney General *v.* Biphosphated Guano Co., 240 (*o*), 751 (*w*).
 Attorney General *v.* Day, 358 (*l*).
 Attorney General *v.* Morgan, 121 (*p*).
 Attorney General *v.* The Master and Fellows of Catherine Hall Cambridge, 128 (*o*).
 Attwater *v.* Attwater, 126 (*l*), 126 (*n*).
 Attwood *v.* Small, 394 (*j*), 398 (*d*).
 Aubhoyessury Daboa *v.* Gouri Sunker Panday, 757 (*w*).
 Aubhoyessury *v.* Gouri Sukar, 751 (*z*).
 Aulad Ali *v.* Ali Athar, 131 (*o*), 151 (*e*), 240 (*j*).
 Aunda *v.* Nilphamari 252 (*h*).
 Aung Ban *v.* Chettiar Firm, 478 (*w*).
 Aung Dun *v.* Maung Tun Ya, 745 (*k*).
 Aung Kaing *v.* Maung San, 38 (*v*).
 Auriol *v.* Mills, 857 (*u*).
 Austen *v.* Halsey, 441 (*x*).
 Austerberry *v.* Corporation of Oldham, 136 (*e*), 232 (*k*), 232 (*p*).
 Auston *v.* Mead, 934 (*z*).
 Authinarayana *v.* Krishnaswamy, 752 (*l*).
 Avabai *v.* Pestonji, 521 (*o*).
 Avelyn *v.* Ward, 195, 196 (*b*), 196 (*o*).
 Averall *v.* Wade, 692 (*k*).
 Avery *v.* Cheslyn, 852 (*z*).
 Avudai Ammal *v.* Chinna Ramaswami Naik, 724 (*x*), 725 (*d*), 730 (*h*).
 Avula Charamudi *v.* Marriboyina Raghavulu, 146 (*s*), 372 (*d*), 376 (*x*).
 Ayderman *v.* Syed Ali, 95 (*c*).
 Ayr Harbour Trustees *v.* Oswald, 235 (*k*).
 Ayyakutti Markandan *v.* Periyasami, 701 (*r*), 703 (*o*).
 Ayyareddi *v.* Gopalakrishnayya, 772 (*e*).
 Azima Bibi *v.* Shamalanand, 247 (*d*), 249 (*r*).
 Azim-un-nissa *v.* Clement Dale, 323 (*u*).
 Azimut Ali *v.* Jowahir Singh, 560 (*a*).
 Aziz Ahmad *v.* Alauddin, 818 (*q*).
 Aziz Ahmad Khan *v.* Chhota Lal, 720 (*y*), 733 (*k*).
 Aziz Khan *v.* Duni Chand, 557 (*k*).

B

- Baba Sah v. Hajee Mohamad*, 41 (*b*).
Babaji v. Magniram, 562 (*r*), 563 (*i*), 591 (*w*), 619 (*g*).
Babajirao v. Laxmandas, 920 (*n*).
Babaji v. Vasudev, 275 (*t*).
Babhadra v. Bhowani, 928 (*u*).
Baboo Gopail v. Budurooden, 907 (*g*).
Baboo Kallyan Doss v. Baboo Sheo Nundun Purshad Singh, 669 (*o*), 669 (*x*).
Babu Bhagwati v. Maiyan Murat, 735 (*a*).
Babui Girija Kuer v. The Secretary of State for India in Council, 745 (*d*).
Babu Lal v. Ganesham Das, 130 (*c*).
Babu Lal v. Ghansham Das, 136, 923 (*q*).
Baburam Bag v. Madhab Chandra Pollay, 238 (*v*), 267 (*m*).
Babu Ram v. Inam Ullah, 455 (*s*).
Baburam v. Madhab, 458 (*b*).
Babu Ram v. Ram Sarup, 24 (*m*), 472 (*u*).
Baburam v. Madhab Chandra, 40 (*x*), 378 (*r*).
Baburao v. Tukaram, 104 (*b*).
Babu Singh v. Bihari Lal, 110 (*c*).
Babu Singh v. Rameshwar, 104 (*b*), 104 (*c*).
Bachan Singh v. Bijai Singh, 312 (*q*).
Bachchu Lal v. Mohammad Mah, 677 (*w*).
Bachumal v. Mulchand, 134 (*p*).
Bachumal v. Vessimal, 132 (*u*).
Bachun v. Hamid Khan, 714 (*f*).
Bachu v. Perbhu, 546 (*y*).
Backer Khorasanee v. Ahmed Esmail, 473 (*b*).
Backhouse v. Charlton, 511 (*b*).
Bacon v. Proctor, 162 (*j*).
Badagala Jogi Naidu v. Bendalam Papiiah Naidu, 111 (*e*).
Badam v. Ganga Dei, 123 (*i*).
Badan v. Murari Lal, 261 (*e*).
Badridas v. Sundar Das, 173 (*u*), 175 (*o*).
Badri Das v. Besa, 621 (*n*).
Badri Prasad v. Madan Lal, 110 (*z*).
Badri Prasad v. Murlidhar, 495 (*l*).
Badri Prasad v. Sheo Dhian, 650 (*q*).
Badri Singh v. Hazari Singh, 327 (*f*).
Badrudin v. Sitaram, 542 (*d*).
Bageshri Dayal v. Pancho 441 (*u*).
Bageswari Charan v. Kumar Kama-khya Narain, 121 (*a*).
Baghelin v. Mathura Prasad, 492 (*y*).
Baghut Pershed Singh v. Girja Koer, 110 (*e*).
Bagnall v. Vellar, 536 (*g*).
Bagot v. Bagot, 625 (*m*).
Bagot v. Chapman, 680 (*w*).
Bahadur v. Raja Moti, 859 (*m*).
Bahadur Singh v. Mohar Singh, 59 (*f*), 60 (*n*).
Bahadur Singh v. Ram Bahadur, 60 (*u*).
Bai Chanchal v. Chimanlal, 102 (*e*), 102 (*h*), 103 (*r*).
Bai Devmani v. Ravishankar, 336 (*z*), 441 (*n*).
Baidya Nath v. Alef Jam Bibi, 250 (*n*), 254 (*y*).
Baidya Nath Dutt v. Alef Jam Bibi, 243 (*y*).
Bai Dhanlaxmi v. Hariprasad, 197 (*g*).
Bai Ganga v. Rajaram, 13 (*v*).
Bai Hirakore v. Trikamdas, 274 (*d*).
Baijanath v. Bhimappa, 284 (*g*).
Baijnath v. Mangla, 105 (*i*), 105 (*k*).
Baij Nath v. Moheswari, 14 (*c*).
Baijnath v. Parmeshwar Dayal, 74 (*f*).
Baijnath Singh v. Mt. Biraj Kuer, 930 (*i*).
Baij Nath Singh v. Paltu, 367 (*q*), 368 (*s*), 426 (*w*), 439 (*x*), 440 (*d*).
Bai Kamala v. Revashankar, 178 (*y*).
Bai Kanku v. Bai Jadav, 542 (*o*).
Baikantha Nat Dey v. Mohesh Chander Dey, 710 (*p*).
Bailey v. Barnes, 37 (*g*), 45 (*c*), 384 (*h*), 635 (*u*).
Bailey v. Hobson, 280 (*s*).
Bailey v. Richardson, 771 (*q*), 776 (*b*).
Bailey v. Stephens, 232 (*k*).
Bai Mahakore v. Bai Mangla, 53 (*d*).
Bai Narmada v. Bhagvantrai, 760 (*e*).
Bain v. Brand, 846 (*v*).
Bain v. Fothergill, 407 (*v*), 459 (*l*), 459 (*m*).
Baines, Re., 5 (*n*).
Bai Parvati's Case, 62 (*m*).
Bai Ramabai v. Bai Mani, 928 (*u*).
Bai Rewa v. Vali Mahomed, 770 (*d*), 774 (*e*).
Bai Vijli v. Nansa Nagar, 190 (*c*).
Bajiangi v. Udit Narain, 470 (*d*).
Bajrangi Singh v. Manokarnika, 62 (*k*), 104 (*x*), 104 (*y*).
Baker, Re., Ex parte Bisdee, 506 (*r*).
Baker (Albert) & Co., Ltd., 802 (*z*).
Baker & Harley, Re. Ex parte Linden, 685 (*s*).
Baker & Selmon's Contract, Re. 90 (*s*), 409 (*p*).
Baker v. Dening, 519 (*i*).
Baker v. Grat, 575 (*w*).
Baker & Harley, Re., Ex parte Winden, 685 (*s*).
Baker v. Moss, 391 (*k*), 394 (*n*).

- Bakhtawar Begum *v.* Husaini Khan, 528 (*u*), 542 (*n*), 557 (*o*), 578 (*q*).
 Bakhtawar Lal *v.* Barumal, 658 (*x*).
 Baksh *v.* Briggis Shaw, 78 (*r*).
 Bakshiram *v.* Darku, 585 (*j*).
 Baksu Laxman *v.* Govind Kanji, 482 (*e*).
 Bala *v.* Daulu, 307 (*y*), 314 (*o*).
 Bala *v.* Shiva, 550 (*h*).
 Bala Prasad *v.* Shyam Behari, 13 (*w*).
 Balabhai *v.* Motabhai, 142 (*g*).
 Balaji Anant *v.* Ganesh Janardan, 275 (*r*).
 Balaji *v.* Babu, 350 (*j*).
 Balaji *v.* Ganesh, 275 (*k*), 275 (*t*).
 Balaji *v.* Gopal, 816 (*r*).
 Balaji *v.* Magniram, 659 (*d*).
 Balaji *v.* Ramchandra, 87 (*j*), 907 (*d*).
 Balaji Singh *v.* Gangamma, 4 (*b*), 4 (*c*).
 Balaji Singh *v.* Chakka Gangamma, 343 (*s*).
 Bala Kandappa *v.* Sadashiv Hari, 373 (*h*).
 Balakrishna *v.* Bhawanipur Banking Corporation, Ltd., 36 (*b*).
 Balamukandas *v.* Moti Narayan, 378 (*k*).
 Balaram *v.* Appa, 40 (*v*).
 Balaram *v.* Mangta Dass, 489 (*r*).
 Balaram *v.* Nanuram, 706 (*w*).
 Bala *v.* Sadashiv, 373 (*f*).
 Balasidhantam *v.* Perumal, 703 (*m*).
 Balasubramania Nadar *v.* Sivaguru Asari, 747 (*a*).
 Balbaddar *v.* Dhanpat, 546 (*y*).
 Balbhadar Singh *v.* Lakshmi Bai, 928 (*x*), 930 (*g*).
 Balbhaddai *v.* Bitto, 705 (*o*).
 Balbhaddar Prasad *v.* Dhanpat Dayal, 624 (*d*).
 Balbhaddar Singh *v.* Kusehar Das, 267 (*c*).
 Balbhadr Singh *v.* Lukshmi Bai, 926 (*y*).
 Balchand *v.* Balaki, 40 (*w*).
 Baldeo Bharthi *v.* Hushiar Singh, 737 (*t*).
 Baldeo *v.* Bir Gir, 327 (*n*).
 Baldeodas *v.* Sarojini, 312 (*o*).
 Baldeo *v.* Losai, 546 (*y*).
 Baldeo Parshad *v.* Miller, 24 (*q*), 52 (*p*), 472 (*u*).
 Baldeo Prasad *v.* Fateh Singh, 103 (*j*).
 Baldeo Prasad *v.* Uman Shankar, 767 (*w*), 774 (*x*), 775 (*i*).
 Baldeo Sahai *v.* Baiji Nath, 311 (*a*), 315 (*y*), 690 (*t*), 692 (*h*).
 Baldeo Singh *v.* Deputy Commissioner, Kheri 769 (*s*).
 Baldeo Sahu *v.* N. B. Miller, 271 (*z*).
 Baldwin *v.* Lewis, 675 (*u*).
 Baldwin *v.* Smith, 93, (*a*).
 Balgobind Das *v.* Narain Lal, 102 (*p*), 111 (*k*), 275 (*i*).
 Baliram *v.* Sadaram, 819 (*t*).
 Baliramsingh *v.* Ramchandra, 311 (*z*).
 Balkantha Nath Dey *v.* Mohesh Chandra Dey, 713 (*q*).
 Balkishen Das *v.* Legge, 482 (*k*), 483 (*o*), 483 (*t*), 487 (*h*).
 Balkishen Das *v.* W. F. Legge, 441 (*p*), 481 (*u*), 485 (*l*), 485 (*n*).
 Balkishen *v.* Legge, 481 (*w*), 481 (*y*), 482 (*g*), 485 (*q*), 486 (*f*), 488 (*p*).
 Balkissondas *v.* W. F. Legge, 514 (*x*), 514 (*y*).
 Balkrishna *v.* Moro, 816 (*r*).
 Bal Krishna *v.* Paij Singh, 73 (*q*), 75 (*r*).
 Balkrishna *v.* Shripatsingh, 367 (*q*), 426 (*w*), 440 (*b*), 444 (*l*).
 Balkrishna *v.* Vishvanath, 597 (*f*).
 Ballabha Das *v.* Murat Narain Singh, 837 (*s*).
 Balla Mal *v.* Ahad Shah, 557 (*k*).
 Balla Mal *v.* Ata Ullah, 141 (*x*).
 Ballaramgiri *v.* Vasudev, 878 (*u*), 878 (*w*), 879 (*l*).
 Ballard *v.* Aston, *In re.* Ashton, 202 (*k*).
 Ballard *v.* Way, 389 (*p*).
 Ballin *v.* Ballin, 181 (*o*).
 Balli Singh *v.* Raghubar Singh, 151 (*e*).
 Ball *v.* Mannin, 92 (*j*).
 Ballu Mal *v.* Ram Kishan, 243 (*w*), 250 (*l*).
 Balmakund *v.* Bhagwan Das, 918 (*r*).
 Balmukund *v.* Bhagwandas, 522 (*z*).
 Balmer, *Re., Ex-parte* Johnson, 722 (*w*).
 Balmukund *v.* Tula Ram, 53 (*o*), 55 (*r*), 55 (*t*), 58 (*b*).
 Balraj Kunwar *v.* Jagatpal Singh, 4 (*c*).
 Balton *v.* Salmon, 711 (*w*).
 Balu *v.* Gopal, 521 (*n*).
 Balusu Veeraraghavalu *v.* Boppana Manikyam, 913 (*n*).
 Baluswamy Aiyer *v.* Krishnaswamy Aiyer, 703 (*w*).
 Balvant Ramchandra *v.* The Secretary of State, 79 (*t*).
 Balvanta *v.* Bira, 449 (*l*), 451 (*w*).
 Balvantrav *v.* Pirshotam, 21 (*b*).
 Balvantrav *v.* Purshotam, 20 (*j*), 22 (*o*).
 Balwant Singh *v.* Joti Prasad, 53 (*m*), 55 (*m*), 57 (*f*), 172 (*q*), 175 (*q*).
 Balwant Singh *v.* R. Claney, 81 (*o*).

- Bama Sundari Dasi v. Adhar Chandar**, 845 (k).
Bamford, Re., Ex-parte, Games, 330 (y).
Banarsi Das v. Ram Chandar, 370 (w), 468 (z).
Banarsi Prasad v. Mohiuddin, 660 (s).
Banarsi Prasad v. Ram Narain, 664 (r), 670 (b).
Bandy v. Cartwright, 828 (n), 828 (p), 829 (s), 836 (a).
Banee Pershad v. Reet Bhunjan, 287 (f).
Banga Chandra v. Jagat Kishore, 106 (w), 246 (a), 246 (b), 246 (d), 524 (x).
Bangarammal v. Lydia Kent, 95 (d).
Bangshiram v. Prasannamoyi Debi, 796 (r).
Bani Mancharam v. Regina Stanger, 190 (j), 801 (a).
Bankruptcy Notice, Re. 348 (f).
Banka Behari v. Madan Mohan, 830 (k).
Banka Behary v. Raj Kumar, 80 (m).
Bank Line v. Capel & Co., 841 (g).
Bank of Baroda v. Shivdasani, 755 (i).
Bank of Bombay v. Fazulbhoy, 34 (z).
Bank of Bombay v. Suleman Somji, 35 (k), 46 (w).
Bank of Ireland v. Evans Charities, 681 (j).
Bank of New South Wales v. O'Connor, 499 (w), 507 (s), 534 (i), 672 (a), 672 (b).
Bank of Upper India, Ltd. v. Fanny Skinner, 369 (g).
Bank of Upper India, Ltd. v. Jaggan, 601 (m).
Banner v. Berridge 560 (r), 641 (u).
Banoo Begum v. Mir Abed Ali, 174, (g).
Bansidhar v. Ashutosh, 68 (o).
Bansidhar v. Gaya Prasad, 725 (h).
Bansidhar v. Shiv Singh, 733 (j), 733 (m).
Bansidhar v. Sant Lal, 24 (m), 52 (p), 259 (e), 271 (l), 472 (u).
Bansiram v. Naga Ayyar, 608 (u), 608 (x).
Banwari Lal v. Bhagmal, 322 (p).
Banwari v. Muhammad, 460 (q).
Bappu v. Venkatachalapathi, 723 (j), 732 (x).
Bapu Apaji v. Kashinath, 354 (y), 356 (z).
Bapu Appaji v. Kashinath Sadoba, 375 (e), 379 (v), 427 (d).
Bapuji v. Senanaraji, 486 (y), 488 (k).
Bapu v. Kashiram, 434 (l), 435 (q), 435 (v).
Bapu v. Maruti, 912 (e).
Bapu v. Venkatachalapathi Auuar, 769 (r).
Barati Lal v. Salik Ram, 51 (i), 60 (t).
Barclay v. Messenger, 423 (i).
Barclay v. Raine, 403 (q), 436 (b).
Barff v. Probyn, 851 (s).
Barhamdeo v. Tara Chand, 542 (p), 658 (x), 660 (o), 660 (r).
Barham v. Thanet (Earl of), 625 (m).
Barijrao v. Sardarmal, 9 (q).
Barker v. Barker, 869 (e).
Barker v. Baker, In Re. Parker, 181 (v), 183 (d).
Barker's Claim, In Re. 626 (r).
Barling v. Bishopp, 330 (g).
Barnard v. De Charleroy, 415 (i).
Barnats v. Foster, Re. Foster, 469 (g).
Barnes v. Racster, 460 (s), 650 (m).
Barnet v. Guildford (Earl of), 663 (b).
Barnett v. Eastman, 220 (f).
Barnett v. Tugwell, 195 (o), 196 (x), 196 (z).
Barnet v. Wheeler, 397 (k).
Barnhart v. Greenshields, 40 (r), 330 (o), 398 (y).
Barnhart v. Shields, 32, (i).
Barnsidhar v. Sant Lal, 267 (l).
Barnwell v. Harris, 411 (p).
Barrett v. Hartley, 671 (o).
Barring v. Abingdon, 420 (k).
Barrington, Re., Ex-parte Sidebotham, 417 (b).
Barrington v. Liddell, 162, (l).
Barrow's Case, 241 (q), 241 (r).
Barrow v. Isaacs & Son, 857 (q).
Barrow v. White, 631 (k).
Barry v. Barry, 875 (n).
Barry v. Nugent, 786 (d).
Barsht v. Tagg, 428 (m).
Bartlett v. Franklin, 559 (j).
Bartlett v. Salmon, 393 (h).
Bartram v. Whichcote, 913 (o).
Basalinga v. Chinnava, 440 (g).
Basa Mal v. Tajammal, 618 (a), 659 (h).
Basangowda v. Irgowdatti, 51 (i), 60 (u), 73 (p), 73 (r), 132 (s).
Basant Kumar Basu v. Ramshankar Ray, 57 (e), 57 (f).
Basant Kumar v. Khulera Loan Co., 658 (x).
Basant Lal v. Commissioner of Income Tax, 501 (w), 502 (d).
Basant Lal v. Tapesshri, 496 (q).
Basant Lal v. Tapesshri Rai, 512 (m).
Basant Mal v. Jawahir Singh, 518 (x).
Basanta Kumar v. Ramshankar, 59 (f).
Basanta Kumar Basu v. Ramshankar Ray, 59 (g), 61 (b), 61 (w).
Basappa v. Bhimangowda, 306 (e), 312 (l), 315 (t), 315 (t), 316 (e), 316 (f).

- Basappa v. Fakirappa, 61 (e), 62 (h), 62 (o), 102 (b), 104 (c).
 Basappa Budappa v. Bihman Gowda, 314 (p), 315 (s), 315 (w).
 Basantakumar Basu v. Ramshankar Ray, 923 (l).
 Basantakumar v. Ramshankar, 59 (f).
 Basaraddi v. Enajaddi, 433 (g).
 Basarkhan v. Leakat Hossein, 266 (i).
 Basava v. Anjaneyulu, 17 (r).
 Basava Sankaran v. Anjaneyulu, 272 (r).
 Basava Sankaran v. Ganapati Anjaneyule, 86 (r).
 Basawan v. Nathu, 714 (d).
 Basdeo Rai v. Dwarka Ram, 793.
 Basdeo Rai v. Jhagru Rai, 131 (o), 151 (e), 240 (i), 240 (j), 374 (z).
 Bashir Ahmad Khan v. Nazir Ahmad Khan, 442 (b).
 Bashir Ahmad v. Mt. Zobaida, 366 (k), 366 (v), 367 (d).
 Baskett v. Skeel, 507 (a).
 Baslingham v. Chinnana, 439 (v).
 Basalinga v. Chinnava, 428 (k).
 Baslingawa v. Chinnava, 440 (c), 441 (k), 442 (z).
 Basrat Ali Khan v. Manirulla, 133 (e), 891 (r).
 Bassil v. Lister, 163 (x).
 Basti Begum v. Banarsi Prasad, 331 (p).
 Bastin v. Bidwell, 798 (m), 806 (f), 834 (w).
 Baswantapa v. Rance, 243 (y).
 Batchu Ramajogayya v. Vajjula Jagannadhan, 744 (u).
 Batchu Ramayya v. Dhara Stachi, 268 (n).
 Bateman v. Hotchkin, 162 (j), 162 (n).
 Bateman v. Hut, 565 (t).
 Bateson v. Gosling, 715 (w).
 Bathe v. Public Trustee, *In re. Bathe*, 199 (w).
 Bath v. Standard Land Co., Ltd., 671 (s).
 Battersby v. De. Cruze, 819 (y).
 Battoo v. Narainprasad, 909 (d).
 Baxendale v. Bennett, 681 (i).
 Baylis v. Le Gros, 869 (d).
 Baynard v. Wooley, 501 (q).
 Baynes & Co. v. Lloyd & Sons, 828 (g), 829 (d), 829 (g).
 Baynes v. Lloyd, 407 (v).
 Baynham v. Guy's Hospital, 805 (b), 806 (u).
 Baynton v. Morgan, 863 (t), 889 (g).
 Bayya Sao v. Narasinga, 702 (i).
 Beal v. The South Devon Railway Company, 45 (w).
 Beale v. Sanders, 791 (l), 791 (o).
 Beale v. Symonds, 408 (g).
 Beamish v. Owens, 453 (u).
 Beardman v. Wilson, 191 (m), 861 (d).
 Beard v. Westcott, 147 (d), 157 (h).
 Beauclerk v. James, *In re. Brooksbank*, 211 (w), 217 (k).
 Beaufort (Duke) v. Bates, 848 (y).
 Beaufort (Duke) v. Inland Revenue Commissioner, 844 (j).
 Beavan v. M'Donnell, 445 (l).
 Beavan, *Re.*, *Ex-parte Combe*, 505 (y).
 Becha v. Mothina, 226 (j).
 Bechervaise v. Lewis, 721 (e), 722 (a).
 Bechu v. Bhabhuti Prasad, 293 (n), 298 (n), 302 (j).
 Bechu v. Bhabhuti, 589 (c).
 Bechu Sahu v. Arjun Sahu, 622 (i).
 Beckley v. Newland, 190 (s).
 Bedford v. Hopes, 402 (k).
 Beech v. St. Vincent (Lord), 162 (q), 162 (r).
 Beer v. Beer, 795 (n).
 Beever v. Lawson, 711 (r).
 Beevor v. Luck, 575 (u), 575 (v), 711 (r).
 Beyfus v. Lodge, 452 (k), 453 (z).
 Befyus & Master's Contract, *Re.*, 388 (d), 394 (l).
 Begraj v. Alisher, 38 (d).
 Begum v. Mahomed Yakub, 354 (e), 356 (b), 365 (i).
 Behari Lal v. Indra Narayan, 266 (i), 648 (b).
 Behari Lalji v. Bai Rajbai, 226 (f).
 Behari Lall v. Jagodish Chunder, 189 (w).
 Beharilal v. Murlidhar, 114 (k).
 Behari Lal v. Madho Lal, 107 (t).
 Behari Lal v. Ram Ghulam, 530 (k), 530 (p).
 Behari Lal v. Sindhubala, 930 (d).
 Behn v. Burness, 680 (u).
 Behram Rashid v. Sorabji Rustomji, 501 (z), 508 (f), 510 (r).
 Beioley v. Carter, 33 (n).
 Bejoy Chand v. Kali Prasanna, 813 (y).
 Bejoy Chandra v. Bunker Behari, 21 (p).
 Bejoy Singh v. Surendra Narayan Singh, 121 (y).
 Bela Bibi v. Akbar Ali, 71 (e).
 Belaney v. Belaney, 887 (c).
 Belcher v. M'Intosh, 865 (s).
 Belchier v. Renforth, 739 (b).
 Belfour v. Weston, 840 (z).
 Bellamy & Metropolitan Board of Works, *Re.*, 417 (i).
 Bellamy v. Sabine, 305 (a), 306 (d), 315 (s), 315 (w).
 Bell v. Sunderland Building Society, 776 (a).

- Bell v. Taylor*, 501 (*m*).
Belworth v. Hassell, 393 (*f*).
Bengal Banking Corporation v. Mackertich, 760 (*e*).
Bengal Indigo Co. v. Raghibar Das, 496 (*p*), 496 (*s*).
Bengal National Bank, Ltd. v. Janaki Nath Roy, 498 (*e*).
Beni Chand v. Ekram Ahmad, 193 (*z*).
Beni Prasad v. Gangoo Singh, 601 (*e*).
Beni Prasad v. Parbati, 98 (*m*).
Beni Prasad v. Rewat Lall, 6 8 (*y*), 693 (*s*).
Beni Prosad v. Rewat Lall, 659 (*e*).
Beni Prosad Sinha v. Rewatt Lall, 688 (*o*).
Beni v. Puran Das, 787 (*j*), 789 (*v*), 791 (*p*).
Beni Ram v. Kundan Lal, 300 (*w*), 784 (*o*), 848 (*t*), 851 (*n*).
Benjamin, E. In the Estate of, 525 (*s*).
Bennet v. Bennet, 336 (*a*).
Bennet v. Womack, 808 (*t*).
Bennet v. Herring, 871 (*b*), 871 (*b*), 872 (*g*).
Bennett v. Wornack, 845 (*m*).
Benoy Krishna Das v. Salsiccioni, 883 (*s*), 883 (*t*).
Benoy Krishna v. Fanindra Nath Roy, 805 (*p*).
Benoy Krishna v. Santi Charan, 920 (*x*).
Ben Singh v. Hazra Singh, 777 (*h*).
Bepanna v. Parachuri, 94 (*o*).
Bepin Behari v. Tincouri, 826 (*s*).
Bepin Behary v. Kalidas, 844 (*d*).
Bepin Krishna v. Byomkesh Deb, 310 (*t*), 312 (*p*).
Bepin Krishna v. Joheshwar Roy, 316 (*o*).
Bepin Krishna v. Priya Brata, 37 (*n*).
Bepin Krishna v. Priya Brata Bose, 316 (*o*).
Berger v. Jenkinson, Re. Spark's Lease, 855 (*z*).
Berhamdeo v. Tara Chand, 595 (*d*), 596 (*s*).
Beri Ram v. Kundu Lal, 255 (*h*).
Berwick & Co. v. Price, 36 (*d*), 42 (*m*).
Besent (Mrs.), Re., 4 (*y*).
Beti v. Sikhdar Singh, 337 (*k*).
Bettyes v. Maynard, 642 (*na*).
Beverley's Case, 91 (*g*).
Beyfus Bullock, 338 (*z*).
Beyfus v. Lodge, 88 (*w*).
Beyfus and Master's Contract, 410 (*c*).
Bhabi Dutt v. Ramalalbyamal, 371 (*n*).
Bhabani v. Kadambini, 701 (*q*).
Bhagabati v. Kalicharan, 173 (*t*), 175 (*o*).
Bhagat Ram v. Mst. Sahib, 226 (*f*).
Bhagavati v. Ram Jatan, 105 (*l*).
Bhagawati v. Shafaat Muhammad, 694 (*b*).
Bhagbut Pershad v. Girja Koer, 111 (*g*).
Bhagchand v. The Secretary of State for India, 87 (*b*).
Bhagh Mal v. Shiromani, 443 (*a*).
Bhagirathi v. Jokhu Ram, 228 (*f*), 228 (*i*).
Bhagirathibai v. Khanujirav, 103 (*s*).
Bhagirathi Misr v. Sheobhik, 102 (*q*).
Bhagirathi v. Rajkishore, 308 (*z*).
Bhagvant v. Kondi, 541 (*a*).
Bhagwan Das v. Bhawani, 574 (*m*).
Bhagwandas Das v. Hari Debi, 698 (*e*).
Bhagwan Das v. Karam Husain, 660 (*r*), 733 (*k*).
Bhagwan Deen v. Billeshur, 55 (*o*).
Bhagwandas v. Mahdeo Prasad, 105 (*v*).
Bhagwan v. Nanak Chand, 312 (*q*).
Bhagwan Prasad v. Hari Singh, 928 (*u*).
Bhagwan Sahai v. Bhagwan Din, 481 (*u*), 484 (*v*), 489 (*a*).
Bhagwan Sahai v. Narsingh, 65 (*m*).
Bhagwan Sahai v. Narsingh Sahai, 366 (*m*).
Bhagwan Sahai's, In., 482 (*i*).
Bhagwan Singh v. Kharag Singh, 912 (*g*).
Bhagwan Singh v. Mazhar Ali, 697 (*u*).
Bhagwani Prasad v. Ghulam Muhammad, 82 (*v*).
Bhagwati v. Banarsi Das, 429 (*v*), 430 (*d*), 430 (*z*), 735 (*a*).
Bhagwat Koer's Case, 108 (*e*).
Bhagwat Das v. Parshad Singh, 529 (*d*), 578 (*r*).
Bhagwant v. Kedari, 322 (*h*), 326 (*y*), 329 (*d*).
Bhagwant v. Nivratti, 102 (*z*).
Bhagwantrao v. Ramnath, 106 (*h*).
Bhagwat v. Bipin Behari, 177 (*f*).
Bhagwat Dayal v. Debi Dayal, 191 (*o*).
Bhagwat Koer v. Dhanukhadhari, 108 (*v*).
Bhagwatibai v. Bhagwandas, 124 (*z*).
Bhagwati Prasad v. Radha Kishen Sewak Pande, 746 (*t*).
Bhaidas Shivdas v. Bai Gulab, 131 (*r*).
Bhai (Kirpa) Singh v. Rassalldar, 13 (*s*).
Bhairab v. Nandiram, 87 (*z*).
Bhairab Chandra Bose v. Anath Nath De, 509 (*h*), 510 (*r*).
Bhairab Chandra v. Jiban Krishna, 272 (*q*), 913 (*l*).
Bhairab Chandra v. Jivan Krishna, 61 (*e*).
Bhairo v. Parmeshri, 129 (*v*).
Bhairo Tewari v. Ramnath Rai, 71 (*x*).

- Bhaja Chowdhury v. Chuni Lal Marwari, 648 (t).
 Bhajahari Maiti v. Gajendra Narayan Maiti, 712 (h).
 Bhana v. Guman Singh, 60 (j).
 Bharatpur State v. Gopal, 226 (c), 226 (f), 226 (g), 226 (h).
 Bharat Ramanuj v. Srinath Chandra, 308 (b), 308 (z).
 Bhaskar Gopal v. Padman Hira Chowdhari, 370 (u).
 Bhaskar v. Padman 369 (u).
 Bhaskar v. Shankar, 313 (a), 317 (r).
 Bhau v. Budha, 275 (q).
 Bhau v. Revappa, 611 (t).
 Bhau Daji v. Patlu Malu, 549 (w).
 Bhawani v. Himmat, 102 (a).
 Bhawani v. Jung Bahadur, 618 (q), 618 (r), 618 (s).
 Bhawani v. Jung Bahadur Singh, 618 (v).
 Bhawani Kumar v. Mathhura Prasad, 774 (e).
 Bhawani Prasad v. Ghulam Muhammad, 617 (j).
 Bhawani v. Sheodihal, 529 (a), 556 (a).
 Bhekdhari v. Srimati Radhika, 748 (y).
 Bhijabhai v. Hayem, 810 (x).
 Bhikabhai v. Panachand, 329 (m), 331 (k).
 Bhikhai Mal v. Debi Sahi, 312 (u).
 Bhikaji v. Lakshman, 561 (c).
 Bhikaji v. Pandu, 21 (z).
 Bhikanbhai v. Hiralal, 854 (o).
 Bhikhi Rai v. Udit Narain, 40 (z).
 Bhikari v. Dalip Singh, 460 (q).
 Bhikubai v. Hariba, 226 (l).
 Bhiku v. Puttu, 275 (s).
 Bhiku v. Shrijat, 773 (s).
 Bhiku v. Shujat Ali, 769 (w), 774 (a).
 Bhimappa v. Basawa, 244 (k).
 Bhimappa v. Shivbasappa, 245 (p).
 Bhimbhat v. Yeshwantrao, 369 (l).
 Bhoalee Singh v. Nemoo Behoo, 22 (n).
 Bhoja Tarini v. Peary Lall, 201 (g).
 Bhoja Sundari v. Rakhal Chunder, 16 (r).
 Bhogilal v. Jethalal, 118 (m).
 Bhojabhai v. Hayem, 812 (u).
 Bhoje Madhev v. Gangabai, 305 (v).
 Bhojraj v. Nathuram, 102 (s).
 Bhojraj v. Sitaram, 106 (a).
 Bhola Das v. Bish Nath, 468 (w).
 Bholai v. The Rajah of Bansi, 874 (e).
 Bhola Nath v. Bhuthnath Sen, 313 (d).
 Bholanath Chattopadhyaya v. Mrityunjay Chattopadhyaya, 449 (k).
 Bholanath v. Kartick Kissen, 102 (t).
 Bholanath v. Kartick Kirsan Das, 111 (m).
 Bholanath v. Mrityunjay, 113 (c), 419 (a), 920 (w).
 Bhola Nath v. Supper, 880 (y), 880 (z), 882 (l).
 Bhome Lal v. W. A. Vincent, 796 (w).
 Bhoopal Rai v. Shiam Sunder, 79 (w).
 Bhooresao Khemchand v. Mahomed Syed Khan, 648 (l).
 Bhopatrao v. Shri Ramchandra, 50 (b), 52 (x), 938 (g).
 Bhopatrao v. Shri Ramchandra Sansthan Kund Sarjapur By Punch Khushal, 940 (x).
 Bhubneshwari v. Manir Khan, 759 (v).
 Bhuggobutty v. Gooroo Prosonno, 166 (j).
 Bhugwan Acharjee v. Gobind Sahoo, 620 (s).
 Bhugwan Doss v. Upooch Singh, 247 (t).
 Bhagwandas v. Karam Husain, 698 (z).
 Bhugwandeem v. Myna Bae, 103 (t), 280 (v).
 Bhugwan Singh v. Murli Singh, 496 (w).
 Bhuj Singh v. Chheda Singh, 595 (r), 659 (g).
 Bhullan v. Bachcha Kunbi, 547 (d), 547 (v).
 Bhundal Panda v. Pandol Pos, 21, (e).
 Bhupal Ram v. Lachma Kuar, 108 (a).
 Bhupati v. Ram Lal, 166 (k).
 Bhupati Mohan Das v. Phanindra Chandra Chakravarty, 945 (i).
 Bhupati Mohan Das v. Phanindra Chandra, 30 (a).
 Bhupati Nath v. Ram Lal, 53 (a).
 Bhupati Nath v. Ram Maitra, 919 (g).
 Bhupendra Narayan v. Rajeswar Prosad, 121 (z), 124 (w).
 Bhupendra Krishna v. Amarendra Nath Dey, 178 (x).
 Bhupendra Nathu Basu v. Mussammatt Wajichumniss Begum 648 (v), 503 (m).
 Bhupendra Nath v. Mt. Wajihunnissa, 6 (t).
 Bhup Narain v. Gocul Chand, 267 (m), 458 (b).
 Bhup Narain Singh v. Gokhul Chand, 228 (j), 238 (s), 240 (o).
 Bhup Singh v. Chedda Singh, 659 (i).
 Bhup Singh v. Jhamman Singh, 104 (x).
 Bushan v. Surjya Kamta Roy, 186 (v).
 Bhuta Singh v. Mangu, 124 (y).
 Bhutia v. Ambo, 827 (b).
 Bhyrub Chander v. Sondamini Dabee, 448 (f).
 Biba Jan v. Kalb Husain, 167 (x).
 Bibhuti Bhusan v. Bai Kuntha, 743 (e), 744 (l), 760 (e).
 Bibhutubhushan v. Majibat Rahman, 448 (h), 642 (n).

- Bibi Jawahir v. Chhattearput, 355 (r).
 Bibi Khaver Sultan v. Bibi Rukhia Sultan, 924 (t).
 Bidder v. Trinidad Petroleum Co., 849 (e).
 Bidhubhushan v. Umeschandra, 430 (x).
 Bidhutibhushan v. Anadinath, 171 (h).
 Biggs v. Hoddinott, 146 (o).
 Biggs v. Hoddinott, 545 (h), 545 (o), 548 (k), 553 (u).
 Bigland v. Hudelestone, 216 (b).
 Bihari Lal v. Shib Lal, 677 (t).
 Bijay Chandra Sinha v. Howrah Amta Light Ry. Co., Ltd., 842 (j), 842 (k).
 Bijoi Chandra v. Howrah Amta Railway Co., 843 (z).
 Bijoy v. Howrah Amta Light Railway Co., Ltd., 816 (v).
 Bijoychand v. Kalipada, 919 (k).
 Bijoy Chand v. Khoka Sinha, 796 (x).
 Bijoy Gopal v. Kishna Mahishi, 106 (b).
 Bijraj Nopani v. Pura Sundary Dasee, 117 (j).
 Bikanbhai v. Hiralal, 861 (a).
 Bikkina Ramayya v. Adabala Seshayya, 16 (r).
 Bilas Kunwar v. Desraj, 336 (c), 336 (e).
 Bilas Kunwar v. Desraj Ranjit Singh, 227 (z), 922 (e).
 Bilaso v. Munni Lal, 170 (o), 173 (u).
 Bimal Jati v. Birenja Kuar, 145 (j), 146 (o), 149 (u), 151 (g), 556 (w).
 Binand Sawase v. Thuroo Mahto, 542 (i).
 Bindeshri v. Somnath 283 (d).
 Bindeshwari v. Harnarain Singh, 104 (y).
 Bindeshwari Singh v. Har Narain Singh, 61 (e), 260 (p), 268 (r).
 Bindesri Naik v. Ganga Saran Sahu, 760 (a).
 Bindraban v. Rajpat Singh, 366 (p).
 Binnington v. Harwood, 675 (g).
 Binns v. Nichols, 688 (h).
 Binode Ram Sein v. Deputy Commissioner of Sontah Parganas, 66 (w).
 Binoy Krishna Das v. Salsicconi, 812 (t).
 Binstead v. Coleman, 363 (v).
 Biraj Mohinee v. Kedarnath, 820 (h).
 Birbeck Permanent Benefit Building Society, *Re.*, *Ex-parte*, Official Receiver, 860 (v).
 Birch v. Joy 444 (g).
 Birch, *Re.*, 194 (f).
 Birch v. Wright 663 (e), 863 (q).
 Birds v. Askey (No. 2), 746 (q).
 Bird v. Cross, *Re. Bird*, 199 (t).
 Bird v. Greville, 825 (a).
 Bird v. Wenn, 575 (y).
 Birdichand v. Popatlal 791 (q).
 Birendra v. Bahuria, 741 (q).
 Birendra Keshri v. Baburia, 926 (c).
 Birkbeck Freehold Land Society, *Ex-parte*, 404 (u).
 Birmingham Canal Co. v. Cartwright, 146 (u).
 Bir Mohammad v. Nagoor Rowther, 578 (q).
 Birsm Wood, The, 34 (o).
 Bisdee, *Ex-parte*, 506 (r), 647 (d).
 Bishambar Nath v. Imdad Ali Khan, 79 (x).
 Bishan Chand v. Radha Kishan Das, 452 (h).
 Bishan Dial v. Ghazi-ud-din, 124 (v).
 Bishan Lal v. Manni Ram 608 (t).
 Bishen Dayal v. Udit Narain, 467 (r).
 Bishen Sarup v. Abdul Samad, 810 (v), 825 (h).
 Bisheshur Dial v. Ram Sarup, 548 (n), 568 (h), 609 (f), 694 (z).
 Bishnath v. Chandika, 923 (i).
 Bishop v. Elliott, 27 (y), 849 (h).
 Bishop v. Fowler, *Re. Fowler*, 560 (o), 560 (q).
 Bishop v. Taylor & Co. 390 (a), 808 (f).
 Bishun Prasad Sheoratan v. Mahomed Nayin, 934 (c).
 Bishveshwar v. Mahablesliwar, 861 (c).
 Bismillah Begam v. Rahsin Ali Khan, 320 (u), 321 (w).
 Bissessur v. Lala Suram Singh, 718 (m).
 Bissessur v. Luchmessur, 336 (c).
 Bisseswar Prosad v. Lala Sarnam Singh, 723 (l), 725 (k), 735 (h), 735 (y).
 Bisset v. Wilkinson, 392 (l), 396 (c).
 Biss v. Hygate, 360 (n).
 Bissonath v. Doyaram, 521 (p).
 Bissonauth Chunder v. Bamasoondery Dossee, 159 (q).
 Biswanath v. Chandra Narayan, 370 (a), 518 (y).
 Biswanth Prasad v. Chandra Narayan Chowdhuri, 518 (b).
 Bittal Das v. Nand Kishore, 109 (u).
 Black v. Homersham, 219 (c).
 Blackford v. Davis, 674 (a).
 Blackford v. Preston, 190 (u).
 Blacklock v. Dobie, 327 (l).
 Blacklow v. Laws, 403 (n).
 Blagden v. Bradbear, 358 (m).
 Blair v. Assets Co., Ltd., 407 (s).
 Blair v. Duncan, 166 (d), 920 (s).
 Blakely v. Dent 603 (d).
 Blakesley v. Whieldon, 808 (y).

- Blane *v.* Francis, 867 (*s*).
 Blasson *v.* Blasson, 145 (*f*).
 Blenkinsopp *v.* Blenkinsopp, 330 (*f*).
 Bloodburn *v.* Smith, 402 (*g*).
 Blore *v.* Sutton, 359 (*s*).
 Blornt *v.* Bunow, 934 (*v*).
 Blyth *v.* Birmingham Water Works Co., 45, (*x*).
 Blyth *v.* Dennett, 900 (*r*).
 B. Mofrurappa *v.* K. Ramasami, 785 (*m*).
 B. N. Ry. Co., Ltd. *v.* Bal Mukunda, 898 (*y*).
 Boaler, *Re.*, 3, (*j*).
 Boaler *v.* Mayor, 765 (*w*).
 Board of Revenue *v.* South Indian Railway Co., Ltd 792 (*x*).
 Bochen *v.* Wood, 405 (*g*).
 Boddington *v.* Robinson, 421 (*t*).
 Bodger *v.* Bodger, 511 (*g*).
 Bodha Ganderi *v.* Ashloke Singh, 23 (*i*).
 Bodordoja *v.* Ajijuddin, 811 (*j*), 812 (*w*), 812 (*x*).
 Bodordoja *v.* Ajijuddin Sarkar, 811 (*m*), 813 (*h*), 813 (*y*).
 Bodvel-Roberts *v.* Poole, *Re.*, Powell, 88, (*s*).
 Bogg, *Re.*, Allison *v.* Paice, 546 (*t*).
 Bohra Thakur Das *v.* Collector of Aligarh, 653 (*z*).
 Bolekow *v.* Fisher, 43 (*b*).
 Bolo *v.* Kolan, 625 (*g*).
 Bolton *v.* Buckenham, 616 (*c*).
 Bolton *v.* Donald, 870 (*t*).
 Bolton (Duke) *v.* Williams, 418 (*n*).
 Bolton Partners *v.* Lambert, 376 (*s*).
 Bolyechund *v.* Moulard, 534 (*e*).
 Bombay Rules and Orders, 9 (*o*), 9 (*p*), 11 (*d*).
 Bombay Steam Navigation Co. *v.* Ramdas, 947 (*a*).
 Bombay Tramways Co. *v.* Bombay Municipal Corporation, 367 (*h*).
 Bompas *v.* King, 674 (*v*).
 Bomsot *v.* Savage, 42 (*n*).
 Bonithon *v.* Hockmore, 671 (*k*).
 Bonner *v.* Great Western Railway Co., 387 (*t*).
 Bonnerji *v.* Sitanath Das, 89 (*n*).
 Bonow, *Re.*, *Ex-parte* Broadbent, 503 (*y*).
 Booth *v.* Alcock, 420 (*j*).
 Booth *v.* Meyer, 199 (*q*).
 Booth *v.* Thomas, 831 (*d*), 833 (*u*), 834 (*b*).
 Boraston's Case, 176 (*v*).
 Borland's Trustee *v.* Steel Bros. & Co., Ltd., 145, (*j*).
 Borrowman *v.* Free, 534 (*k*).
 Bosanquet, In the goods of, 523 (*h*).
 Bosaraddi *v.* Enajaddi, 431 (*o*).
 Boswanath *v.* Jagdip, 109 (*p*), 110 (*a*).
 Boswanath Prashad *v.* Chandra Narayan Chowdhuri, 371 (*l*).
 Boswell *v.* Crucible Steel Co., 870 (*u*).
 Bott *v.* Smith, 329 (*j*), 330 (*v*), 338 (*c*).
 Boughton *v.* James, 142 (*e*), 147 (*b*).
 Boulton *v.* Bustard, 912 (*a*).
 Bourne *v.* Buckton, 162 (*r*).
 Boverg *v.* Skipinth, 575 (*q*).
 Bovill *v.* Endale, 529 (*h*), 530 (*i*), 559 (*n*).
 Bowen *v.* Phillips, 85 (*i*).
 Bower *v.* Cooper, 418 (*r*).
 Bowman *v.* Taylor, 258 (*b*).
 Bown *v.* Stenson, 416 (*s*).
 Bowreman *v.* Pym, 550 (*d*).
 Bowser *v.* Colby, 500 (*h*).
 Boxhall *v.* Jackson, 416 (*u*).
 Boyd *v.* Kreig, 787 (*i*), 789 (*w*).
 Boyd *v.* Petrie, 640 (*l*), 820 (*g*).
 Bozon *v.* Williams, 500 (*f*), 500 (*z*).
 Bradley *v.* Atkinson, 814 (*l*), 814 (*w*).
 Bradley *v.* Carritt, 547 (*z*), 553 (*y*), 555 (*m*).
 Bradley *v.* Peixoto, 125 (*g*), 202 (*p*).
 Bradley *v.* Riches, 42 (*m*), 42 (*n*), 678 (*b*), 683 (*g*).
 Bradshaw *v.* Bradshaw, 93 (*q*).
 Bradshaw *v.* Toulmin, 100 (*x*).
 Bragg *v.* Wiseman, 593 (*e*).
 Brahmadeo *v.* Harjan, 60 (*m*).
 Brahmadeo *v.* Harjan Singh, 53 (*e*).
 Brahmo Dutt *v.* Dharma Das Ghose, 98 (*b*).
 Brajendrakumar *v.* Shusheelchandra, 343 (*s*).
 Bramamoyi Dasi *v.* Joges Chandra, 159 (*v*).
 Bramley *v.* Chesterton, 878 (*a*), 878 (*f*).
 Bramwell *v.* Lacy, 802 (*l*), 802 (*t*).
 Brandling *v.* Plummer, 384 (*j*), 384 (*o*).
 Brandon *v.* Brandon, 676 (*f*).
 Brandon *v.* Robinson, 125 (*h*).
 Brandts *v.* Dunlop Rubber Co., 31 (*m*).
 Brashier *v.* Jackson, 833 (*t*).
 Brayshaw *v.* Ninnies, *Re.*, Warriner, 845 (*r*).
 Brecon Corporation *v.* Seymour, 536 (*j*).
 Bret *v.* Rogers, 845 (*p*).
 Brett *v.* Cumberland, 857 (*t*).
 Brewer & Hankin's Contract, *Re.*, 395 (*w*).
 Brower *v.* Broadwood, 409 (*u*), 458 (*k*).
 Brice *v.* Bannastar, 32 (*w*).
 Brickton *v.* Hay, In *re.*, Pridley, 143 (*q*).
 Bridges *v.* Longman, 630 (*y*).
 Bridgwater's Settlement, *Re.*, 264 (*y*).

- Briggs v. Jones, 682 (r).
 Briggs v. Thornton, 230 (r), 802 (a), 802 (x).
 Bright v. Campbell, 670 (f), 670 (i).
 Bright v. Tyndall, 57 (n).
 Brij Gopal v. Mt. Masuda, 702 (e), A. I. R. 702 (h).
 Brij Kishore v. Madho Singh, 561 (c).
 Brij Lal v. Bhawani Singh, 555 (s).
 Brij Lal v. Narain Das, 920 (s).
 Brij Lal Singh v. Bhawani Singh, 555 (u).
 Brij Mohan v. Bhikhuji, 65 (p).
 Brijmohan v. Dakhan, 730 (h).
 Brijmohan Singh v. Dukhan Singh, 685 (o).
 Brijmohan v. Mahabeer, 939 (i).
 Brijmohan v. Mr. Mahbhuban, 273 (w).
 Brij Narain v. Kedar Nath, 71 (b).
 Brij Narain v. Mangal Prasad, 110 (z).
 Brij Raj Kuar v. Ram Dayal, 933 (l).
 Brinda v. Radhica, 226 (i).
 Brindaban v. Sureswar, 60 (p).
 Brine & Davies's Contract, *Re.*, 409 (r).
 Bristow v. Warde, 213 (g).
 Britain v. Rossiter, 345 (a) 345 (x), 347 (r), 348 (w), 358 (k).
 British Economical Lamp Co., Ltd. v. Empire Mile End Ltd., 28 (r).
 British Emporium Mutual Life Insurance Co., v. Cooper, 802 (y).
 British and French Trust Corporation v. New Brunswick Railway Co., 474 (l).
 British Land Co., and Allen's Contract, *Re.*, 913 (j).
 British Red Ash Collieries, *Re.*, 849 (z).
 British Red Cross Society v. Johnson, 931 (a).
 British South Africa Co. v. De Beers Consolidated Mines, Ltd. 555 (m), 558 (a), 558 (d).
 British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Co. of London, 872 (o).
 Broadbent v. Barlow, 36 (c).
 Broad v. Selfe, 554 (g), 554 (i).
 Brocklebank v. Johnson, 170 (w).
 Brocklesby v. Temperance Permanent Building Society, 682 (u).
 Brodie v. Brodie, 190 (d).
 Broja Lal v. Belchambers, 908 (k).
 Brojo Kishore v. Meajan Biswas, 308 (y).
 Brojonath v. Koylash, 247 (s).
 Brojonath v. Maheswar, 124 (e).
 Bromet v. Neville, 376 (t).
 Bromitt v. Moor, 714 (y).
 Bromley v. Kelly, 474 (m).
 Bronard v. Dumaresque, 631 (d), 637 (t).
 Brookes v. Drysdale, 390 (y).
 Broom v. Phillips, 393 (h), 394 (l).
 Brouche v. Chhatar Kumari, 908 (p).
 Broughton v. Mercer, 166 (h).
 Brown v. Brine, 190 (a).
 Brown v. Brown, 214 (e), 330 (e).
 Brown v. Brown, *Re.*, J. Browns Estate, 615 (p), 615 (q).
 Brown v. Cole, 529 (g).
 Brown v. Hartill, 632 (t).
 Brown v. Kennedy, 920 (z).
 Brown v. Lockhart, 567 (f).
 Brown v. Patterson, 912 (h).
 Brown v. Skirrow, 523 (e), 523 (f).
 Brown v. Stead, 775 (s).
 Brown v. Stedman, 683 (c), 890 (i).
 Brown v. Trumper, 865 (y).
 Browne v. Browne, 181 (m).
 Browne v. Flower, 830 (o), 831 (a), 835 (k).
 Browne v. Kenyon (Lord), 174 (b).
 Browne v. Lockhart, 559 (g).
 Browne v. Tighe, 806 (a).
 Browne v. Warner, 787 (k).
 Brown's will, *Re.*, Brown's Settlement, 199 (r).
 Browning v. Wright, 422 (x).
 Brownlie v. Campbell, 398 (d).
 Bruce, *Ex-parte*, 504 (f), 847 (l).
 Bryan v. White, 520 (y).
 Bryant and Barningham's Contract, *Re.*, 89 (h), 90 (t), 455 (n).
 Bubhan Mohan Co-operative Hindusthan Bank, 510 (s).
 Buchanan v. Greenway, 676 (m).
 Buchanan v. Hill, *In re.*, Billham, 185 (p).
 Buchanan v. Poppleton, 392 (p).
 Buchi v. Jagapathi, 103 (t).
 Buckell v. King & Koral, 802 (z).
 Buckinghamshire (Earl of) v. Hobart, 775 (l), 775 (r).
 Buckingham v. Hubart, 770 (h).
 Buckland v. Papillon, 805 (r).
 Buckle v. Mitchell, 340 (i), 340 (x).
 Buckmaster v. Harrop, 360 (q).
 Bucks (Duke) v. Gayer, 676 (d).
 Budd-Scott v. Daniell, 828 (n), 828 (o), 828 (p), 828 (r), 836 (c).
 Budesab v. Hanmanta, 269 (w).
 Budhmal v. Rama, 695 (d).
 Budhoo v. Sheo Charan, 96 (o).
 Budhoo Singh v. Perhlad Sein, 56 (z).
 Budmul Kevalchand v. Rama, 562 (n).

Bugden v. Bignold, 460 (s).
 Bukhtawar Lal v. Baru Mal, 595 (r).
 Buldeo Sahu v. N. B. Miller, 267 (l).
 Bulkeley v. Hope, 407 (y).
 Bull v. Hutchens, 316 (l), 316 (m),
 Bull v. Pritchard, 181 (l), 182 (x),
 Bulner v. Hunter, 331 (q).
 Bulpett v. Sturges, 33 (w).
 Bulteel, *Ex-parte*, 502 (i), 505 (r),
 505 (s).
 Bunbury v. Winter, 554 (l).
 Bunn v. Harrison, 825 (x).
 Bunny v. Hopkinson, 434 (k).
 Bunseedhur v. Sujaat Ali, 614 (g),
 615 (m).
 Bunwari v. Ramjee, 38 (b), 378 (m),
 Burchell v. Clarke, 883 (u).
 Burchell v. Thompson, 424 (p).
 Burgess v. Moxon, 499 (u).
 Burke v. Moore, 519 (e).
 Burkill, *Re.*, *Ex-parte*, Nettleship,
 499 (r).
 Burlinson v. Hall, 750 (p).
 Burma Shell Oil Storage and Distri-
 buting Co. of India Ltd., *In Re.*,
 792 (y), 792 (z).
 Burnell v. Brown, 416 (r).
 Burnett v. Lynch, 828 (m), 858 (d),
 Burn v. Phelps, 863 (v).
 Burrell v. Egremont (Earl), 775 (o),
 775 (p).
 Burroughs v. Oakley, 417 (c).
 Burstal v. Bianchi, 824 (w).
 Burt, Boulton & Hayward v. Bull,
 616 (v).
 Burton v. Barclay, 421 (s), 886 (q),
 889 (b).
 Burton v. Nocton, 601 (j).
 Bury v. Thompson, 814 (p), 814 (r).
 Butcher v. Stapley, 346 (c).
 Butler v. Butler, 448 (e), 625 (h),
 625 (j).
 Butler v. Rice, 728, 730 (i), 730 (l),
 768 (i).
 Butler's, Trust, *Re.*, 99 (q).
 Butterfield v. Heath, 340 (j), 340 (x),
 340 (y).
 Bycroft v. Sibel, 567 (e).
 Byjnath Lall v. Ramoodeen Chowdhry,
 594 (q), 693 (u).
 Byjnath Lall v. Ramoodeen, 594 (p),
 657 (u), 659 (i).
 Byles v. Cox, 523 (k).
 Byramji v. Chunilal, 317 (r).
 Byrd, *In the goods of*, 524 (q).

C

Cadell v. Palmer, 143 (n), 145 (h).
 Cadman v. Lubbock, 531 (v).
 Cadogan & Hans Place Estate, Ltd.,
Re., *Ex-parte*, Willis, 594 (h).
 Cahrsley v. Jones, 825 (f).

Cain v. Moon, 934 (t).
 Cairn-cross v. Lorimer, 253 (u),
 262 (g).
 Cairney v. Back, 286 (t).
 Calcutta Trades Association v. Ryland,
 78 (j).
 Cally Nath v. Chunder Nath, 173¹(u),
 Calthorp v. Heyton, 833 (p).
 Calvert v. Sebright, 832 (i).
 Camfield v. Gilbert, 453 (x).
 Campbell v. Lewis, 804 (o), 833 (u).
 Campbell v. Rothwell, 721 (k),
 721 (n).
 Canadian Pacific Railway v. The
 King, 299 (q).
 Canadian Pacific Railway Co. v.
 Toronot Corporation, 808 (k).
 Canmeer, *Ex-parte*, 92 (k).
 Cannock v. Jauncey, 567 (i).
 Canterbury Corporation v. Cooper,
 889 (v).
 Capel v. Lowe, *Re. Lowe*, 438 (l).
 Capital and Counties Bank v. Boulter,
In re Boulter, 197 (e).
 Capital & Counties Bank, Ltd. v.
 Rhodes, 886 (s).
 Capper v. Terrington, 536 (a).
 Carlisle and Cumberland Banking Co.
 v. Bragg, 270 (f).
 Carlsh v. Salt, 385 (p), 388 (x), 389 (q),
 455 (o).
 Carr, *Ex-parte*, *Re. Hofmann*,
 654 (u).
 Carr v. London & North Western
 Railway Co., 262 (l).
 Carter v. Carter, 684 (l), 684 (m).
 Carter v. James, 675 (o).
 Carter v. Seaton, 523 (d), 523 (f).
 Carter v. Wake, 643 (o).
 Carver v. Bowles, 204 (e).
 Casamajor v. Strobe, 392 (w).
 Casberd v. A. G., 499 (x), 504 (e).
 Case of Mines, The, 121 (p).
 Casmore, *In the goods of*, 519 (e).
 Cassamally v. Currimbhoy, 174 (h),
 Cassim Mamooji v. K. B. Dutt,
 92 (v).
 Castellain v. Preston, 285 (n).
 Cato v. Thompson, 406 (m).
 Cavaleiro v. Puget, 780 (v).
 Cavalier v. Pope, 842 (m).
 Cave v. Cave, 33 (u), 42 (u).
 Cave v. Horsell, 802 (z).
 Cecil Gray v. Cantonment Committee,
 78 (h).
 Central Bank of India v. Nusserwanji,
 501 (a), 502 (b).
 Central Bank of India, Ltd. v.
 Sachindra, 660 (p).
 Cessford v. Dover Harbour Board,
 834 (y), 834 (z).
 Chabildas v. Dayal Mowji, 635 (p),
 635 (u), 635 (v), 636 (l), 637 (w).

- Chagandas v. Cansing, 561 (i).
 Chagandas v. Gansing, 690 (t), 691 (x).
 Chabildas Lallubhai v. Dayal Mowji, 635 (x), 636 (j).
 Chabildas Lallubhai v. Mowji Dayal, 636 (j), 636 (y).
 Chabildas v. Mowji Dayal, 642 (j), 642 (k).
 Chahlu v. Parmal, 60 (t).
 Chakrapani v. Varahamma, 9 (g).
 Chaladom Tholan v. Kakkath Kunhambu, 122 (d).
 Chalikani v. Tuni (Zemindar), 535 (p), 535 (q).
 Challa Subbiah v. Palury, 108 (b), 108 (w), 108 (x).
 Chamanlal v. Bai Parvati, 103 (v).
 Chamaru Sahu v. Sona Koer, 128 (f), 128 (n), 135 (t).
 Chama Swami v. Padala Anandu, 730 (h), 733 (n).
 Chambers v. Goldwin, 553 (c), 638 (m), 671 (m).
 Chambers v. Kingham, 887 (y).
 Chambers v. Randall, 236 (u), 238 (q), 238 (r).
 Chamiyappa v. Rama Ayyar, 715 (z).
 Chamiyappa v. Rama Iyer, 309 (j).
 Chammu Lal v. Bhajan Lal, 588 (x), 655 (j).
 Chandan v. Fakirgir, 312 (j).
 Chandanmal v. Bhaskar, 51 (n).
 Chandan Singh v. Fakirgir, 310 (s), 314 (q).
 Chandbhai v. Hasanbhai, 721 (b).
 Chandbi v. Abdul Karim, 84 (w), 84 (x).
 Chandi Charan v. Haribola, 919 (j).
 Chandi Churn v. Sideshwari, 129 (v).
 Chandika Singh v. Pohkar Singh, 608 (w).
 Chandi v. Sat Narain, 23 (a), 23 (f).
 Chand Mal v. Bachraj, 813 (z).
 Chand Mall v. Ban Behari, 626 (n).
 Chandra v. Abidalli, 274 (z).
 Chandradeo v. Mata Prasad, 102 (q), 110 (c), 111 (e), 111 (k).
 Chandra Kishore v. Dampat Kishore, 102 (p).
 Chandra Kishore Roy v. Prasanna Kumari, 179 (x).
 Chandramma v. Venkataraju, 67 (n).
 Chandrasekaralingam v. Nagabhusanam, 75 (c), 939 (o).
 Chandri v. Daji, 907 (i), 907 (x).
 Chandulal v. Keshavlal, 785 (k).
 Chan Yin v. Mg. Aung, 742 (v).
 Chaplin v. Smith, 855 (u).
 Chapman v. Bhick, 787 (i).
 Chapman v. Chapman, 500 (z).
 Chapman v. Tanner, 676 (i).
 Chapman v. Towner, 786 (q).
 Chaproniere v. Lambert, 360 (p).
 Charamudi v. Raghavulu, 150 (z).
 Charan Mahton v. Kumar Kamakhya, 908 (n).
 Charles v. Jones, 637 (n), 641 (a), 665 (w), 665 (x).
 Chathu v. Kunjan, 479 (f), 491 (v), 492 (d), 492 (f), 493 (l), 493 (m), 497 (y).
 Chattar Mal v. Thakuri, 752 (k).
 Chatterbhuj v. Bennett, 848 (x).
 Chatterput Singh v. Maharaj Bahadur, 313 (d).
 Chatterton v. Terrell, 128 (n), 894 (t).
 Chaturbhuj v. Bennett, 29 (e), 122 (k).
 Chaturbhuj v. Chatarjit, 919 (h).
 Chaturbhuj v. Mansukhram, 46 (n), 46 (y), 136 (f), 231 (c).
 Chaturbhuj v. Man Sukhtam, 34 (f).
 Chatur Mal v. Mt. Majidan, 17 (f).
 Chaubi Beneik v. Puttam Singh, 699 (j).
 Chaudhri Ahmed Baksh v. Seth Raghubir Dayal, 712 (e).
 Chaudri Ahmad v. Seth Raghubar, 560 (w).
 Chedambara Chetty v. Renga Krishna, 191 (n).
 Chedi Lal v. Saadat-un-nissa Bibi, 624 (x).
 Cheekati Zamindar v. Ranasooru, 810 (u).
 Cheeso v. Keen, 510 (v).
 Chellakutti v. Vengappa, 558 (e).
 Chellamcherla v. Mummaredi, 719 (v), 775 (s).
 Cheminant v. Thornton, 533 (o).
 Chemminian v. Udayavarma, 815 (f).
 Chengappa v. Buradagunta, 109 (j).
 Chengiah v. Damara Kumara, 897 (k).
 Chennapatnam v. Tadakamalla, 479 (g), 496 (p).
 Chennapragada v. Secretary of State, 295 (j).
 Chennu v. Krishnan, 327 (n).
 Chenvirappa v. Puttappa, 305 (y), 308 (b).
 Chesire Lines Committee v. Lewis & Co., 783 (d).
 Chester v. Powell, 825 (b).
 Chesworth v. Hunt, 569 (f).
 Cheta Bhaira v. Purna Chandra, 270 (e).
 Chetan Das v. Gobind Saran, 535 (r).
 Chet Ram v. Ram Singh, 110 (b), 110 (d).
 Chetti Gaundan v. Sundaram, 471 (g).
 Chettyar Firm v. A. K. R. M. K. Chettyar Firm, 503 (m).
 Chevwynd v. Allan, 729.
 Chetty v. Maniandi Seervai, 335 (t).
 Chhaganlal Sakham v. Chunilal Jagmal, 743 (c).
 Chhathi Lal v. Bindeshwari, 493 (l), 493 (s), 496 (t).
 Chhotabhai v. Juan Chandra, 167 (v).

- Chhotalal v. Bai Mahakore, 13 (q).
 Chhota Lal v. Bansidhar, 723 (o), 727 (u).
 Chhotalal v. Gobindram, 555 (t).
 Chhotalal v. Manohar, 115 (z).
 Chhotalal v. Mathur Kevalram, 575 (t).
 Chhotalal v. Seth Lakmichand, 320 (s).
 Chhote Singh v. Surat Singh, 714 (e).
 Chhotku Rai v. Baldeo Shukul, 529 (c).
 Chhot Lal v. Kedar Nath, 86 (w).
 Chidambara v. Koothaperumal, 111 (e).
 Chidambara v. Krishnasami, 84 (p).
 Chidambara v. Vaidilinga, 912 (d), 914 (t).
 Chidambara Nadan v. Muni Nagen-drayyan, 723 (f).
 Chidambaram v. Srinivasa, 329 (m).
 Chidambaram Chettiar v. Sami Aiyar, 319 (g), 323 (v), 325 (u), 328 (y), 331 (k).
 Chidambaram Chettier v. Srinivasa, 319 (h).
 Chidambaramma v. Husainamma, 104 (f).
 Chidley v. West Ham, 27 (r).
 Childe v. Hodgson's Contract, *Re.*, 388 (f), 398 (z).
 Child v. Steening, 835 (u).
 Chillingworth v. Esche, 451 (b).
 Chilton v. Carrington, 535 (w), 535 (y).
 Chilton v. Progressing, Printing and Publishing Co., 3 (o).
 Chimanlal v. Bahadur, 496 (v).
 Chimman Lal v. Bahadur Singh, 492 (z).
 Chimnaji v. Sakharam, 550 (h).
 Chinamal v. Gul Ahmad, 324 (h), 324 (i), 324 (j).
 China Pitchiah v. Pedakotiah, 331 (h).
 Chinna Aiyar v. Mahomed Fakr-u-din Saib, 3 (n).
 Chinna Narayadu v. Harischandra, 893 (u).
 Chinnaaswami v. Darmalinga, 307 (r).
 Chinnayya Rawuthan v. Chidambaram Chetti, 669 (r).
 Chinnu Pillai v. Kalimuthu, 112 (r).
 Chintaman v. Dareppa, 38 (w), 378 (k).
 Chintaman v. Dulari, 516 (f), 626 (t).
 Chintamanrav v. Kasinath, 110 (c).
 Chiranji Lal v. Poorna, 523 (n).
 Chisum v. Dewes, 507 (t), 648 (u).
 Chitkali Koer v. Mathuralal, 620 (o), 620 (p), 620 (q), 621 (s).
 Chitta v. Bai Jamni, 666 (k).
 Chitu v. Charan Singh, 83 (h).
 Chob Singh v. A. J. Williams, 744 (s).
 Chockalingam Chetty v. Seethai Ache, 74 (y).
 Chogalal v. Malkarjunappa, 444 (j), 444 (k).
 Choga Lal v. Piyari, 190 (j), 801 (a).
 Chokhey Singh v. Joto Singh, 250 (g).
 Chokkalinga v. Ramanadan, 689 (r).
 Cholmeley School Highgate v. Sewell, 4 (w).
 Cholmendeley (Marquis) v. Clinton Lord, 663 (f).
 Cholmonley v. Clinton, 595 (y), 638 (m).
 Cholomendeley v. Clinton, 642 (g).
 Chooni Lal v. Nilmadhad, 247 (r).
 Choonilal v. Vithaldas, 449 (l), 508 (g), 510 (r).
 Chota Bhaira v. Purna Chandra, 258 (u), 264 (y).
 Chotalal v. Gobindram, 555 (t).
 Chota Nagpur Banking Association, Ltd. v. Kumar Kamakhya, 15 (k).
 Chotesha v. Mt. Maktum Bi, 6 (t).
 Chowdhry Jogessar v. Khetter Mohun, 658 (w), 658 (y).
 Christian v. Field, 715 (y), 754 (d).
 Christie v. Gosling, 142 (f).
 Christison v. Bolam, *In re* Gregson, 569 (d), 573 (b).
 Christ's Hospital v. Grainger, 168 (o), 168 (p).
 Christy v. The Company, *Re. Hayman, Christy and Lilly, Ltd.* (No. 2), 844 (h).
 Chullile v. Othenam, 22 (r).
 Chundee Churn v. Shib Chunder, 65 (o).
 Chunder Caunt v. Jadoonath, 532 (n).
 Chunder Coomar v. Hurbuns, 251 (b).
 Chunder Dutt v. Bhagwat Narain, 524 (x).
 Chunder v. Krishna, 377 (y).
 Chunder Nath v. Kristo Komul, 336 (c).
 Chundro Sheekhur Roy v. Nobin Soondur Roy, 67 (g).
 Chundu Nath Roy v. Bhoirub Chunder, 377 (y).
 Chunilal v. Bai Jethi, 443 (q), 443 (s), 752 (k).
 Chunilal v. Bai Muli, 173 (u).
 Chunni Bibi v. Basanti Bibi, 441 (s).
 Chunilal v. Bomonji Mancherji, 375 (g).
 Chunilal v. Fulchand, 688 (n).
 Chunilal v. Gopiram, 787 (i), 789 (w), 820 (k).
 Chunilal Harilal v. Bai Mani, 316 (j).
 Chunilal v. Ramchandra, 38 (f), 41 (d), 283 (z), 378 (k).
 Chunilal v. Sikishan Singh, 694 (z).
 Chunni Kuar v. Rup Singh, 192 (w).
 Chunni Lal v. Abdul Ali Khan, 316 (c).
 Churaman v. Balli, 22 (n), 378 (l), 746 (p), 753 (v).
 Churamani v. Baidya, 327 (q).
 Churaman Sahu v. Gopi Sahu, 105 (p).
 Church v. Brown, 808 (f), 808 (v), 854 (h), 854 (k).
 Church's, Patents, 648 (x).
 Citron v. Cohen, 868 (y).
 Clare v. Bedford (Earl), 681 (d).
 Clarendon v. Barham, 771 (l).

- Clarendon v. Barham, 767 (c).
 Clarges v. Albemarle, 217 (h).
 Clarke v. Clarke, 524 (p).
 Clarke v. *Ex-parte*, 93 (g).
 Clarke v. Mackintosh, 385 (c).
 Clarke, In the goods of, 519 (i).
 Clarke v. Palmer, 682 (t).
 Clarke v. Parker, 124 (m), 193 (y),
 194 (g), 194 (i).
 Clarke v. Stevens, *Re* Stevens, 170 (x).
 Clarke v. Willott, 340 (k).
 Clayton v. Leech, 325 (u), 326 (z).
 Clavering v. Ellison, 199 (n), 200 (e),
 203 (w), 203 (x).
 Claydon v. Green, 5 (o).
 Clayton v. Leech, 833 (r).
 Clegg v. Fisherick, 590 (q).
 Clegg v. Hands, 241 (p).
 Clements v. Matthews, 52 (p).
 Clement v. Wells, 237 (l), 240 (n).
 Clemow v. Geach, 258 (s).
 Clerke v. King, 454 (i).
 Clerk v. Robinson, 376 (r).
 Clerk v. Wright, 348 (x).
 Clermont (Viscount) v. Tasburgh,
 396 (i).
 Clinic v. Wood, 27 (y), 28 (f), 28 (k).
 Clinan v. Cooke, 347 (p).
 Cloake v. Hooper, 834 (x).
 Cloncurry v. Fenton, *In re* Quintin
 Dick, 198 (m).
 Clough v. London and North Western
 Railway Company, 897 (l).
 Clowes v. Hilliard, 57 (n).
 Coaks v. Boswell, 445 (p), 445 (s).
 Cobson v. Williams, 636 (i), 636 (k).
 Cochrane v. Moore, 916 (v).
 Cockburn v. Edwards, 633 (x).
 Cockburn v. Smith, 843 (v).
 Cockell v. Bacon, 640 (e).
 Cockell v. Taylor, 476 (w).
 Codrington v. Codrington, 211 (x),
 213 (f).
 Coe v. Clay, 827 (y).
 Coggan v. Pogose, 283 (x).
 Coggs v. Bernard, 45 (b).
 Cohen v. Kitchell, 86 (w).
 Cohen v. Popular Restaurants, Ltd.,
 860 (v).
 Cohen v. Tannar, 831 (d), 881 (c).
 Colby v. Gadsden, 394 (u).
 Colby v. Gadsden, *Per Lord Chelmsford*
in, 386 (d).
 Cole v. Allcot, 185 (n).
 Cole v. Allcot, *In re* Friends Settle-
 ment, 185 (p).
 Colebrooke v. Tickell, 119 (a).
 Cole v. Forth, 876 (v).
 Cole v. Kelly, 867 (t).
 Coles v. Sims, 233 (z).
 Colegrave v. Dias Santos, 420 (l).
 Colgan v. Administrator General of
 Madras, 167 (g).
 Collector of Etawah v. Beti Maharani,
 744 (s).
 Collector of Gorakhpur v. Ram Sunder,
 518 (b).
 Collector of Masulipatam v. Cavalry
 Vencata, 102 (d), 102 (x), 103 (p).
 Collector of Thana v. Hari Sitaram,
 22 (o), 55 (h).
 Collector of Thana v. Krishnanath,
 22 (m).
 Collector Singh v. Madari Lal, 71 (j).
 Collett v. Collett, 199 (q).
 Collier v. Haron, 294 (z).
 Collins v. Hopkins, 825 (a), 825 (e).
 Collins v. Plum, 804 (w).
 Collins, *Re*, *Ex-parte* Peiry, 505 (z).
 Collins v. Stimson, 451 (c).
 Collyer v. Isaacs, 52 (q), 271 (l), 472 (s).
 Colombine v. Penhall, 331 (q).
 Colonial Bank v. Whinney, 30 (p).
 Colonial Sugar Refining Co. v. Irving,
 6 (x), 7 (b).
 Colville v. Parker, 339 (g).
 Colyer v. Finch, 681 (m).
 Combe v. Hughes, 161 (e).
 Coming, *Ex-parte*, 502 (h).
 Commercial Bank, Ltd. v. Sabju Saheb,
 316 (d).
 Compton (Lord) v. Oxenden, 766 (q).
 Constance v. Cunningham, 917 (d).
 Conquest v. Ebbetts, 872 (l), 872 (m).
 Cook v. Dawson, 411 (q), 630 (y).
 Cooke v. Booth, 806 (t).
 Cook v. Frederick, *In re* Nash,
 141 (a).
 Cook v. Guena, 287 (a).
 Cook v. Guerra, 601 (j).
 Cook v. Waugh, 385 (v).
In re Cooks Mortgage Lawhedge v.
 Tyndall, 696 (i).
 Coombe, *Ex-parte*, 499 (l).
 Coomes v. Hayward, 568 (w).
 Cooper, *Re*, 257 (p).
 Cooper & Allen's Contract, for sale to
 Harlech, *Re*, 88 (d), 632 (n).
 Cooper v. Campbell, *Re* Campbell,
 183 (a).
 Cooper v. Cartright, 418 (q), 773 (j).
 Cooper v. Cooper, 211 (w), 215 (y).
 Cooper v. Jenkins, 722 (t).
 Cooper v. Metropolitan Board of
 Works, 472 (l).
 Cooper Mining Co. v. Beach, 806 (x).
 Co-operative Co., Ltd. v. Bhugwan
 Das & Co., 219 (b).
 Co-operative Hindusthan Bank Ltd.
 v. Surendranath De, 471 (g), 472 (i),
 472 (j), 472 (m), 472 (n), 472 (r),
 473 (x).
 Cooth v. Jackson, 347 (s).
 Cooverjee v. Vasant, Etc. Society,
 343 (z).
 Cooverji v. Bhimji, 239 (b), 239 (d).

Cope, In the goods of, 524 (s).
 Copley v. Hepworth, 786 (t).
 Coppinger v. Gubbins, 875 (n).
 Coppring v. Cooke, 676 (j).
 Corbett v. Corbett, 127 (b).
 Corbett v. National Provident Institution, 536 (b), 537 (p).
 Corbett v. Plowden, 601 (e).
 Corbett v. Radcliff, 329 (j).
 Cornish v. Abington, 262 (k).
 Cornish v. Cleife, 119 (x), 871 (w).
 Cornish v. Searell, 809 (n).
 Cornwall v. Henson, 450 (o).
 Cornwallis Case, 32 (j).
 Cornwallis v. Wykeham—Martin, *In re. Cornwallis*, 204 (b).
 Corporation of Calcutta v. Arun-chandra, 4 (c), 611 (u).
 Corporation of Calcutta v. Arun-chandra Singha, 747 (o), 748 (t), 751 (x).
 Cosser v. Collinge, 397 (m).
 Cotterell v. Stratton, 534 (l).
 Cottey v. National Provincial Bank of England, Ltd., 682 (x), 683 (d).
 Cotton's Trustees & London School Board, for London, *Re.*, 88 (t).
 Cousins, *Re.*, 43 (w).
 Couter v. Hubback, 567 (q).
 Coutts v. Ackworth, 213 (i).
 Coutts & Co. v. Somerville, 602 (y).
 Couturier v. Hastie, 189 (m).
 Cowan v. Hilbourn, 189 (r).
 Coward v. Gregory, 872 (k).
 Cowasji Byramji Lialaovala, *Re.*, 92 (o).
 Cowasji v. Rustomji, 143 (k).
 Cowderoy v. *Re.*, *Ex-parte Martin*, 506 (f).
 Cowdroy v. Day, 547 (j).
 Cowen v. Truefitt, Ltd., 415 (e), 415 (f).
 Cowie v. Goodwin, 825 (d).
 Cowper v. Fletcher, 100 (z), 280 (m).
 Cox v. Bishop, 500 (i).
 Cox v. Glue, 121 (b).
 Cox & Neve's Contract, *Re.*, 239 (c).
 Cox's Trust, *Re.*, 219 (s).
 Crabb v. Crabb, 336 (b).
 Cracknall v. Janson, 718 (i), 718 (m), 776 (z).
 Craddock v. Rogers, 633 (x).
 Craddock *In Re. v. The Scottish Provident Institution*, 755 (z).
 Craggs v. Gray, 469 (i).
 Crane v. Batten, 839 (o).
 Cranstown v. Johnston, 558 (c).
 Crawford v. Newton, 865 (q).
 Crawley v. Price, 133 (f).
 Creet v. Gangarg Gulraj, 296 (u).
 Crawley v. Ventty, 795 (j).
 Creswell v. Davidson, 410 (z).
 Crew (Lord) v. Edleston, 603 (c).

Crippen, In the Estate of, 190 (q).
 Cripps v. Wolcott, 185 (m), 185 (r).
 Crisp v. Platel, 567 (j).
 Crockford v. Alexander, 443 (w).
 Croft v. Lumley, 898 (y).
 Croggan, *Re.*, *Ex-parte Corbis*, 43 (c).
 Crompton & Co., Ltd., *Re.*, 755 (e).
 Cromwell Property Investment Co., Ltd. v. Western, 559 (k).
 Cropp's Case, 863 (z).
 Crosby v. Wadsworth, 345 (y).
 Crosse v. Murray, 801 (b).
 Cross v. Young, 834 (c).
 Crouch v. Crouch, 419 (x).
 Crowe v. Price, 78 (n).
 Crow v. Pettingall, 775 (q).
 Crusoe d'Blencowe v. Bogly, 857 (l).
 Crutchley v. Jenningham, 452 (n).
 C. Sundarmmal v. Arunachala, 249 (u), 250 (h).
 Culpepper v. Aston, 306 (b).
 Cummins v. Fletcher, 576 (b).
 Curling v. Mills, 785 (n), 788.
 Curling v. Shuttleworth, 640 (k).
 Cursetji v. Rustomji, 130 (g).
 Curson v. Belworthy, 369 (g).
 Cursondas v. Vandravandas, 920 (p).
 Curteis v. Fenning, 615 (r).
 Cuthbertson v. Irving, 217 (g), 867 (r).

D

Dada v. Genu, 550 (z).
 Dadachanji v. Ruttonbai, 179 (c).
 Dadasaheb v. Bai Nahani, 98 (h).
 Dadasaheb Dasrathrao v. Bai Nahani, 98 (c).
 Dadoba Arjunji v. Damodhar Raghu-nath, 737 (s).
 Dahyabhai v. Bapalal, 316 (j).
 Daivanayaka v. Rennukambal, 13 (w).
 Dalby v. Pullen, 389 (j).
 Dalchand v. Ganpat, 440 (y), 442 (c), 443 (x), 444 (k), 444 (m).
 Dale v. Hamilton, 347 (v), 360 (d), 360 (e).
 Daley v. Desbouverie, 194 (e).
 Dalibai v. Gopibai, 246 (f), 247 (x).
 Dalichand v. Lotu Sakharam, 525 (u).
 Dalip Narayan Singh v. Chait Narayan Singh, 685 (o), 739 (c).
 Dalip Rai v. Birnaik Rai, 775 (s).
 Dalip Singh v. Bahadur Ram, 515 (n), 749 (o).
 Dal Singh v. Pitam Singh, 703 (p), 703 (u).
 Dalthammam v. Amardeo, 546 (w).
 Daluchand v. Appi, 611 (s).
 Dambai Singh v. Jawitri Kunwar, 246 (h), 247 (y).
 Dambar Singh v. Kalyan Singh, 654 (b).
 Dames & Wood, *Re.*, 413 (j), 414 (r).
 Damodar v. Atmaram, 472 (j).

TABLE OF CASES.

XXXV

- Damodar Das v. Lakhan Das, 114 (j).
 Damodara v. Chandappa, 497 (z).
 Damodara v. Somasundara, 38 (r).
 Damodardas v. Dayabhai, 918 (n).
 Damodardas v. Uttamram, 70 (y).
 Damodar Gangadar v. Vamanrao Lakshman, 596 (y).
 Damodar Gangadhar v. Vamanrav Lakshman, 652 (u).
 Damodhar Madhavji v. Kahandas Narandas, 192 (s).
 Danappa v. Yamnappa, 698 (d).
 Dance v. Goldinham, 88 (e), 635 (q).
 Daniels v. Davison, 40 (o), 40 (t), 373 (q).
 Daniels v. Trefusis, 360 (g).
 Daniel v. Ubley, 126 (j).
 Danily v. Johnson, *Re. Johnson*, 195 (u).
 Danoba v. Danwdhar, 737 (s).
 Dantmara Tea Co. v. Provodh, 361 (s).
 Darapali v. Najib Ahmed, 415 (i).
 Darbari Lal v. Gobind Saran, 102 (b), 104 (x).
 Darbari Lal v. Khetra Chandra, 501 (w), 502 (d).
 Darby Motor Car Co. v. Crompton & Evans Union, Bank, 802 (z).
 Darby's estate, *Rendall v. Darby, In re.*, 695 (h).
 Darcy (Lord) v. Askwitt, 875 (h).
 Darghai Lal v. Rafiqunnisa, 546 (y).
 Darke v. Williamson, 752 (o).
 Darley v. Langworthy, 189 (o).
 Darlington v. Hamilton, 410 (h), 410 (y).
 Darnley (Earl) v. Proprietors of London Chatham & Dover Railway, 458 (j).
 Darrell v. Tibbitts, 285 (k).
 Darshan Singh v. Arjun Singh, 770 (d), 775 (j), 777 (e).
 Darshan Sing v. Hanwanta, 467 (r).
 Daryao Singh v. Jahan Singh, 912 (g).
 Dasani Sahu v. Ramdulari, 601 (c).
 Dashwood v. Bulkeley, 203 (u).
 Dasi Svarnam v. Deivanayagam, 930 (m).
 Daso Poai v. Narayana Patro, 768 (g).
 Dassorathy v. Ram Krishna, 894 (p).
 Dasureddi v. Venkatasubammal, 520 (v).
 Dat v. Gopal, 820 (h).
 Dattambhat v. Krishnabhat, 514 (y), 515 (v), 515 (w), 515 (x), 516 (f).
 Dattaram v. Gangaram, 96 (r).
 Dattaram v. Vinayak, 94 (j), 654 (t).
 Dattatraya Govind Haldankar, *In re.*, 107 (p).
 Dattatraya v. Shridhar, 301 (x).
 Dattoo v. Ramchandra, 483 (p).
 Datto v. Vithu, 479 (d), 489 (f).
 Datto v. Vittu, 515 (p).
 Datubhai v. Abubaker, 469 (n), 469 (o).
 Daudbhai v. Daudbhai, 642 (f).
 Daulat Ram v. Ghulam Fatima, 328 (c), 329 (d), 329 (f), 329 (g), 331 (m).
 Davenport v. Charsley, 387 (s).
 Davenport v. R., 892 (f), 897 (x), 898 (y).
 Davenport v. Smith, 897 (v), 904 (z).
 Daverges v. Sandeman Clark & Co., 629 (v).
 Daves v. Cavey, 390 (z).
 Davey v. Durrant, 631 (c), 631 (f), 631 (h), 637 (s), 637 (u), 637 (v).
 David Cutinha v. Salvadora, 128 (n).
 David Payne & Co., *Re.*, 42 (v).
 David v. Sabin, 422 (x), 433 (y).
 David v. Salvadora, 894 (t).
 Davies v. Angel, 57 (n), 58 (q).
 Davies v. Bush, 259 (c).
 Davies v. Davies, 195 (o), 559 (f).
 Davies & Kents Contract, *Re.*, 157 (j).
 Davies v. Leo, 877 (g).
 Davies v. Thomas, 35 (q).
 Davies v. Witts, *Re. Hole*, 766 (q).
 Davis v. Banett, 723 (h).
 Davis v. Barrett, 767 (c), 771 (l).
 Davis v. Burrell, 892 (c).
 Davis v. Burrell & Lane, 851 (r).
 Davis v. Dendy, 671 (n).
 Davis & Cavey, *Re.*, 390 (u), 412 (s).
 Davis v. Dysart (Earl), 568 (r).
 Davis v. May, 675 (h), 675 (q).
 Davis v. Parry, 568 (s).
 Davis v. Symons, 548 (k), 562 (s).
 Davis v. Town Properties Investment Corporation, Ltd., 831 (c), 831 (f), 831 (g), 833 (n), 834 (f).
 Davis v. West, 901 (a).
 Davison d Bromley v. Stanley, 888 (t).
 Davood Mohideen v. Jayarama, 827 (c).
 Dawal v. Dharma, 47 (f).
 Dawes, *Ex-parte, In re Moon*, 115 (d), 419 (w).
 Daw Ohn v. U. Bah, 751 (d).
 Dawn v. Spurrier, 754 (m).
 Dawood v. Vullubhdas, 48 (v).
 Dawson v. Dyer, 834 (w).
 Dawson v. Great Northern City Railway, 76 (p).
 Dawson v. Great Northern Eastern Railway, 75 (d).
 Dawson's Bank Ltd. v. Menkwa Kabushiki Kaisha, 253 (v).
 Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, 243 (c).
 Dawson v. Oliver-Massey, 193 (a).
 Daw v. Terrel, 505 (w).
 Dayal Jairaj v. Jivraj Ratansey, 502 (g), 504 (h).
 Dayabhai v. Parvati, 98 (l).
 Dayal Singh v. Indar Singh, 443 (z), 456 (v).
 Dayamayi v. Ananda Mohan Roy, 81 (t).
 Dayamani Debi v. Srinibash Kundu, 104 (d).

Diplock *v.* Hammend, 31 (*s*).
 Dip Narain *v.* Har Singh, 737 (*s*).
 Dip Narain *v.* Nageshar, 621 (*h*).
 Dip Narain *v.* Nageshar Prasad,
 81 (*w*), 82 (*e*).
 Dip Narain Singh *v.* Hira Singh, 712 (*i*),
 737 (*s*).
 Dip Narain Singh *v.* Nageshar Prasad,
 47 (*c*), 189 (*c*), 365 (*c*).
 Diramoyee Debi *v.* Bon Behari Kapur,
 520 (*b*).
 Diwali *v.* Apaji, 132 (*s*).
 Diwali *v.* Apaji Ganesh, 70 (*d*).
 Diwan Chand *v.* Manak Chand, 272 (*s*).
 Diwan Singh *v.* Jadhoo Singh, 377 (*y*).
 Dixon *v.* Baty, 836 (*m*).
 Dixon *v.* Bradford & District Railway
 Servants Coal Supply Society,
 814 (*m*).
 Dixon *v.* Clark, 532 (*n*).
 Dixon *v.* Muckleston, 507 (*x*), 683 (*i*).
 Dixon *v.* Steel, 721 (*f*).
 Dixon (Trustee) *v.* Tucker, *Re.* Martin,
Ex-parte, 898 (*b*).
 Dixon *v.* Winch, 41 (*k*).
 Dix, *Re.*, *Ex-parte* Whitbread, 765 (*d*).
 Dnyanu *v.* Fakira, 293 (*s*), 588 (*a*),
 588 (*z*).
 Dobb *v.* England, *Re.* England's
 Settlement Trusts, 752 (*p*).
 Dobell *v.* Hutchinson, 393 (*g*).
 Dobell *v.* Stevens, 385 (*z*).
 Doble *v.* Manley, 711 (*s*).
 Doble, *Re.*, *Ex-parte* Doble, 340 (*m*).
 Dobson *v.* Horseby, 843 (*u*).
 Dobson *v.* Land, 723 (*h*).
 Dodson *v.* Downey, 625 (*i*).
 Doe *v.* Carter, 134 (*o*).
 Doe d Abdy *v.* Stevens, 873 (*x*),
 891 (*p*).
 Doe d Ambler *v.* Woodbridge, 801 (*g*).
 Doe d Baker *v.* Jones, 897 (*s*).
 Doe d Barker *v.* Goldsmith, 892 (*j*).
 Doe d Bateman *v.* Darby, 839 (*g*).
 Doe d Bate (Marquis) *v.* Guest,
 808 (*l*).
 Doe d Beadon *v.* Pyke, 889 (*e*).
 Doe d Bothell *v.* Martyr, 340 (*v*).
 Doe d Bridger *v.* Whitehead, 839 (*q*).
 Doe d Bristow *v.* Pegge, 595 (*v*).
 Doe d Christinas *v.* Oliver, 260 (*t*).
 Doe d Dillon *v.* Parker, 893 (*o*).
 Doe d Dymoke *v.* Withers, 808 (*x*),
 867 (*u*).
 Doe d Edney *v.* Benham, 794 (*a*).
 Doe d Edney *v.* Billett, 794 (*a*).
 Doe d Ellis & Medwin *v.* Sandham,
 808 (*e*).
 Doe d Flower *v.* Peck, 839 (*f*).
 Doe d Freeman *v.* Bateman, 892 (*g*).
 Doe d Garrod *v.* Olley, 664 (*q*).
 Doe d Gatehouse *v.* Roes, 898 (*c*).
 Doe d Goodbehare *v.* Bevan, 860 (*t*).

Doe d Gray *v.* Stanion, 892 (*m*).
 Doe d Green Colcombe *v.* Fidler,
 786 (*v*).
 Doe d Griffith *v.* Pritchard, 898 (*z*).
 Doe d Grubb *v.* Burlington, 876 (*t*),
 876 (*u*).
 Doe d Hemmings *v.* Dumford, 899 (*m*).
 Doe d Holland *v.* Worsley, 854 (*l*).
 Doe d Hughes *v.* Derry, 793 (*n*).
 Doe d Knight *v.* Rowe, 839 (*p*).
 Doe d Lambert *v.* Roe, 902 (*k*),
 902 (*m*).
 Doe d Lloyd *v.* Ingleby, 894 (*i*).
 Doe d Lloyd *v.* Powell, 894 (*k*).
 Doe d Lyster *v.* Goldwin, 814 (*q*).
 Doe d Martin *v.* Watta, 791 (*k*).
 Doe d Mathews *v.* Jackson, 814 (*o*).
 Doe d Mitchinson *v.* Carter, 860 (*y*).
 Doe d Morecraft *v.* Meux, 869 (*c*).
 Doe d Morgan *v.* Powell, 785 (*o*).
 Doe d Morris *v.* Roe, 568 (*u*).
 Doe d Murton *v.* Gladwin, 839 (*h*).
 Doe d Muston *v.* Gladwin, 839 (*l*).
 Doe d Newman *v.* Rusham, 340 (*h*).
 Doe d Ogle *v.* Vickers, 595 (*v*).
 Doe d Oldershaw *v.* Breach, 891 (*u*).
 Doe d Parsley *v.* George Day, 664 (*q*).
 Doe d Pearson *v.* Ries, 786 (*c*),
 786 (*t*), 789.
 Doe d Phillip *v.* Benjamin, 786 (*b*),
 786 (*p*).
 Doe d Pittman *v.* Sutton, 865 (*w*).
 Doe d Pitt *v.* Shewin, 839 (*k*), 839 (*n*).
 Doe d Roby *v.* Maisey, 664 (*q*).
 Doe d Rochester *v.* Bridges, 888 (*i*).
 Doe d Sheppard *v.* Allen, 898 (*e*).
 Doe d Thompson *v.* Davis, 897 (*g*).
 Doe d Tucker *v.* Morse, 795 (*e*).
 Doe d Vickery *v.* Jackson, 867 (*k*).
 Doe d Viscount Downe *v.* Thompson
 259 (*k*).
 Doe d Walker *v.* Groves, 786 (*b*),
 786 (*t*), 786 (*z*).
 Doe d Wetherell *v.* Bird, 801 (*j*),
 869 (*g*).
 Doe d Whitehead *v.* Pittman, 893 (*z*).
 Doe d Whitfield *v.* Roe, 901 (*g*).
 Doe d White *v.* Okey, 814 (*j*).
 Doe d Williams *v.* Evans, 854 (*s*).
 Doe d Williams & Jeffery *v.* Cooper,
 893 (*n*).
 Doe d Williams *v.* Lloyd, 258 (*t*).
 Doe d Williams *v.* Pasquali, 893 (*s*).
 Doe d Wood *v.* Clarke, 787 (*m*).
 Doe dom Williams *v.* Cooper, 899 (*p*).
 Doe *v.* Lamirag, 857 (*m*).
 Doe d Levy *v.* Horne, 595 (*w*).
 Doe Lessee of Parry *v.* James, 330 (*t*).
 Doe *v.* Maylor, 841 (*b*).
 Doe *v.* Oliver, 261 (*w*).
 Doe *v.* Pearson, 126 (*k*), 126 (*o*), 126 (*t*).
 Doe *v.* Watt, 133 (*g*).
 Doherty *v.* Allman, 234 (*c*), 875 (*k*).

- Dolman v. Nokes, 445 (r).
 Dolphin v. Aylward, 340 (r), 688 (d).
 Doma v. Govind, 367 (f).
 Donisthorpe v. Porter, 766 (p), 770 (j), 770 (h).
 Donnelly v. Broughton, 519 (l).
 Doolabdas v. Chhabildas, 634 (j), 641 (r).
 Doolee Chand v. Omda Khanum, 669 (u).
 Dooli Chand v. Birj Bhookun, 258 (z).
 Doongersey v. Keshavji Meghji & Co., 875 (m), 876 (o).
 Doorga Narain v. Baney Madhub, 33 (s).
 Doorga Narain Sen v. Baney Madhub Mozoomdar, 36 (f).
 Doorga Singh v. Sheo Pershad Singh, 591 (v).
 Doraiswamy Mudaliar v. Doraiwamy Iyengar, 32 (a).
 Doraiswamy v. Thangavelu, 76 (q).
 Dorasami v. Venkatasehayyar, 569 (x), 574 (e), 725 (l).
 Dorasinga v. Arunachalam, 442 (f).
 Dose Thimmanna v. Krishna, 310 (v).
 Dosibai v. Dhanbai, 389 (o), 458 (q).
 Dosibai v. Dhunbai, 390 (v).
 Douce, In the goods of, 519 (r).
 Dougherty v. Oates, 239 (c), 388 (f).
 Doughty v. Bowman, 231 (c), 867 (p).
 Douglas Menzies v. Umphelby, 212 (b).
 Douglas & Powell's Contract, Re., 411 (o).
 Doulatram v. Meherchand, 110 (a).
 Dowle v. Saunders, 679 (s).
 Downes v. Cottam, Re. Beddoe, 752 (p).
 Downes v. Grazebrook, 637 (r), 638 (j), 638 (m), 640 (h).
 Dowson & Jenkin's Contract, Re., 629 (u).
 Draper v. Borlace, 678 (c), 681 (d).
 Draper v. Crofts, 878 (d).
 Draupner, the 34 (b).
 Dresser v. Norwood, 43 (j).
 Drew v. Corp, 394 (i).
 Drieselman v. Winstanley, 845 (n).
 Driver v. Broad, 755 (b).
 Drummond v. Tracy, 402 (m).
 Drury v. Macnamara, 827 (y).
 Dryden v. Frost, 43 (m), 397 (q), 443 (y).
 Drysdale v. Mace, 397 (m).
 D. Sinclair v. Sitabkan, 268 (s).
 Duber v. Ram Sahai, 723 (n), 723 (o), 727 (v), 727 (v), 727 (w).
 Duber v. Ram Sahair, 727 (u).
 Dubo Misser v. Srinivas, 69 (s).
 Dubri v. Ram Naresh Singh, 623 (o), 623 (t).
 Duddell v. Simpson, 413 (g), 413 (i), 413 (j), 414 (u).
 Dudley v. Folliott, 830 (n).
 Dudley (Lord) v. Warde (Lord), 28 (h).
 Duffield v. Duffield, 180 (h).
 Duffield v. Eleves, 934 (b).
 Dugdale v. Dugdale, In re Dugdale, 126 (r), 201 (i), 202 (j).
 Dugappa v. Venkatramnaya, 275 (t).
 Duggins, In the goods of, 524 (r).
 Dukhi Mollah v. Halway, 4 (a).
 Dular Chand v. Balram Das, 615 (o).
 Dula Singh v. Bela Singh, 10 (x).
 Dulhin v. Baijnath, 107 (s).
 Dulhin Lachhmibati v. Bodhnath, 887 (e), 887 (w).
 Dulhin Lachhmibati v. Bodhnath Tewari, 886 (o), 887 (v).
 Dulhin Parbati Kuer v. Baijnath Prasad, 107 (l).
 Dullabhdas v. Lakshmandas, 764 (v).
 Dumergue v. Rumsey, 849 (i).
 Duncan Fox & Co. v. North and South Wales Bank, 722 (z).
 Dundaya v. Chenbasappa, 38 (w), 40 (v), 378 (k), 378 (r).
 Dungannon (Lord) v. Smith, 144 (s), 145 (a), 147 (g), 149 (s).
 Dungariya v. Nand Lal, 244 (f).
 Duni Chand v. Gurmukh Singh, 79 (a), 79 (u).
 Dunk v. Hunter, 787 (q).
 Dunlop v. Dunlop, In re. Dunlop, 692 (i), 692 (l), 697 (t).
 Dunn v. Flood, 89 (f).
 Dunne v. Nobo Krishna, 783 (l).
 Durga Bibi v. Chanchal Ram, 58 (t), 69 (t).
 Durga Charan v. Ambica Charan, 735 (a).
 Durga Charan Chandra v. Ambica Charan Chandra, 723 (d), 726 (o).
 Durga Charan v. Khundkar, 273 (u), 277 (g).
 Durga Chunder Roy v. Koilas Chunder, 75 (s).
 Durga Das v. Muhammad Ismail, 266 (i), 269 (y), 270 (a).
 Durga Devi v. Girivar Singh, 542 (i).
 Durga Din. Siraj Bakhsh, 521 (n).
 Durga v. Jhinguri, 82 (c), 189 (u).
 Durga Nath v. Chintamoni, 103 (t).
 Durgapada v. Nrisinghachandra, 343 (p).
 Durga Prasad v. Brojo Nath, 121 (s), 121 (u).
 Durga Prasad v. Dukhi Roy, 555 (t), 555 (u).
 Durga Prasad v. Gangadin, 312 (u).
 Durga Prasad v. Narain, 60 (r).
 Durga Prasad v. Rajendra, 820 (h).
 Durga Prasad v. Shambhu, 68 (c).
 Durga Prasad Singh v. Rajendar Narayan, 827 (g).

Durga Priya Chowdhury v. Durga Pada Roy, 5 (f).
 Durgar Singh v. Naurang, 301 (x).
 Durga Shankar v. Lala Ganga, 677 (v).
 Durga Singh v. Naurang Singh, 584 (u), 585 (e), 653 (g).
 Durgawati v. Jagannath, 521 (l).
 Durgazi Row v. Fakeer Sahib, 296 (f).
 Durgi Nikarini v. Gobordhan Bose, 16 (q).
 Durgi Nikarni v. Goverdhan, 906 (r).
 Durgozi Row v. Fakeer Sahib, 18 (h), 290 (p), 294 (x), 295 (g).
 Durham v. Legard, 392 (s).
 Duthy & Jesson's Contract, *Re.*, 436 (f).
 Dutton v. Thompson, 256 (l).
 Dwarkanath v. Burroda, 166 (q).
 Dwarkanath Mitter v. S. M. Sarat Kumari, 508 (e), 510 (r).
 Dwarkanath v. Srigobinda, 798 (r).
 Dwarkanath v. Tafazar, 5 (i).
 Dwark Prasad v. Nasir Ahmad, 60 (q), 61 (c).
 Dwarka Prasad v. Nasir Ahmad, 260 (p), 262 (m), 263 (n), 268 (r).
 Dwason v. Oliver Massey, 199 (p).
 Dwijendra Mohan Sarma v. Manorama Dasi, 96 (r).
 Dwijendra Nath Biswas v. Jitendra Nath Roy, 798 (j).
 Dyal Das-Chanan v. Harkishan Singh, 442 (j).
 Dykes v. Blake, 392 (q).
 Dyke v. Staveley, *Re. Staveley*, 147 (h).
 Dynevor (Lord) v. Tennant, 886 (m).
 Dyson v. Foster, 231 (h).
 Dyson v. Peat, 754 (o).

E

Eardley v. Knight, 655 (l).
 Earl of Sifton, *In re Charles William Hilton*, 188 (g).
 Early v. Rathbone, 416 (n).
 Easterly v. Sampson, 803 (f).
 Eastern Countries Rly., Co. v. Hawkes, 921 (p).
 Eastern Mortgage and Agency Co., Ltd. v. Muhammed Fazlul Karim, 398 (b).
 Eastern Mortgage & Agency Co., Ltd. v. Muhammad Fazal, 400 (r).
 Eastern Telegraph Co., Ltd. v. Dent, 857 (q).
 Eastern Union Railway Co. v. Hart, 616 (d).
 Eastwood v. Ashton, 395 (v), 415 (h), 420 (h), 459 (p).
 Eastwood v. Lever, 236 (w).
 Eaton v. Jaques, 857 (u).
 Eaton v. Lyon, 805 (b), 807 (p).
 Ebbs v. Benlnois, 4 (w).

Ebrahim v. Arumugathae, 596 (b).
 Ebrahimbhai v. Fletcher, 454 (g), 454 (h).
 Ebrahimbhai v. Fulbai, 324 (s), 329 (i).
 Ebrahim v. Foolbai, 337 (q).
 Ebrahim Pir Mahomed v. Cursetji Sorabji De Vitre, 816 (q).
 Ebrington v. Ebrington, 216 (b).
 Ebsworth & Tidy's Contract, *Re.*, 392 (r), 408 (j).
 Economic Life Assurance Society v. Osborne, 765 (x).
 Edathil Itti v. Kopashon Nayar, 491 (q), 513 (t).
 Ede v. Knowles, 340 (t), 499 (m).
 Edge v. Boileau, 534 (w).
 Edge v. Strafford, 825 (i).
 Edgeworth v. Edgeworth, 195 (o).
 Edge v. Worthington, 504 (f), 505 (x).
 Edmondson v. Copland, 559 (k).
 Edmunds v. Edmunds, 319 (c), 328 (a).
 Edwardes v. Barrington, 793 (s), 854 (n).
 Edwards, *Re.*, 198 (m).
 Edwards v. Edwards, 87 (y), 145 (z), 149 (r), 149 (r).
 Edwards v. Halinder's Case, 876 (w).
 Edwards v. Hammond, 179 (e), 179 (f).
 Edwards v. McLeay, 400 (p).
 Edwards v. Shenen, 4 (v).
 Edwards v. Standard Rolling Stock Syndicate, 607 (n), 607 (o), 607 (p).
 Edwards to Sykes, *Re.*, 397 (n).
 Edwards v. West, 840 (u).
 Edwards v. Wickwar, 388 (x).
 Edwards—Wood, *Re.*, *Ex-parte Mayoy*, 322 (n).
 Egerton v. Brownlow, 189 (s), 190 (p), 203 (v).
 Egmont (Earl of) v. Smith, 423 (c), 423 (d).
 Ehtisham All v. Jamna Prasad, 373 (g).
 Ekambara Ayyar v. Meenatchi Ammal, 620 (y).
 Ekradeshwari Bahuasin v. Homeshwar Singh, 227 (q).
 Eldridge v. Iles, *Re. Hewett*, 203 (t), 931 (y).
 Elias Meyer v. Manoranjan, 124 (e).
 Elias v. Snowden Slate Quarries Co., 648 (m).
 Elkins v. Cullen, 166 (g), 166 (i).
 Elliott v. Bishop, 26 (e).
 Elliott v. Boynton, 892 (b).
 Elliott, *Ex-parte*, 325 (w).
 Ellis & Co.'s Trustees v. Dixon-Johnson, 617 (p), 619 (g), 626 (q).
 Ellis v. Glover & Holson, Ltd., 603 (a).
 Ellis v. Goulton, 451 (e).
 Ellis v. Griffiths, 676 (l).
 Ellis v. Maxwell, 163 (y).
 Ellis v. Smith, 519 (n).
 Ellis v. Torrington, 75 (d), 867 (r).
 Ellis v. Towbotham, 220 (d).

Ellison v. Wright, 655 (e).
 Elliston v. Reacher, 46 (v), 230 (x),
 234 (d), 235 (g), 235 (i), 236 (n),
 237 (a).
 Elizabeth May v. Bhupendranath,
 501 (r), 503 (m).
 Elmes, *Ex-parte*, *Re.*, Huges, 325 (w).
 Elsey v. Cox, 338 (v).
 Elumalai v. Balakrishna, 22 (p), 22 (u),
 511 (y).
 Elumalai Chetty v. Balakrishna,
 370 (v), 468 (y).
 Elumalai Chetty v. Balakrishna
 Mudaliar, 123 (p).
 Elwes v. Maw, 28 (f), 28 (n).
 Emerson, In the goods of, 519 (o).
 Emery, *Re*, *Ex-parte* Harvey, 765 (y).
 Emmerson v. Heelis, 359 (r).
 Emnabai v. Hajirabai, 10 (b), 934 (d).
 Emnabai v. Hajra Bai, 924 (u).
 Emperor v. Chimanlal, 9 (j).
 Emperor v. Joggesur, 915 (u).
 Empress v. Ashootosh, 20 (j).
 Empress v. Husen, 92 (p).
 Empress v. Ramanjiyya, 20 (j).
 Enayet Hossein v. Muddun Moonee
 Sagoon, 758 (l), 759 (r).
 England Fire Insurance Company v.
 Whipp, 45 (g).
 English Electric Metallurgical Co.,
 Ltd. v. Glasdir Copper Works, Ltd.,
In re. Glasdir Copper Works, Ltd.,
 852 (u).
 Enlayde Ltd. v. Roberts, 839 (m).
 Entazuddi Sheikh v. Ram Krishna
 Banik, 86 (k), 86 (v).
 Erlanger v. New Sombrero Phosphate
 Co., 398 (g).
 Ernest Clarence O'Brien, *Re.*, 137 (h),
 137 (j), 138 (n).
 Errington v. Morewood, 438 (o).
 Ershaque v. Dalah Miah, 785 (d).
 Esberger & Son, Ltd. v. Capital &
 Counties Bank, 499 (t).
 Esdaile v. Oxenham, 423 (l).
 Esham Kishar v. Haris Chandra,
 189 (e).
 Eshan Chunder v. Monmohini,
 21 (u), 70 (y).
 Eshan Chunder Roy v. Monmohini
 Dasi, 68 (y).
 Esqhal v. Dulla, 271 (k).
 Espin v. Pemberton, 41 (j).
 Espin v. Pernbuton, 33 (u).
 Estwick v. Caillaud, 325 (w).
 Esubai v. Damodhar, 836 (j).
 Etches v. Etches, 195 (t).
 Ethel v. Clara, 493 (l).
 Eton College (Provost) v. Winchester
 (Bishop of), 911 (m), 911 (n), 914 (s).
 Evans v. Becknell, 681 (o).
 Evans v. Bicknell, 46 (i).
 Evans v. Davis, 64 (c), 892 (d).

Evans v. Edmonds, 680 (x).
 Evans v. Judkins, 532 (l).
 Evans v. Levy, 857 (s).
 Evans v. Mathias, 809 (o).
 Evans, *Re.*, *Ex-parte* Robinson,
 499 (p).
 Evans v. Rival Granite Quarries,
 Ltd., 286 (t), 755 (e).
 Evan's, Contract, *Re.*, 203 (z).
 Evans v. The Trustees of the Port of
 Bombay, 843 (p).
 Everitt v. Everitt, 256 (l).
 Evers v. Challis, 157 (k).
 Eversfield v. Troup, 416 (v).
 Ewart v. Williams, 3 (e).
 Ewens v. Addison, 194 (h).
 Exel v. Wallace, 142 (e).
 Exhall Coal Co., Ltd., *Re.*, Bleckley,
 752 (n).
 Eyles v. Ellis, 796 (p).
 Eynon, In the goods of, 520 (c),
 520 (g).
 Eyre v. Wynn—Mackenzie, 469 (m).
 Eyston v. Simonds, 458 (i).

F

Faber v. Montagu, *Re*. Montagu,
 216 (c).
 Fadu Jhala v. Gour Mohun, 3 (b).
 Fahmidunnisa v. Hiralal, 366 (n).
 Fairclough v. Swan Brewery Co., Ltd.,
 548 (k).
 Fairman v. Perpetual Investment
 Building Society, 843 (u).
 Faiz Ali v. Har Kuar, 324 (h).
 Faiyaz Husain Khan v. Prag Narain,
 305 (x).
 Faiz Husain v. Prag Narain, 311 (a).
 Faiz-un-nissa v. Hanif-un-nissa,
 483 (p).
 Fakeer Rawot v. Sheikh Emam-
 buksh, 71 (q).
 Faki Ibrahim v. Faki Gulam, 378 (r),
 378 (s).
 Fakiraya v. Gadigaya, 694 (a), 774 (e).
 Fakir Baksh v. Sadak Alli, 711 (z).
 Fakir Baksh v. Sadat Ali, 577 (l),
 721 (c).
 Fakir Chand v. Babu Lal, 560 (x).
 Fakiruddin v. Abdul Husain, 95 (c).
 Fakrunnessa v. District Judge,
 88 (n).
 Falkrishna v. Jagannath, 467 (o),
 498 (e).
 Fala Krista v. Jagannath Marwari,
 781 (t).
 Falcke v. Scottish Imperial Insurance
 Co., 758 (g), 758 (i).
 Falkner v. Equitable Reversionary
 Society, 635 (r), 637 (m).
 Falluton v. Provincial Bank of Ireland,
 330 (z).

- Fane v. Fane, *In re* Fane, 144 (t), 146 (r), 153 (u).
 Fanindra Kumar v. The Administrator General of Bengal, 167 (t).
 Fanny Skinner v. Bank of Upper India Ltd., 370 (x).
 Faqir Bakhsh v. Murli Dhar, 885 (b), 887 (a), 887 (f).
 Faquir Chand v. Aziz Ahmad, 695 (f), 697 (w).
 Faquir Chand v. Sant Lal, 109 (u).
 Farebrother v. Wodehouse, 722 (y).
 Farhall v. Farhall, 616 (w), 616 (x), 688 (l).
 Farid-un-nisse v. Mukhtar Ahmad, 112 (y), 113 (a), 920 (w).
 Farmer v. Pitt, 571 (i).
 Farmer v. Turner, 407 (r), 408 (f).
 Farrand v. Lovel, 877 (l).
 Farrant v. Lovel, 667 (d).
 Farrar v. Farrars, Ltd. 631 (i), 639 (s).
 Farrer v. Lacey, Heartland & Co., 632 (o), 638 (g).
 Farrington v. Forrester, *In re* Jones, 422 (r), 461 (f), 462 (g), 824 (s).
 Farrow v. Rees, 46 (k).
 Farrow's Bank Ltd., *Re.*, 860 (v).
 Farrow v. Wilson, 70 (f).
 Fasey, *Re.*, 319 (d), 322 (k).
 Fasey, *Re.*, *Ex-parte*, Trustees, 322 (l).
 Fateh Chand v. Moti Singh, 730 (h).
 Fateh Din v. Kishen Lal, 618 (d), 622 (e).
 Fateh Mohammad v. Ram Dayal, 546 (x).
 Fateh Singh v. Prithi Singh, 911 (l), 912 (z).
 Fateh Singh v. Thakur Rukmini, 61 (e), 61 (f), 62 (r), 104 (b), 104 (c).
 Fatimatulnissa v. Soonder Das, 542 (m).
 Fatimtulnissa Begum v. Sundar Dass, 497 (a).
 Fatma Bibi v. Ganesh, 14 (x).
 Fatmabibi v. The Advocate General of Bombay, 167 (z).
 Fawcett, & Holmes *Re*. Contract, 230 (z), 388 (b), 392 (t).
 Fawcett, v. Holmes, 391 (f).
 Fazal Husain v. Jivan Singh, 524 (x).
 Featherstonhaugh v. Fenwick, 590 (o).
 Featherstone v. Mitchell, 758 (j).
 Feilden v. Slater, 240 (n).
 Fellows v. Clay, 4 (p).
 Fender v. Mildmay, 189 (f), 190 (f).
 Fenn v. Smart, 64 (f).
 Fenton v. Browne, 394 (i), 396 (g), 451 (d).
 Fenton v. Thorley & Co., Ltd., 3 (j).
 Fenwick v. Potts, 505 (v).
 Fern d Mathews Lewis v. Smart, 892 (i).
 Fernandez, *Re.*, *Ex-parte* Hope, 722 (v).
 Fernandez v. Rodrigues, 327 (n).
 Fernando v. Gunatillaka, 260 (u).
 Feroz Shah v. Sohbat Khan, 664 (p).
 Ferrand v. Clay, 636 (f), 640 (i), 640 (n).
 Ferris v. Mullins, 503 (v), 507 (w).
 Festing v. Allen, 181 (k).
 Fewings, *Ex-parte*, *Re*. Sneyd, 617 (l), 654 (s).
 Fewster v. Turner, 386 (e), 386 (t).
 Fida Ali v. Ismailji, 516 (f).
 Field v. Hopkins, 469 (k), 554 (g), 554 (h), 554 (i).
 Field v. Kurnick, 871 (x).
 Filby v. Hornsell, 376 (r).
 Finch v. Brown, 675 (n).
 Firm Nanak Chand v. Firm Ram Sarup, 31 (p).
 Fischer v. Kamala Naicker, 191 (n).
 Fisher v. Calvert, 31 (s).
 Fisher v. Dixon, 27 (v).
 Fisher v. Doody, *Re*. Doody, 469 (l).
 Fisher v. Walters, 869 (l).
 Fitzgerald v. Champneys, 12 (j).
 Fitzgerald Trustee v. Mellerish, 559 (i).
 Fitzherbert v. Shaw, 847 (f).
 Fitzsimons v. Fitzsimons, 217 (n).
 Fleetwood v. Green, 416 (r).
 Fleetwood v. Hull, 240 (n).
 Fletcher v. Nokes, 904 (a).
 Flight v. Booth, 391 (g), 391 (h), 392 (t), 395 (x).
 Flint v. Howard, 460 (p), 687 (y), 696 (j).
 Flint v. Woodin, 391 (c).
 Flood v. Pritchard, 397 (n).
 Florence Land & Public Works Co., *In re.*, 755 (a).
 Flower & Metropolitan Board of Works, *Re.*, 417 (i).
 Flower & Sons, Ltd. v. Pritchard, 640 (p).
 Flowers & Co., *Re.*, 87 (g).
 Floyd v. Lyons, *Re*. Floyd, 845 (n).
 Floyer v. Lavington, 547 (f).
 Fludyer v. Cocker, 416 (t), 417 (g), 444 (g).
 Flureau v. Thornhill, 407 (v), 459 (l).
 Flux v. Best, 391 (d).
 Foley & Anr. v. Addenbrooke, 849 (f), 852 (b).
 Folwer v. Willis, 409 (v).
 Foodeni v. Azhar Hussain, 653 (k).
 Fool Kumari v. Khired Chandra, 334 (j).
 Foulger v. Arding, 845 (r).
 Forbes v. Ameeroonissa, 211 (u).
 Forbes v. Campbell, 715 (s).
 Forbes v. Jackson, 721 (h).
 Forbes v. Meer Mahomed Tuquee, 68 (p).

Forbes v. Moffatt, 762 (l), 762 (n),
767 (d), 768 (h), 770 (h), 771 (l).
Ford v. De Pontes, 190 (h).
Ford & Hill, *Re.*, 412 (v).
Ford v. Noll, 531 (p).
Ford v. Olden, 563 (l).
Ford v. Tynte, 573 (y).
Forest v. Forest, 336 (b).
Formby v. Barker, 230 (x), 230 (z).
238 (q), 238 (r).
Forster v. Baker, 32 (y).
Foster v. Dawber, 270 (z).
Foster v. Hoggart, 90 (w).
Foster & Lister, *Re.*, 340 (z).
Foster v. Mackinnon, 680 (w).
Foster v. Pierson, 400 (q).
Foster, *Re.*, *Ex-parte* Foster,
359 (b).
Foster v. Ussher, *In re* Usshe,
181 (v).
Fotick Chander Dey Sircar v. Foley,
748 (u).
Fotick Chunder Dey v. E. G. Foley,
753 (a).
Foulston v. Furber, Hunt, 127 (a).
Fowell v. Tranter, 883 (x).
Fowler v. The Secretary of State,
124 (e).
Fowlers Trusts, *Re.*, 213 (g).
Fox v. Fox, 181 (t).
Fox v. Mackreth, 400 (o).
Frame v. Dawson, 347 (t), 359 (c),
359 (y).
France v. Clarke, 643 (o).
Francis v. Francis, *In re* Francis,
170 (a), 179 (b), 179 (d).
Francis v. Hayward, 416 (l).
Franco v. Alvarez, 199 (s).
Frankly v. Tuton, 802 (v).
Frederick Peacock v. Madon Gopal,
757 (q).
Freeman v. Butler, 567 (g).
Freeman v. Cooke, 262 (j).
Freeman v. Pope, 334 (m).
Fremoult v. Dedric, 746 (x).
French v. Baron, 671 (q), 675 (x).
Freshfield v. Read, 521 (m).
Frisby Dyke & Co. v. Owen, *Re. Owen*,
752 (n).
Frost v. Beaven, 93 (z).
Fry v. Lane, 369 (i).
Fuller v. Benett, 33 (q).
Fulse v. Khubchand, 738 (v).
Fulthorpe v. Foster, 491 (w).
Furness v. Catorham Railway Co.,
607 (k), 607 (r).
Furnivall v. Coombes, 616 (a),
616 (b).
Fussell, *Re.*, *Ex-parte* Allen, 889 (c).
Futtehsangji v. Desai Kallian, 21 (c).
Fuzlur Rehman v. Krishna Prasad,
21 (q).
Fytche v. Fytche, 216 (f).

G

Gadadhar Bhat v. Chandrabhagabai,
103 (u).
Gadgappa Desai v. Apaji Jivanrao,
106 (h).
Gadigeppa v. Balangauda, 98 (g),
246 (k).
Gadi Kunbi v. Ramlal, 837 (p).
Gadiram v. Poonamchand, 734 (s).
Gaffur v. Bhicaji, 378 (i).
Gaffur Imam v. Amir Isab, 720 (z),
732 (f), 741 (r).
Gain Narayan Mazumdar v. Braja
Nath Kundu, 739 (e).
Gainsborough (Earl) v. Watcombe
Terra Cotta Clay Co., Ltd., 37 (i).
Gajadhar Agarwalla v. Sibananda,
742 (x).
Gajadhar v. Bechan, 343 (o).
Gajadhar Pande v. Jadubir Pande,
112 (v).
Gajapathi v. Alagia, 387 (q), 389 (k).
Gajapathi Nilmani v. Gajapathi
Radhamani, 281 (v).
Gajapathi v. Pusapati, 107 (k).
Gajendra v. Ashraf Hoosain, 355 (t).
Gajendra Nath v. Ashraf Hossain,
906 (r).
Gajraj v. Munnu, 557 (j).
Galbraith's Case, 757 (r).
Galloway v. Hope, *Re. Jump*, 88 (u).
Gama v. Lahanna, 51.
Gambhirya v. Sakharan, 288 (l).
Games v. Bonnar, 411 (r).
Games, *Ex-parte*, 325 (w), 326 (d).
Gamu v. Nathu, 324 (h), 324 (i).
Ganan Sundaram v. Vulcan Insurance
Co., Ltd., 285 (p).
Ganapa v. Hammad, 435 (r), 435 (t).
Ganapathi v. Beeru, 572 (r).
Ganapathi v. Sivamalai, 327 (q).
Ganap v. Subbi, 104 (e), 109 (p).
Gandeo Singh v. Chandrika Singh,
735 (c).
Ganendra Mohun Tagore v. Rajah
Juttendro Mohun Tagore, 187 (b),
193 (c).
Ganesa Mudaliar v. Ganasikhamani,
485 (n), 489 (x), 489 (y).
Ganeshdas Bhiwraj, a firm, 919 (u).
Ganeshdas Panalal, *Re.*, 256 (o).
Ganeshi Lal v. Charan Singh, 691 (f),
692 (q), 696 (n).
Ganeshi Lal v. Rohni, 779 (j).
Ganesh v. Khaparde, 890 (l), 893 (b).
Ganesh Lala v. Bapu, 98 (c), 98 (h).
Ganesh Lal v. Khotra Mohan,
625 (f).
Ganeshi Lal v. Rohni, 703 (q), 779 (j).
Ganesh v. Shankar, 68 (d), 69 (f).
Ganesh Singh v. Singhari Kuar, 620 (u).
Ganesh Singh v. Sujari, 621 (h).

- Gangabai v. Baswant Bin Balappa, 594 (i).
 Gangabai v. Baswant, 264 (z).
 Gangabai v. Kalapa Dasi Mukrya, 591 (x), 591 (y).
 Gangabai v. Sonabai, 98 (j), 117 (i).
 Ganga Baksh v. Jagat Bahadur, 930 (n).
 Gangadas v. Auanda Chandra, 814 (y).
 Ganga Dei v. Shiam Sundar, 520 (x), 521 (q), 522 (u), 522 (v).
 Gangadhara v. Sivarama, 769 (x), 771 (v).
 Gangadhar v. Parbhudha, 108 (g).
 Gangadhar v. Rachappa, 291 (y), 295 (m), 301 (a).
 Ganga Din v. Dhurandhar Singh, 82 (z).
 Ganga Din v. Jagat Tewari, 296 (x).
 Ganga Din v. Piyare, 75 (x).
 Gangama v. Veerappa, 331 (l).
 Ganga Narain Gope v. Kali Churn Goala, 372 (r).
 Ganga Narain v. Kali Charan, 372 (s).
 Ganga Parshad Sahu v. The Land Mortgage Bank, 737 (s).
 Ganga Pershad v. Ishri Pershad, 525 (r).
 Gangapershad v. Maharani Bibi, 96 (x).
 Ganga Pershad v. The Land Mortgage Bank, 557 (h).
 Ganga Prasad v. Maharani Bibi, 96 (p).
 Ganga Prasad v. Rachpal, 756 (l).
 Ganga Rai v. Kirtanath Rai, 572 (s).
 Ganga Ram v. Kika Ram, 712 (j).
 Gangaram v. Laxman, 240 (e), 377 (y).
 Gangaram Narayandas Teli, *Re.*, 789 (b).
 Ganaram v. Luxman Ganoba, 354 (a).
 Gangaram v. Laxman, 240 (e), 377 (y).
 Ganga Ram v. Natha Singh, 469 (a), 746 (l), 757 (m).
 Gangaram Tekchand v. Dharmasi Jetha Co., 9 (q).
 Ganga Sahai v. Kishen Sahai, 16 (p).
 Ganga Sahai v. Lachman Singh, 490 (d).
 Ganga Sahai v. Tulshi Ram, 660 (m).
 Gangi Ammal v. Govinda, 368 (z).
 Gangi Ammal v. Gounda Padayachi, 370 (f).
 Gangi Ammal v. Govinda Padayachi, 448 (j).
 Gangubdi v. Ramanna, 102 (u).
 Gani Mia v. Wajid Ali, 924 (t).
 Gani Miya v. Wajid-Ali, 924 (w), 924 (x), 924 (z).
 Gannu v. Nathu, 329 (n).
 Ganpat v. Bhanji, 714 (i).
 Ganpati v. Sonaji, 119 (v).
 Ganpat Singh v. Gopal, 524 (z).
 Ganpat v. Tulsiram, 102 (c), 105 (n).
 Ganpatrao v. Vithabai, 307 (r).
 Ganpatsa v. Joomabhai, 312 (u).
 Garage v. Lockwood, 867 (l).
 Garden v. Ingram, 286 (s), 669 (n).
 Gardiner & Co. v. Dessaix, 127 (c).
 Gardiner v. Smith, *Re.*, Gardiner, 162 (s), 163 (x).
 Gardiner v. Williamson, 794 (v), 809 (p).
 Gardner v. Ingram, 812 (u), 814 (u).
 Gardner v. London Chatham & Dover Railway Co., 607 (l).
 Garlick v. Jackson, 676 (l).
 Garnham v. Skipper, 507 (x).
 Garside v. Liverpool Railway Permanent Benefit Building Society, 681 (l).
 Garth v. Ersfield, 340 (u).
 Garth v. Ward, 313 (e).
 Gartside v. Silkstone & Dodworth Coal & Iron Co., 284 (h), 284 (i).
 Gashi Ram v. Dulichand, 489 (u).
 Gaslight Coke Co., v. Towse, 407 (v).
 Gas Light & Coke Co. v. Turner, 189 (q).
 Gateh Din v. Kishen Lal, 624 (w).
 Gath v. Burton, 189 (o).
 Gaunt v. Waiman, 258 (w).
 Gaur Narayan v. Brajanath, 763 (e).
 Gauri v. Mumtaz Ali Khan, 854 (o), 861 (a).
 Gauri Nath v. Gaya Kuar, 107 (k), 107 (o).
 Gauri Shankar v. Bahdur Singh, 767 (f), 771 (m).
 Gauri Shanker v. Bhairon Pershad, 599 (x).
 Gaurishankar v. Chinnumiya, 115 (a), 272 (o).
 Gauri Shankar v. Gopal Das, 343 (j).
 Gaurishankar v. Ibrahim Ali, 377 (g), 378 (j), 378 (t).
 Gauri Shankar v. Munnee, 429 (v).
 Gauri Shankar v. Ram Sewak, 458 (b), 458 (c).
 Gaya Din v. Jhumman Lal, 489 (v).
 Gaya Din v. Kashi Gir, 259 (f), 265 (d), 267 (l), 271 (l).
 Gaya Prasad v. Murlidhar, 337 (d).
 Gaya Prasad v. Salik Prasad, 764 (l).
 General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society, 261 (v), 261 (x).
 Gentle v. Faulkner, 854 (q), 894 (m).
 Genu v. Narayan, 558 (z).
 George v. Coats, 845 (q).
 George v. Milbanke, 323 (r).
 Geresh Chunder v. Mat. Bhuggobutty, 920 (w).
 German v. Chapman, 230 (y).

- Gerrard v. Butler, 204 (e).
 Ghafuruddin v. Hamid Husain, 366 (r).
 Ghanesy am v. Rago Sahu, 946 (q).
 Ghanshyam Das v. Ragho Sahu, 946 (p).
 Ghanya v. Ukand Rao, 709 (c).
 Gharibullah v. Kalah Singh, 110 (a).
 Gharibullah v. Khalak Singh, 94 (v), 96 (k), 109 (p).
 Ghasi Khan v. Kishore, 610 (n).
 Ghasi Khan v. Thakur Kishor, 608 (x).
 Ghasitey v. Gobind, 312 (q).
 Ghasulal v. Gabhirmall, 78 (c).
 Ghisulal v. Gumbhirmall, 74 (d).
 Ghisiawan v. Mt. Raj Kumari, 104 (x).
 Gholam Sidhique v. Jogendra Nath, 243 (y), 249 (s), 250 (n), 254 (y).
 Ghousiah Begum v. Rustomjah, 433 (h).
 Ghulam Hazrat v. Gobardhan, 693 (y).
 Ghulam Nabi v. Kanhai, 714 (z).
 Ghulam Nabi v. Niaz-un-nissa, 489 (a).
 Ghulam Nabi Khan v. Niaz-un-nissa, 484 (x).
 Ghulam Shah v. Hakam Rai, 30 (f).
 Ghumna v. Ram Chandra, 931 (v), 931 (w).
 Ghumna v. Ramchandra Rao, 930 (k).
 Ghunsham Das v. Uma Pershad, 335 (q).
 Gibbs v. Hume, 190 (b).
 Giblin v. McMullen, 45 (a).
 Gibson v. Hammersmith & City Rly., Co., 28 (f), 852 (z).
 Gibson v. Seagrim, 688 (j).
 Gibson v. Scurrier, 407 (c).
 Giffard v. Fitzhardinge, 773 (v), 775 (k).
 Gifford (Lord) v. Fitz-Hardinge (Lord), 768 (j).
 Gillard v. Cheshire Lines Committee, 790 (g), 827 (d).
 Gill v. Newton, 633 (d), 640 (e).
 Girdaridas v. Ponnu Pillai, 838 (x).
 Girdharee Lall v. Kantoo Lall, 111 (g).
 Girdharidas v. Ponna Pillai, 842 (i).
 Girdhari Lal v. Dhirendra Kristo, 511 (g), 511 (h).
 Girdhar Lal v. Bhola Nath, 653 (a).
 Girdhar Lal v. Liladhar, 287 (h), 287 (x), 306 (e), 310 (p), 311 (z).
 Girdharlal v. Manikamma, 336 (z).
 Girendro Coomar v. Kumud Kumari, 506 (j), 506 (m), 506 (p).
 Girdharidoss Co. v. Para Appaduari, 896 (c).
 Giridhari v. Dhirendra, 283 (p).
 Giridhari Singh v. Megh Lal Pandey, 121 (z).
 Girija Kanta v. Mohin Chandra, 277 (l).
 Girija Prasad v. Purshottam, 921 (i).
 Girindra Nath v. Bejoy Gopal, 468 (w).
 Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee, 748 (a).
 Girish Chandra v. Sirish Chandra, 874 (e).
 Girish Cunder v. Chhatradhar Ghose, 862 (b).
 Girish Chunder v. Juramoni, de, 560 (a).
 Girja Bai v. Sadashi, 13 (p).
 Girja Nandan v. Hanuman Das, 7 (z).
 Girja Nandan Kalwar v. Hanuman Das, 3 (m).
 Girjoji v. Keshavrav, 664 (s).
 Girsh Chandra Dey v. Jura Moni, De., 709 (d).
 Girwar Singh v. Thakur Narain, 471 (g), 486 (w), 489 (r).
 Gitabai v. Balaji, 369 (m).
 Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiram, 113 (d).
 Gladdon v. Stoneman, 85 (h).
 Glascott v. Day, 531 (q).
 Glegg v. Bromely, 75 (d), 192 (r), 321 (z), 323 (t).
 Glenton & Saunder's to Haden, Re., 414 (m).
 Glenwood Lumber Co., Ltd. v. Phillips, 792 (a).
 Gloag & Miller's Contract, Re., 397 (k), 407 (q), 416 (u).
 Gloag & Miller's Contract, 417 (z).
 Gloah & Miller's Contract, Re., 397 (l).
 Gloucester Union v. Woolwich Union, 6 (x).
 Glover, In the goods of, 519 (m).
 Glover v. Wright, 523 (l).
 Gnanasambanda v. Velu Pandaram, 69 (r).
 Gobardhan v. Raghubir Singh, 32 (h).
 Gobardhan v. Sujan, 577 (l), 721 (c).
 Goberdhan Singh v. Ritu Roy, 80 (m).
 Gobinda Chandra v. Dwarka Nath, 760 (e).
 Gobinda Chandra Pal v. Kailas Chandra Pal, 751 (c).
 Gobinda v. Dwarka, 906 (r).
 Gobinda v. Mohunt Ram, 113 (e).
 Gobindnarayan v. Shyamlal Singh, 121 (t).
 Gobind Chunder v. Doorgapersad, 33 (p).
 Gobind Chunder v. Ram Chunder, 22 (n).
 Gobind v. Guru Churn, 317 (r).
 Gobind v. Kailash, 697 (u).
 Gobind Lal v. Ramjanam, 660 (o).
 Gobind Prasad v. Jagdeep Sahai, 124 (x).
 Gobind Sarup v. Kuldip Singh, 774 (e), 774 (g).
 Gobind Upadhyaya v. Lakhrani, 103 (m).

- Goculdas Gopaldas v. Puranmal, 768 (h).
 Goculdas Gopaldas v. Puranmal Prem-sukhdas, 769 (p), 771 (s).
 Goculdas Kirparam, 486 (a).
 Goddard v. Keate, 873 (r).
 Goddard v. Whyte, 721 (l).
 Godfrey v. Hughes, 203 (r).
 Godfrey v. Poole, 335 (p).
 Godfrey v. Watson, 653 (l), 671 (l).
 Godson v. Turner, 406 (n).
 Gohek Nath Misser v. Lalla Prem Lal, 771 (o).
 Gokaldas Case, 763 (w).
 Gokaldas Gopaldas v. Puranmal Premsukhdas, 717 (d), 732 (g), 734 (q), 735 (d), 764 (o), 764 (q), 766 (n), 767 (v), 768 (g), 771 (o), 771 (u), 772 (e), 773 (t).
 Gokaldas Gopaldas v. Rambux Seochand, 728 (y).
 Gokal Dass v. Eastern Mortgage Agency Co., 509 (k), 510 (s), 511 (w), 511 (x).
 Gokal Kalwar v. Chandar Sekhar, 780 (k).
 Gokal Prasad v. Govindrao, 13 (v).
 Gokal Prasad v. Sukru, 772 (x).
 Gokal v. Shrimal, 620 (b), 622 (h).
 Gokul Chand v. Shib Charan, 816 (x).
 Gokul Das v. Debi Prasad, 477 (r).
 Gokul Dass v. Eastern Mortgage Agency Co., Ltd., 283 (x), 476 (f), 501 (x), 508 (c).
 Gokul Kalwar v. Dhandar Sekhar, 704 (c).
 Gokul Mandar v. Pudmanund Singh, 5 (s).
 Gokul v. Shrimal, 494 (w).
 Golaknath v. Mathura Nath, 134 (p).
 Golam Mohiuddin v. Parbati, 21 (t).
 Golam v. Parbati, 55 (l).
 Gol Dai v. Dod Laxman, 893 (c), 893 (q).
 Golden v. Gillam, *Re. Johnson*, 321 (c).
 Goldstein v. Sanders, 804 (m).
 Goluck Nath Misser v. Lalla Prem Lal, 768 (h).
 Goluk Nath Roy v. Mathura Nath Roy, 133 (c).
 Gomaji v. Subbarayappa, 524 (a).
 Gomm's Case, 231 (f).
 Gondu Ramasubbu Iyer v. Muthiah Kine, 389 (r).
 Gooch's Case, 320 (v).
 Gooch v. Clutterbuck, 858 (e).
 Goode v. Burton, 441 (j).
 Goodhart v. Woodhead, *In re Greenwood*, 187 (z), 197 (c), 199 (q), 207 (o).
 Goodland v. Blewith, 534 (d).
 Goodman v. Grierson, 485 (k).
 Goodman v. Kine, 603 (b).
 Goodricke v. Taylor, 337 (t).
 Goodright d. Humphreys v. Moses, 340 (s).
 Goodwin v. Gray, 721 (o).
 Goodwin v. Waghorn, 503 (z).
 Goopee v. Thakoordas, 70 (y).
 Gooroo Doss v. Issur Chunder, 836 (j).
 Goosman v. Kine, 604 (f).
 Gopala Dasu v. Rami, 269 (w).
 Gopala Iyer v. Ramaswami, 74 (w).
 Gopalakrishna v. Gopalakrishna, 941 (e).
 Gopalakrishna v. Venkatanarasa, 228 (e), 228 (f).
 Gopala Menon v. Narayana, 673 (g).
 Gopalasami v. Arunachella, 620 (a), 622 (i), 622 (j).
 Gopala v. Saminatha Ayyar, 688 (f).
 Gopal v. Badri, 51 (e).
 Gopal v. Bank of Madras, 326 (y), 329 (d).
 Gopal Chander Sreemany v. Herembo Chunder Holder, 768 (h), 771 (n).
 Gopal Chandra v. Bhutnath, 909 (z).
 Gopal Chandra v. Heramba, 769 (y), 771 (p).
 Gopal Chandra v. Satya Bhanu, 783 (h).
 Gopal v. Desai, 496 (q).
 Gopal v. Dhakeswar, 895 (u).
 Gopal v. Gangaram, 48 (l).
 Gopal Lal v. Marsden, 73 (o).
 Gopal Pandey v. Parsotam Das, 3 (a), 82 (y).
 Gopal Ramchandra v. Gangaram, 192 (t).
 Gopal Ram v. Dhakeswar, 816 (r), 899 (l).
 Gopal Ram v. Dhakeshwari Prasad, 816 (r).
 Gopal Ram v. Lachmi Misir, 283 (d).
 Gopalrao v. Kisher Kalidas, 816 (o).
 Gopal Row v. Narshimha Row, 614 (h).
 Gopal Sahoo v. Gunga Pershad, 769 (z).
 Gopal Sahoo v. Gunga Pershad Sahoo, 772 (y).
 Gopal v. Shriniwas, 894 (s).
 Gopal Singh v. Ladha Mal, 777 (h).
 Gopal Singh v. Lallo Lal, 441 (o).
 Gopal Singh v. Sheokumar, 330 (r).
 Gopeekrist v. Gungapersaud 227 (y), 228 (d), 922 (d).
 Gopeshwar Pal v. Jiban Chandra, Gopi Chand v. Jodhraj, 319 (b).
 Gopikisan v. Mankuar, 614 (c).
 Gopikisan v. Mt. Mankuar, 614 (z).
 Gopi Lal v. Abdul Hamid, 13 (s), 14 (z), 293 (q), 587 (v).
 Gopi v. Mst. Jaldhara, 918 (n).
 Gopi Nath Bagdi v. Ishur Chundra Bagdi, 746 (z), 754 (g).
 Gopi Narain v. Bansidhar, 773 (j).
 Gopi Narain Khauna v. Bansidhar, 614 (i), 625 (h), 724 (x), 725 (c).

- Gopi Nath Chongdar *v.* Shaik Abdul Gafur, 810 (b).
 Gopinath *v.* Mst. Bekali, 940 (b).
 Gopi Nath *v.* Rup Ram, 263 (n), 272 (p).
 Gopi Ram *v.* Durhan, 914 (q).
 Gopi Ram *v.* Durjan, 912 (c), 912 (i), 913 (k).
 Gopi Ram *v.* Jeot Ram, 373 (c), 374 (z).
 Gopiram *v.* Jeotram, 151 (e).
 Gordhandas *v.* Mohanlal, 39 (m).
 Gordon Comming *v.* Holdsworth, 420 (g).
 Gordhandas *v.* Mahanlal, 38 (x), 378 (k).
 Gordon Grant & Co., Ltd. *v.* F. L. Boos, 617 (m).
 Gore *v.* Lloyd, 787 (r).
 Goring *v.* Bickerstaff, 144 (u).
 Goring *v.* Howard, 157 (j).
 Gosavi Shivagar *v.* Rivett-Carnac, 173 (x).
 Gosling *v.* Gaskell, 663 (c).
 Gosling *v.* Gosling, 172 (n), 173 (x),
 Gosling *v.* Wolf, 408 (l).
 Gossain Ramdhan *v.* Gossain Dulamir, 192 (u).
 Gostho Behary Ghosh *v.* Rohini Gowalini, 368 (a), 370 (c).
 Go syan Lachmi Narain *v.* Vikram Singh, 711 (b).
 Gosto Behari Pyne *v.* Shib Nath Dut, 595 (s).
 Gosto Behary *v.* Shib Nath, 596 (d), 658 (w), 658 (x), 660 (o).
 Goth *v.* Gandy, 843 (r).
 Goudoin *v.* Venkatesa Moodally, 130 (e), 130 (h).
 Gough *v.* Offley, 568 (v).
 Gould, *Ex-parte*, *Re.* Walker, 850 (k).
 Gould *v.* Oliver, 43 (d).
 Gould *v.* Tancred, 674 (e), 675 (j).
 Goundan's Case, 108 (d).
 Goundasawmi *v.* Ramasawmi, 74 (j).
 Gouri Pattra *v.* Reily, 794 (z).
 Gourlay *v.* Somerset, 367 (l).
 Gour Sundar *v.* Hem Chunder, 311 (c).
 Governments Stock Etc. *v.* Manila Railway Co., Ltd., 755 (d).
 Governors of the Harrow School *v.* Alderton, 875 (n).
 Govinda Chandra Pal *v.* Dwarka Nath Pal, 760 (c).
 Govinda Chandrav *v.* Dwarka Nath, 747 (d), 749 (o).
 Govinda Kangani *v.* Muragesa Mudali, 730 (j).
 Govinda Kuar *v.* Lala Kishun, 80 (m).
 Govinda Kurup *v.* Chowakkaram, 81 (p), 817 (b).
 Govindammal *v.* Gopalachariar, 367 (q), 441 (l).
 Govindan *v.* Koipunthil, 518 (u), 518 (w).
 Govinda Padayachia *v.* Lokanatha Aiyar, 719 (u).
 Govinda Padayachia *v.* Lakanatha Aiyar, 734 (v).
 Govindarajulu *v.* Ranga Rao, 30 (e), 945 (d).
 Govindarazulu *v.* Devarabhotla, 228 (e), 228 (f).
 Govindasami *v.* Dorasami, 735 (h).
 Govindasami Thevan *v.* T. M. Doraisami Pillai, 775 (s).
 Govindaswami *v.* Palaniappa, 891 (w).
 Govindaswami *v.* Ramaswami, 75 (a).
 Govindaswami Tevan *v.* Doraiswami Pillai, 373 (j), 732 (h).
 Govindaswami *v.* Ramasawmi, 77 (z).
 Govind Bhatta *v.* Narain Bhatta, 574 (o).
 Govind Bhikaji *v.* Bhau Gopal, 525 (n).
 Govind Baba *v.* Jajibai Saheb, 307 (q).
 Govind *v.* Bhau Gopal, 519 (j).
 Govind *v.* Dillar Jang, 705 (p).
 Govind *v.* Dilar Jung, 514 (d), 514 (w), 533 (x).
 Govind *v.* Jagannath, 488 (p), 514, (w).
 Govind *v.* Jaggonath, 514 (d), 514 (y).
 Govind *v.* Jijibai, 308 (e).
 Govind Krishna Gujar *v.* Sakharam Narayan, 110 (z).
 Govind Prosad *v.* Tek Narain, 611 (r).
 Govind *v.* Ramakrishna, 69 (f).
 Govindrao *v.* Jivanji, 492 (b), 492 (h), 493 (u), 494 (a).
 Govindrav *v.* Ragho, 550 (i).
 Govind *v.* Sakharam, 111 (f).
 Govind *v.* Shamtaya, 598 (p).
 Govind Venkaji *v.* Sadashiv Bharna, 296 (y).
 Gowardhandas *v.* Vira Mal, 104 (f).
 Graham *v.* Erwood, 795 (f).
 Graham *v.* Krishna Chandra Dey, 392 (w).
 Graham *v.* Krishna Chunder, 457 (z).
 Graham *v.* Seal, 537 (m).
 Granger *v.* Worms, 454 (c).
 Gray *v.* Bompas, 878 (b).
 Grayson *v.* Atkinson, 519 (n).
 Gray *v.* Spyer, 785 (l), 806 (v).
 Great American Insurance Co., Ltd. *v.* Madanlal, 94 (m).
 Great Berlin Steam Boat Co., *Re.*, 335 (w).
 Great Indian Peninsula Railway Co. *v.* Hanmandas, 947 (a).
 Great Northern Railway Company & Sounderson, *Re.*, 464 (j), 464 (k).
 Great Western Railway Co. *v.* Smith, 889 (f).
 Great Western Railway *v.* Fisher, 395 (v), 459 (p).
 Greaves *v.* Wilson, 414 (n).

- Greenawalt v. Wilson, 87 (k).
 Greender Chunder v. Mackintosh, 41 (c).
 Green v. Eales, 872 (i).
 Green v. Goscoyne, 161 (f).
 Greenhalgh v. Brindley, 387 (t), 387 (v).
 Green, Green v. Meinall, 57 (m).
 Green v. Stephens, 941 (i).
 Green v. Rheinberg, 601 (l).
 Green v. Wynn, 715 (t).
 Greenslade v. Dare, 308 (a).
 Greenway v. Atkinson, 31 (s).
 Greenwood v. Sutcliffe, 531 (w), 532 (m), 796 (s).
 Green v. Wynn, 715 (w).
 Gregg v. Holland, *In re* Holland, 322 (k), 329 (q), 331 (u), 335 (p), 340 (o).
 Gregory v. Mighell, 299 (t).
 Gresham House Estate Co. v. Rossa Grande Gold Mining Co., 812 (v).
 Gresham Life Assurance Society v. Crowther, 258 (u).
 Greswold v. Marsham, 763 (p).
 Gretton v. Haward, 212 (e).
 Greville v. Parker, 806 (f).
 Greydon v. Hicks, 199 (p).
 Grice v. Shaw, 767 (e), 771 (l).
 Griffies v. Griffies, 280 (r).
 Griffin v. Griffin, 31 (v).
 Griffin v. Search, 88 (x).
 Griffin v. Stanhope, 339 (y).
 Griffin v. Tomkins, 897 (u), 898 (y).
 Griffiths v. Deloitte, *In re* Deloitte, 143 (i), 145 (c).
 Griffiths v. Hatchard, 438 (j).
 Griffith v. Hodges, 863 (u).
 Griffith v. Pound, 573 (a).
 Grill v. General Iron Screw Colliery Co., 45 (x).
 Grimond v. Grimond, 166 (d).
 Grissell v. Robinson, 782 (a).
 Grissell v. Swinhoe, 214 (j).
 Grose v. Amirtamayi Das, 192 (x).
 Grosvenor v. Green, 397 (m).
 Grosvenor Hotel Co. v. Hamilton, 835 (v), 835 (z).
 Grove v. Portel, 894 (t).
 Groves v. Loomes, 230 (z).
 Grove v. Search, 88 (x).
 Gubbasappa v. Rango Venkatesh, 591 (y).
 Guest v. Homfray, 401 (x), 826 (r).
 Guest v. Smytho, 639 (o).
 Guindra Nath Mukerjee v. Bejoy Gopal Mukerjee, 754 (j).
 Gujuluva Nagayya v. Theedukuchi Govindayya, 773 (l).
 Gujuluva Nagayya v. Theedukuchi Govindayyar, 767 (y).
 Gulabchand v. Dhondi, 315 (s).
 Gulabchand v. Pathi Gundappa, 30 (o), Gulabchand Manickchand v. Dhondi Valad Bhau, 316 (e).
 Gulab Khan v. Lal Mahomed, 792 (y).
 Gulab Kuar v. Bansidhar, 70 (c).
 Gulamhuseein v. Clara D'Souza, 124 (r).
 Gulam Muhammad v. Mt. Mirza, 38 (d).
 Gulbaji Ajisji v. Rustomji, 202 (k).
 Gulliver v. Ashby, 203 (z).
 Gully v. Exeter, 339 (f).
 Gulzari Lal v. Aziz Fatima, 724 (b), 730 (h).
 Gulzar Mal v. Maghi Mal, 443 (r), 443 (t).
 Gunna v. Ram Chandra Rao, 190 (h), 190 (l).
 Gunabai v. Motilal, 38 (d).
 Gunamoni v. Bassant Kumari, 40 (y).
 Gunepally v. Sri Rajah Tyadappu-sapati, 12 (j).
 Gungadhar v. Ajimuddin, 784 (m).
 Gunga Narain v. Kali Churn, 374 (t).
 Guni Mahomed v. Moran, 223 (q).
 Gunindra Prasad v. Baijnath Singh, 769 (v), 774 (c).
 Gunnam v. Vedapillari, 666 (l).
 Gunter v. Gunter, 887 (b).
 Gunter v. Halsey, 347 (k), 359 (x).
 Gutteridge v. Maynard, 865 (k).
 Gutteridge v. Munyard, 801 (l).
 Gupta Narain Das v. Bijoya Sunderi Debya, 760 (c).
 Guran Ditta v. Ram Ditta, 227 (x), 336 (c), 922 (d).
 Gur Dayal v. Karam Singh, 753 (v).
 Gurdeo Singh v. Chandrika Singh, 718 (g), 718 (l), 719 (o), 729 (c), 730 (h), 730 (h), 736 (n), 737 (r), 769 (u).
 Gurdas v. Punjab Sind Bank, Ltd., 48 (g).
 Gur Dayal v. Kaunsila, 227 (u).
 Gurdial Singh v. The Central Board Local Committee, 3 (a), 8 (e).
 Gurdin v. Badri, 810 (z).
 Gurney v. Seppings, 475 (t).
 Guru Dayal Singh v. Karan Singh, 440 (z).
 Gur Narayan v. Sheo Lal Singh, 62 (j).
 Guru Basappa v. Santhappa, 314 (j).
 Gurunath v. Yamanava, 485 (n).
 Gurusami v. Sivakami, 178 (y).
 Gurusami v. Subbraya, 192 (u).
 Gurushiddaswami v. Parawa, 94 (q).
 Guttrie v. Wood, 322 (e).
 Gyannessa v. Mobarakan Nessa, 6 (t), 13 (m), 911 (p).
 Gyannessa v. Mobarakanessa, 124 (b).
 Gyles v. Hall, 534 (m).
 Gyles v. Kempe, 280 (u).

H

Habibullah v. Nackchad, 518 (d).
 Habib-un-Rahman v. Rasul Bandi, 372 (t).
 Habihar v. Saidannessa Bibi, 88 (n).
 Hadayat Khan v. Shah Amand, 13 (r).
 Hadley v. Robins, 391 (j).
 Haedicke & Lipski's Contract, *Re.*, 391 (b).
 Hafizullah Khan v. Bulaque Mal, 94 (p).
 Haidar Ali v. Mohammad Shajiuddin, 608 (y).
 Haidri Begam v. Nathu, 816 (n).
 Haidri v. Nathu, 893 (u).
 Hailes & Hutchinson's Contract, *Re.*, 90 (s).
 Hajee Essa v. Dayahbai, 384 (n).
 Haji Abdul Rahman v. Haji Noor Mahomed, 533 (w), 637 (n), 641 (a).
 Haji Abdul Shakur v. Nandlal, 231 (a).
 Haji Ali v. Anjuman-i-Islamia, 69 (v).
 Haji Essa v. Dayabhai, 384 (g), 400 (n).
 Haji Fakir v. Shaikh Abdulla, 423 (i).
 Haji Hahomed Mitha v. Musaji Esaji, 397 (j), 405 (c), 436 (z).
 Hajia Mahomed v. Ramappa, 488 (p), 490 (f), 492 (f), 514 (a).
 Hakeem Patte Muhammad v. Sheikh Davood, 308 (e), 742 (t).
 Hakim Lal v. Mooshahar Sahu, 325 (w), 329 (j), 329 (m).
 Hakim Lal v. Ram Lal, 595 (r).
 Halbird v. Anderson, 325 (w).
 Haldane v. Eckford, 163 (a).
 Haldane v. Johnson, 797 (z).
 Hale v. Saloon Omnibus Co., 328 (c), 329 (g).
 Halford v. Close, *Re. Vaughan*, 163 (x).
 Halifax v. Wilson, 170 (b).
 Halkett v. Dudley, 385 (p).
 Halkett v. Dudley (Earl), 458 (g).
 Hall v. Betty, 407 (v), 409 (s).
 Hall v. Burnell, 452 (f).
 Hall v. City of London Brewery Co., 808 (a), 828 (n), 828 (o), 828 (p), 828 (t), 836 (a).
 Hall v. Ewin, 231 (f), 241 (p), 859 (k).
 Hall v. Heward, 537 (o), 560 (s), 674 (u), 711 (w), 712 (g), 713 (w).
 Hall v. Knight & Baxter, *In the Estate of Hall*, 190 (m).
 Hall v. Laver, 416 (w), 417 (h).
 Hamad Yar Khan v. Shankar Das, 620 (g).
 Hames v. Rice, 499 (r).
 Hamida Bibi v. Ahmed Husain, 561 (g).
 Hamid-ud-din v. Kedar Nath, 479 (h).
 Hamiduddin v. Ramani, 36, (b).
 Hamidunnissa v. Nazir-un-nissa, 329 (m).
 Hamilton v. Denny, 591 (u).
 Hamilton v. Royse, 37 (o).

Hammersmith & City Ry. Co. v. Brand, 5 (j).
 Hammond v. Hammond, 419 (t).
 Hampshire v. Wickens, 808 (f), 808 (u), 838 (c).
 Hampton v. Noruse, *Re. Noruse*, 187 (x).
 Hampshire Land Company, *Re.*, 43 (x).
 Hanbury v. Cundy, 795 (l).
 Hancock v. Austin, 793.
 Hancock v. Berrey, 921 (h).
 Hancock v. Caffyn, 786 (u), 786 (y).
 Hancock v. Pawson, *Re. Hancock*, 213 (h), 215 (y).
 Hand v. Blow, 859 (h).
 Hand, *Re.*, *Ex-parte Cocks*, 860 (s).
 Hankey v. Vernon, 502 (g).
 Hanif-un-Nissa v. Faiz-un-Nissa, 441 (r).
 Hanifa Bibi v. Punnamma, 322 (p), 323 (x), 330 (s).
 Hanmanta v. Mir Ajmodin, 373 (m).
 Hanoomanpersaud Panday v. Mussamat Babooee Munraj Koonwaree, 747 (k).
 Hanson v. Derby, 667 (y), 668 (i).
 Hanson v. Graham, 172 (k), 173 (v), 179 (b), 183 (c).
 Hansraj v. Bejoy Lal, 859 (n).
 Hans Raj v. Musammatt Somni, 291 (a), 291 (b), 294 (b), 296 (t), 296 (u), 302 (j).
 Hanuman v. Abbas Bandi, 51 (i), 249 (x), 251 (v).
 Hanuman v. Gursahay, 270 (b).
 Hanuman Kamat v. Hanuman Mandur, 434 (o), 434 (p).
 Hanuman Persad v. Mussammatt Babooee, 95 (y), 110 (a).
 Hanuman Prasad v. Musammatt Babooee, 109 (l).
 Hanuman Sahu v. Abbas Bandi, 129 (u), 129 (w), 132 (s).
 Hanumanthaiyan v. Meenatchi-Naidu, 737 (p), 769 (u).
 Hanwant Rai v. Chandi Prasad, 435 (r), 435 (t), 435 (v).
 Hanwant Ram v. Ram Harakh, 768 (g), 771 (l).
 Hanwant Rao v. Chandi Prasad, 433 (c).
 Haradhan v. Bhagabati, 296 (z).
 Haradhan v. Hargobind, 648 (f).
 Hara Kumari Chowdhurani v. Eastern Mortgage & Agency Co., Ltd., 691 (d).
 Hara Kumari v. Eastern Mortgage Agency Co., 694 (c).
 Harbin v. Masterman, 172 (l).
 Harcharan Lal v. Nural Hasan, 429 (v), 429 (w).
 Har Dayal v. Pirthi Singh, 702 (d), 702 (x).
 Har Dayal v. Raja Ram, 546 (y).

- Har Lal v. Muhamdi, 443 (q).
 Hardee v. Ram Lal, 927 (e).
 Hardeo Prasad v. Gangasahari, 673 (l).
 Hardwar v. Sita Ram, 667 (o).
 Hardi Narain v. Ruder Perkash, 101 (l), 275 (l).
 Hardi Narain Sahu v. Ruder Perkash Misser, 276 (e), 276 (w).
 Harding v. Chethorn, 878 (s), 878 (t).
 Harding v. Davis, 532 (c).
 Hardinge v. O. S. Ch. 213, 412 (y).
 Hardwicke v. Wilmot, *In re. De Ros' Trust*, 419 (v).
 Hare v. Burges, 146 (v), 806 (z).
 Harendra Lal v. Haridari Debi, 518 (y).
 Harendra Lal Roy Chowdhuri v. Hari Dasi Debi, 518 (b).
 Harendra Lal Roy v. Haridasi Debi, 371 (m).
 Harendra Narain v. Moran, 816 (s).
 Hare & O'More's Contract, *Re.*, 455 (o).
 Hargovandas v. Bajibhai, 368 (x).
 Hargowan v. Baijnath, 56 (c).
 Haribhai v. Nathubhai, 260 (c).
 Harichand Mancharam v. Govind Luxman, 376 (r), 376 (w).
 Hari Charan v. Hari Kar, 24 (n).
 Haridas Acharjia v. Baroda Kishore, 66 (a).
 Haridas v. Baroda, 73 (n).
 Hariharan v. Narayan, 120 (i).
 Harihar v. Ram Shashi, 813 (b).
 Harihar Banerji v. Ram Shashi Roy, 812 (w), 812 (x).
 Harihar Bannerjee v. Ramsoshi Roy, 816 (r).
 Harihar v. Bholi, 288 (o).
 Harihar v. Sir Gurugrath, 52 (v).
 Harihar Prasad v. Sir Gurugrath, 926 (c).
 Harihar v. Ramshashi Roy, 810 (t).
 Harihar v. Udainath, 104 (y).
 Hari Kirsen Bhagat v. Veliat Hoosein, 691 (a).
 Hari Kisen v. Veliat Hossein, 609 (z).
 Hari Kishen v. Kashi Prashad, 106 (w), 524 (x).
 Hari Kishen Bhagat v. Kashi Pershad Singh, 245 (v).
 Hari Kissen v. Bagrang Sopai, 102 (e).
 Hari Kissen v. Veliat Hossein, 661 (m), 609 (a), 609 (z).
 Hari v. Lakshman, 669 (o).
 Hari v. Musammat Tapai, 751 (e).
 Harilal v. Gordhan, 294 (y), 295 (h), 296 (e).
 Hari Lal Mullick, *In the matter of*, 725 (g).
 Harilal v. Mulchand, 37 (j), 39 (j), 385 (r), 399 (i), 399 (k), 459 (p).
 Harilal v. Nagar, 48 (v), 49 (w).
 Harilal Ranchhod v. Gordhan Keshav, 95 (g).
 Hari Mohan Misser v. Surendra Narayan Singh, 909 (h).
 Hari Narain Banerjee v. Kusum Kumari Dasi, 726 (l).
 Hari Naraindas, *In re*, 96 (l).
 Hari Narayan v. Sri Ram Chakravarti, 121 (s), 121 (u).
 Harinath v. Promotho Nath, 787 (p).
 Hari Nath v. Raj Chandra, 15 (j).
 Haripada v. Nirod, 355 (p).
 Haripada v. Nirod Krishna, 354 (f).
 Hari Paik v. Jaharuddin Gazi, 151 (g).
 Hari Parasad v. Kodo Marya, 76 (i).
 Hari Prasad v. Harihar Prasad, 440 (a).
 Hari Prasad v. Hanumantrao, 343 (k), 363 (x).
 Hari Raj Singh v. Ahmad-ud-din Khan, 693 (x).
 Hari Ram v. Denaput Singh, 439 (w), 444 (n).
 Hari Ram v. Indraaj, 544 (y), 740 (k).
 Hari Sankar Rai v. Tapai Kuer, 751 (a).
 Harish Chandra v. Chandpore Co., Ltd., 315 (z).
 Harish Chander v. Sree Kalu, 856 (i).
 Haris Paik v. Jahuruddi Gazi, 146 (o), 149 (u).
 Hari v. Shridhar, 666 (i), 666 (j).
 Hari v. Vishnu, 555 (u).
 Hari v. Wanu, 909 (d).
 Harjas Rai v. Naurang, 747 (n).
 Harkissondas v. Bai Dhanu, 150 (d).
 Harkissandas v. Dwarkadas, 520 (i), 525 (k).
 Harlal v. Lala Prasad, 305 (z).
 Harlalsa v. Shaikh Rahim, 614 (e).
 Harlasla v. Bapu, 372 (q).
 Harman v. Ainslie, 892 (e).
 Harman v. Anislie, 64 (e).
 Harman v. Dickenson, 195 (p).
 Harman v. Richards, 329 (j).
 Harmer v. Jumbill (Nigeria) Tin Areas, Ltd., 831 (c).
 Harmongal v. Narain Singh v. Ganaur Singh, 522 (r).
 Harnath Kunwar v. Indar Bahdur Singh, 60 (q), 61 (d).
 Harold v. Plenty, 643 (o).
 Harold Wood Brick Co., Ltd., v. Ferris, 459 (n).
 Haroon v. Meherali, 41 (f).
 Harpal Singh v. Lakhraj Kunwar, 175 (l), 181 (s).
 Har Mitra v. Raghubar, 106 (w).
 Har Pershad Lal v. Dalmardhan Singh, 307 (r).
 Harper's Settlement, *In re.*, 261 (y).
 Har Prasad v. Bhagwan Das, 764 (k).
 Har Prasad v. Raghunandan, 732 (y).

TABLE OF CASES.

li

- Har Prasad v. Raghunandan Prasad*, 720 (y).
Har Prasad v. Ram Chandar, 555 (u), 571 (o).
Har Prasad v. Sheo Gobind, 617 (i).
Har Prasad Tiwari v. Sheo Gobind Towari, 82 (v).
Harries v. Bryant, 807 (m).
Harrington v. Price, 119 (c).
Harris v. Brown, 171 (c), 172 (p), 179 (b).
Harris v. Hickman, 845 (s).
Harris v. Jones, 865 (i).
Harris Paik v. Jahuruddin Gazi, 145 (j).
Harris v. Tubb, 340 (b).
Harrison, Ainslie & Co. v. Barrow-in-Furness Co., 855 (x).
Harrison Ainslie & Co. v. Muncaster, 830 (r), 831 (y).
Harrison v. Barton, 101 (g).
Harrison v. Blackburn, 827 (c).
Harrison v. Edwards, 654 (w).
Harrison v. Elvin, 524 (u).
Harrison v. Good, 237 (e).
Harrison v. Holland, 452 (h).
Harrods, Ltd. v. Stanton, 324 (r).
Harrold v. Plenty, 511 (b).
Har Shankar v. Shew Govind, 317 (r).
Harsuhai Singh v. Syud Lootf Ali, 582 (f).
Har Shyam Choudhury v. Shyam Lal Sahu, 719 (s), 735 (b), 735 (h), 735 (y), 735 (z).
Hartell v. Blackber, 898 (y).
Harter v. Colman, 573 (z), 574 (d), 575 (v).
Hart v. Hawthorne, 534 (d).
Hartley v. Burton, 537 (l).
Hart's Trust, Re., 183 (c).
Hart v. Swaine, 399 (h).
Hart v. Windsor, 824 (u), 829 (x), 835 (x), 836 (a).
Harvey v. Ashley, 214 (m).
Harvey v. Aston, 194 (g).
Harvey v. Horday, In re. Harvey, 775 (p).
Harvey v. Young, 679 (m).
Harunandan v. Jawad Ali, 377 (b).
Hasan Ali v. Nazo, 63 (u).
Hasanbhai v. Umaji, 739 (h).
Hastings (Lord) v. Saddler, 839 (l).
Hatch v. Hale, 863 (y).
Hatch v. Skelton, 766 (t).
Hathising v. Kuverji, 40 (v).
Hat Singh v. Bihari Lal, 701 (o).
Hattikudur v. Andar Sayad, 258 (u), 258 (v), 263 (n).
Havens v. Middleton, 839 (l).
Havu v. Ganpati, 888 (k).
Hawkesworth v. Chaffey, 376 (r).
Hawkins v. Shewen, 407 (a).
Hayden v. Kirkpatrick, 772 (z).
Haydon v. Bell, 417 (a).
Hays v. Bickerstaff, 833 (v), 836 (f).
Hayes v. Bickerstaff, 829 (c), 831 (v).
Hayford v. Criddle, 409 (x), 410 (d), 410 (e).
Hayne v. Maltby, 259 (d).
Haynes v. Forshaw, 688 (l).
Haynes v. Haynes, 840 (w).
Hay v. Ram Chandar, 78 (i).
Hayward v. Harwell, 787 (l).
Haywood v. Brunswick Building Society, 136 (d), 232 (l), 232 (n).
Haywood v. Brunswick Permanent Benefit Building Society, 231 (f).
Hazara Singh v. Bube Khan, 312 (q).
Hazarimal v. Ganpatrao, 322 (i).
Hazarimull v. Sadasukh, 894 (h).
H. Bolton v. F. G. Donald, 843 (y).
Head's Trustees & Macdonald, Re., 90 (u), 453 (a), 455, (n).
Heales v. M'Murray, 664 (k).
Heap v. Barton, 847 (g).
Heap v. Hartley, 792 (i).
Heard v. Stuart, 854 (m), 873 (w).
Hearn v. Tomlin, 393 (e).
Heath v. Chapman, 168 (h).
Heathcote v. Trench, Re. Heathcote, 162 (n).
Heath v. Crealock, 259 (i), 259 (j), 261 (x), 500 (g).
Heath v. Pugh, 536 (h), 642 (k).
Heatherley v. Weston, 280 (t).
Heatly v. Benham, 802 (t).
Heckman v. Isaac, 839 (t).
Heehel v. Tellery, 838 (y).
Heitzmann v. Goweblock, 454 (i).
Hellawell v. Eastwood, 26 (f), 26 (h), 27 (g).
Hemadri v. Ramani, 277 (e), 277 (h).
Hemanjini v. Srigobinda, 815 (h).
Hemanta Kumari v. Midnapore Zemindari Co., 785 (k), 786 (p), 787 (h), 789 (v), 789 (y), 818 (l).
Hemchand Devchand v. Chhotamlal, 9 (k).
Hem Chander Ghose v. Thako Moni Debi, 693 (u).
Hem Chandra v. Amiyabala, 377 (b), 377 (c), 377 (d).
Hemchandra v. Narendranath, 5 (e), 226 (e).
Hem Chandra v. Thako Moni, 659 (i).
Hem Chunder v. Sarnamoyi, 104 (x).
Hem Chunder v. Sarnamoyi Debi, 108 (c).
Hem Chunder Soor v. Kally Churn Das, 482 (e).
Hem Chunder v. Tako Moni, 596 (d).
Hem Chunder v. Thanko Muni, 595 (r).
Hemendra Lal Singh Deo v. Takir Chandra Datta, 752 (y).
Hemmings v. Stoke Poges Gold Club, 879 (i), 879 (k).

- Hemraj Dattubuva v. Nathu, 95 (f),
Hemraj v. Trimbak Kunhi, 367 (j).
Henderson v. Astwood, 588 (y), 589 (g),
642 (i).
Henderson v. Bird, *Re. Henderson*,
189 (g).
Henderson v. Comptoir D'Escompte
44 (s).
Henderson v. Eason, 280 (p).
Henderson v. Hudson, 397 (n).
Henderson v. Hutson, 410 (d), 410 (e).
Henderson v. Mears, 863 (t).
Henderson v. Squire, 878 (r), 878 (t),
878 (w).
Henderson v. Thorn, 873 (q).
Henderson v. Van Cooten, 878 (x).
Heng Moh & Co. v. Lim Saw Yean,
500 (a), 504 (o).
Henman v. Berlinger, 845 (s), 871 (z).
Hermoux v. Harbord, 500 (d).
Hervey v. Smith, 397 (s).
Henry v. Armstrong, 256 (n).
Henty v. Schroder, 459 (n).
Herne v. Merres, 330 (b).
Herranund v. Ozeerun, 22 (n).
Hervey-Bathurst v. Stanley, 170 (u).
Het Ram v. Shai Lal, 777 (g).
Het Narain v. Ram Dein, 48 (q).
Hetsingh v. Bihari Lal, 534 (h), 579 (y).
Hewanchal Singh v. Jawahir Singh,
701 (s), 705 (t).
Hewett v. Eldridge, *In re Hewett's*
Settlement, 147 (e), 157 (h).
Hewitt v. Kayi, 934 (z).
Hewitt v. Loosemore, 33 (t), 683 (d).
Hewitt, *Re.*, 732 (z).
Heyman v. Dubois, 687 (a).
Heywood v. Heywood, 163 (z).
Heywood v. Mallalien, 400 (m).
Heywood v. Mallalieu, 387 (p).
Hiatt v. Hilman, 632 (n).
Hia Ban U. I. U. Kyaw San v. A. V.
P. L. Ramanathan Chettiar, 773 (o).
Hickman v. Isaacs, 802 (r).
Hickron v. Darlow, 639 (b).
Hiern v. Mill, 35 (s).
Higgins & Hitchman's Contract, *Re.*,
408 (k), 414 (u), 451 (u).
Higgins v. York Building Co., 338 (b).
Highett, & Birds Contract, *Re.* 397 (k),
428 (m).
Highett & Burn, *Re.*, 408 (l).
Hikmatulla Khan v. Imam Ali, 493 (n),
494, (m) 515 (c).
Hildyard, *Re. Ex-parte*, Smith, 476 (e),
506 (g), 510 (u).
Hillary v. Gay, 878 (g).
Hilay Subbaya v. Narayanappa
Timmaya, 594 (m).
Hill v. Chapman, 934 (x).
Hill v. Hickin, 754 (e).
Hills v. Hills, 934 (v).
Hill v. Kempshall, 892 (k), 901 (y).
Hill v. Krishenstein, 844 (j).
Hill v. Mills, 85 (f).
Hills v. Webber, 280 (f).
Hilt v. Tupper, 793 (t).
Himalaya Bank, Ltd. v. Quarry,
500 (c), 506 (v).
Himatlal v. Vasudeo, 238 (u), 267 (m),
377 (b), 377 (y), 458 (b).
Hind v. Poole, 629 (w).
Hindu Singh v. Mangal, 13 (s).
Hippolite v. Stuart, 130 (f).
Hira Bibi v. Ram Hari Lal, 525 (r).
Hirachand v. Abdal, 690 (t).
Hirachand v. Jayagopal, 91 (d),
430 (f), 541 (w).
Hirachand v. Nemchand, 30 (c), 76 (l).
Hiralal v. Gaurishankar, 124 (c), 358 (n),
921 (i).
Hiralal v. Gaurishankar, 922 (s),
922 (t), 922 (u).
Hira Lal v. Ghasit, 621 (j), 622 (y).
Hiralal v. Shankar, 354 (w), 354 (x),
356 (g), 789 (c).
Hira Mani v. Anmol, 921 (i).
Hira Mani Singh v. Anmol Singh,
921 (i), 923 (o), 926 (y), 927 (k).
Hira Moti v. Annoda Prasad, 15 (k).
Hiran Bibi v. Lohan Bibi, 51 (i).
Hiran Bibi v. Musammam Sohan
Bibi, 182 (t).
Hiran Bibi v. Sohan Bibi, 60 (t), 911 (o).
Hiraram v. Uderam, 102 (s).
Hirday Narain v. Jogal Prasad, 945 (n).
Hirendra Nath v. Hari Mohan, 16 (m).
Hire Purchase Furnishing Co. v.
Richens, 188 (i).
Hiria v. Mahomed, 119 (v).
Hirth, *Re.*, 319 (d).
Hiseswar Sarkar v. Kali Charan, 799 (i).
Hitchcock v. Giddings, 189 (m).
Hitendra v. Sakhdeb, 102 (t).
Hla Bau U. v. Ranganathan, 768 (m).
Hoare v. Chambers, 829 (v).
Hogre v. W. Tasker & Sons, *In re.*,
W. Tasker & Sons, Ltd., 775 (s).
Hobart v. Abbot, 477 (l).
Hobson v. Bass, 715 (s), 721 (o).
Hobson v. Bell, 403 (n), 413 (b),
636 (y), 637 (m).
Hobson v. Gorrings, 25 (x), 29 (a).
Hockley v. Bantock, 504 (i).
Hodges v. Jones, 416 (p).
Hodgkinson v. Crowe 808 (i), 861 (g).
Hodgson v. Halford, 203 (q).
Hodson v. Ball, 147 (i).
Hodson v. Coppard, 804 (w).
Hodson v. Deans, 631 (i).
Hoorston v. Burns, 920 (s).
Hoggart v. Scott, 458 (h).
Hokes's Case, 843 (x).
Holford v. Holford, *In re. Holford*,
182 (y).
Holford v. Trim, 452 (f).

- Holder v. Taylor, Hobart, 832 (m).
 Holgate v. Kay, 826 (n).
 Holland v. Cole, 894 (l).
 Holland v. Hodgson, 26 (i), 26 (k).
 Holland, *Re. Ex-parte*, Alston, 335 (o), 722 (x).
 Hollas v. Robinson, 472 (v).
 Holliday v. Atkinson, 934 (y).
 Holliday v. Lockwood, 392 (w).
 Holliday v. Overton, 419 (u).
 Holliwell v. Seacombe, 395 (b), 414 (u), 414 (x).
 Holloway Brother Ltd. v. Hill, 802 (x).
 Holloway v. Holloway, *Re. Holloway*, 88 (r).
 Hollroyd v. Marshall, 472 (t).
 Holman v. Hore, 790 (f).
 Holme v. Brunskill, 888 (s).
 Holme v. Fieldsend, 537 (q).
 Holmes v. Hodson, 202 (p).
 Holmes v. Penney, 334 (l), 337 (q).
 Holroyd v. Marshall, 52 (p), 61 (x), 264 (y), 271 (l), 272 (m), 594 (k).
 Honapa v. Narasapa, 336 (z).
 Hone v. Gakstatter, 35 (v), 388 (n), 389 (o), 389 (t).
 Hone's Estate, *Re.*, 545 (i).
 Hood v. Oglander, 127 (x).
 Hood v. Phillips, 767 (u), 770 (k), 777 (f).
 Hoole v. Smith, 90 (x), 633 (e).
 Hooper v. Bromet, 35 (l), 397 (w).
 Hooper v. Eyles, 754 (f).
 Hoosain Ali v. Abid Ali, 9 (l).
 Hooseinbhai v. Haji Ismail Sait, 324 (s).
 Hope Johnstone v. Hope Johnstone, *Re.*, Hope Johnstone, 202 (j).
 Hope v. Liddell, 35 (r), 397 (u).
 Hope Mills Ltd. v. Cowasji Jahangir, 671 (s).
 Hopgood v. Ernest, 683 (e).
 Hopkins v. Hopkins, 144 (x).
 Hopkinson v. Forster, 31 (t).
 Hopkinson v. Lee, 615 (o).
 Hopkinson v. Rolt, 571 (j), 685 (n).
 Horendranarain v. Chandrakanta, 523 (g).
 Horlock v. Smith, 674 (d).
 Hormasji v. Keshav, 374 (c), 374 (l), 374 (y).
 Hormasji Nowroji Davar v. Dadabhoy Nowroji Davar, 137 (k).
 Hormasji Temulji v. Mankuvarbai, 37 (b).
 Hornby v. Cardwell, 859 (f), 873 (s).
 Horne & Bellard, *Re.*, 755 (c).
 Horsefall v. Mather, 864 (e).
 Horsefall v. Testar, 868 (b).
 Horsey Estate, Ltd. v. Steiger, 803 (h), 904 (d), 904 (e).
 Horsfall v. Thomas, 679 (j).
 Horsford, In the goods of, 519 (s).
 Horton v. Smith, 767 (c), 771 (l).
 Hotchand Kishinchand, 6 (t).
 Houlder Bros., & Co., Ltd. v. Gibbs, 855 (a), 855 (w).
 Howard v. Fanshawe, 901 (n), 903 (u), 903 (v).
 Howards Estate, *Re.*, 774 (d).
 Howard v. Shaw, 439 (u).
 Howatson v. Webb, 270 (e).
 Howe v. Smith, 451 (c), 452 (f), 452 (g), 452 (h), 454 (h).
 Howell, *Re. Ex-parte*, Mandleberg 218 (r).
 Howell v. Richard, 433 (a).
 Hub Ali v. Wazir-un-nissa, 490 (g), 490 (i).
 Huddersfield Banking Co. v. Lister, 399 (j).
 Hudson v. Malcolm, 536 (c).
 Hudston v. Viney, 45 (f).
 Hugall v. McKean, 867 (v).
 Hugall v. M'Lean, 869 (k).
 Huggett v. Miers, 843 (p).
 Hughes v. Britannia Permanent Benefit Building Society, 569 (e), 571 (j), 572 (t), 573 (z), 575 (w), 575 (x).
 Hughes, *Ex-parte*, 532 (x).
 Hughes, *Ex-parte* Elmes, *Re.*, 434 (m).
 Hughes v. Howard, 670 (n).
 Hughes v. Metropolitan Railway Company, 898 (h).
 Hughes v. Morris, 347 (q).
 Hughes v. Williams, 676 (b).
 Hukam Singh v. Babu Lal, 672 (z).
 Hukmichand v. Pioneer Mills, Ltd., 470 (s), 470 (w), 746 (l), 757 (m).
 Hukumchand v. Hiralal, 441 (o).
 Hukumchand v. Pirthichand, 434 (p).
 Hukumchand v. Radha Kishen, 470 (b), 470 (c), 757 (u).
 Hukum Chand v. Taharunnessa, 189 (b).
 Hulton v. Lister, *Re.*, Hulton, 101 (j).
 Humble v. Hunter, 70 (f).
 Humble v. Langston, 857 (x).
 Hume v. Pocock, 406 (o).
 Humera Bibi v. Najmun-nissa, 924 (u).
 Hummel v. George Routledge & Sons, Ltd., 776 (w).
 Humphreys v. Inland Revenue Commissioners, 566 (d).
 Humphrey v. Tayleur, 928 (a).
 Hunooman Persaud v. Musammatt Babooee, 95 (z), 104 (d), 109 (r).
 Hunsraj v. Bejoy Lal, Seal, 782 (y), 791 (n).
 Hunsraj v. Bijaylal Seal, 861 (e).
 Hunsraj v. Nathoo, 32 (c), 941 (f).
 Hunt v. Bishop, 881 (c).
 Hunt v. Cope, 863 (w).
 Hunt v. Danvers, 833 (p).
 Hunt v. Elmes, 683 (i).
 Hunt v. Luck, 398

Hunt v. Remnant, 421 (q).
 Hunter v. Nissar Ahmad, 749 (o).
 Hunter v. Walters, 34 (y), 37 (m).
 Hunter's Trust, *Re.*, 183 (d).
 Huntley v. Russell, 876 (z).
 Huri Dars v. Macgregor, 816 (a).
 Hurish Chunder v. Mohinee Mohun, 825 (l).
 Hurlal Singh v. Jorawun Singh, 66 (t).
 Hurlbatt & Chaytor's Contract, *Re.*, 385 (a).
 Hurlbatt v. Hurlbatt, *Re. Hurlbatt*, 162 (k).
 Hurmuzi Begum v. Harday Narain, 22 (n).
 Hurnandun v. Jawad Ali, 374 (y).
 Hurreehur Singh v. Dabee Sahay, 562 (p).
 Hurro Sundari v. Chander Kant, 525 (j), 525 (p).
 Hurry Mohun v. Ganesh Chunder, 106 (f).
 Husainara v. Rahaman Nessa, 288 (o).
 Husaini Begum v. Husani Khan, 528 (y).
 Huseinbhai v. The Advocate General of Bombay, 100 (b).
 Husenbhoy v. Ahmedbhoy, 173 (x).
 Hushmat v. Jamir, 374 (t).
 Hussain Ali Shah v. Sardar Ali Shah, 496 (q).
 Hussain Khan v. Nateri, Srinivasa, 128 (i), 129 (w).
 Husseinali v. Dinbai, 190 (i).
 Hutchings v. Humphreys, 459 (n).
 Hutchinson v. Kay, 420 (n).
 Huthasanan v. Parameswaran, 560 (s), 560 (x), 560 (y), 560 (z), 710 (p).
 Hutson v. Cripps, 831 (z).
 H. V. Low & Co., Ltd. v. Jyotiprasad Singh, 824 (r).
 H. V. Low & Co., Ltd. v. Pulinbiharilal, 471 (g), 472 (i), 610 (m), 755 (g).
 H. V. Low & Co., Ltd. v. Pulinbiharilal Singha, 609 (a).
 Hyde v. Skinner, 805 (l), 806 (c).
 Hyde v. Warden, 64 (b), 64 (c), 64 (i), 390 (w), 397 (o), 790 (i), 808 (j), 809 (m), 892 (d).
 Hyman v. Hyman, 190 (g).
 Hyman v. Rose, 876 (b).

I

Ibbotson v. Rhodes, 678 (e), 681 (f).
 Ibbs v. Richardson, 878 (y), 878 (z).
 Ibid, 10 (v).
 Ibn Hasan v. Brijbhukhan, 698 (a).
 Ibn Husain v. Ramdai, 698 (f).
 Ibrahim Azim v. Cruickshank, 505 (u).
 Ibrahim v. Jivan Das, 318 (t), 321 (y), 329 (d), 329 (g).
 Ibrahimbhai v. Fletcher, 389 (l), 455 (p).

Iburamsa v. Theruvenkatasami, 275 (o).
 Iburamsa Rowthan v. Theruvenkatasami, 275 (u).
 Ideal Bedding Co., Ltd. v. Holland, 320 (p), 338 (a).
 Ideal Film Renting Co., Ltd. v. Nicolson, 857 (r), 857 (s).
 Iggulden v. May, 805 (c).
 Ikbal Begum v. Govind Prasad, 440 (b).
 Ikkotha v. Chakkiamma, 563 (y), 709 (e).
 Ikram Singh v. Intizam Ali, 327 (q).
 Illingworth v. Cooke, 155 (c).
 Illingworth v. Houldsworth, 755 (d).
 Inad Hasan v. Badri Prasad, 653 (h).
 Inam Ali v. Baij, 524 (y).
 Imam Hasan v. Badri Prasad, 653 (a).
 Imam Ali v. Baij Nath, 524 (x), 562 (n), 691 (a), 695 (d).
 Imam Ali v. Baij Nath Ram Saher, 691 (b).
 Imambandi v. Kamleswari, 887 (h).
 Imambandi v. Mutsaddi, 95 (c).
 Imam-ud-din v. Liladhar, 615 (o).
 Imamuddin v. Ramzan Chandri, 372 (p).
 Imam Valda Ibrahim v. Bhau Appaji, 51 (m).
 Imbichi v. Achampat, 755 (u).
 Imbichi v. Avukoya Haji, 745 (j).
 Imdad Hasan v. Badri Prasad, 655 (h).
 Imdad Hasan Khan v. Badri Prasad, 492 (x).
 Imdad Khatun v. Bhagirath, 122 (i).
 Immudipattam v. Periya Dorasami, 51 (k), 124 (v).
 Immudipattam Thirugana v. Periya Dorasami, 449 (m).
 Immudippattam Thirugana Kondama Naik v. Periya Dorasamai, 350 (v).
 Imperial Bank of India v. Bengal National Bank, 123 (q), 124 (b), 124 (c), 125 (f), 370 (x), 510 (t), 743 (d), 755 (d), 755 (f), 756 (k), 760 (e), 932 (j), 940 (a), 940 (b), 943 (u), 944 (x).
 Imperial Bank of India v. U. Gyaw, 46 (o).
 Imperial Bank of India v. U. Ra Gyaw Thu & Co., Ltd., 36 (a), 502 (b), 503 (b), 504 (m), 505 (c), 507 (b), 685 (p), 739 (f).
 Imperial Bank of India v. U. Rai, 283 (y).
 Income-tax v. Pemsol, 165 (c).
 Indal v. Debi, 792 (y), 793.
 Indar Bux v. Sheo Naresh, 102 (g).
 Indarjit v. Lal Chand, 441 (o).
 Indar v. Raghubir Singh, 30 (q), 74 (g).
 Indar Sen v. Raubhat Singh, 496 (w).
 Inderdawan v. Gobind Lal, 38 (z), 378 (m), 668 (n).

Inderwick v. Leech, 872 (n).
 Indian Cotton Co., Ltd. v. Ragunath, 81 (p), 805 (q), 817 (b).
 Indian Hotels Co. v. Phiroz Sorabji, 792 (y), 794.
 Indore State v. Visheshwar, 22 (x).
 Indra Bibi v. Jain Sirdar, 39 (k).
 Indra Bibi v. Jain Sardar Ahiri, 760 (d).
 Indu v. Atul, 878 (v).
 Indu Bhusan v. Atul Chandra, 836 (n).
 Indu Bhusan v. Maozam Ali, 798 (q), 835 (s).
 Indubala v. Manmatha, 214 (n).
 Indukuri v. Yerramith, 460 (q).
 Ingall v. Brown, *Re. Brown*, 199 (v).
 Ingle v. Vaughan Jenkins, 886 (u).
 Inglis v. Robertson, 5 (i).
 Injad Ali v. Mohini, 435 (r).
 Inland Revenue Commissioners v. Raphael, 198 (h).
 Inspector Singh v. Kharak Singh, 105 (v).
 Inuganti v. Sobhandhuri, 518 (b).
 Ipswich Permanent Money Club v. Arthy, 941 (i).
 Iranganda v. Ningappa, 914 (s).
 Irfanali v. Jogendrachandra Das, 441 (m).
 Irvine v. Kirk Patrick, 386 (i).
 Isaacs v. Towell, 414 (k).
 Isaac v. Worstercroft, 502 (j).
 Ishan Chandra v. Sajan Bibi, 516 (p).
 Ishan Chandra v. Sujan Bibi, 621 (k), 491 (o), 493 (p), 494 (v).
 Ishan Chunder v. Bishu Sirdar, 329 (y), 330 (q), 337 (k).
 Ishan Chunder Das v. Bishu Sirdar, 329 (d).
 Ishan Chunder v. Rameswar Mondol, 816 (p).
 Isherwood v. Whitmore, 532 (j).
 Ishrappa v. Krishna, 275 (i), 275 (k), 275 (r).
 Ishvar v. Devar, 324 (h).
 Ishvar Timappa v. Devar Venkappa, 324 (i).
 Ishwar Chunder v. Ram Krishna, 222 (n), 223 (t).
 Ishwar Chunder Dutt v. Ram Krishna Dass, 881 (g).
 Ishwardas v. Dosibai, 374 (y).
 Ishwar v. Dattu, 312 (k), 314 (m).
 Ismai Kani v. Nazarali, 292 (g).
 Ismai Kani Rowthan v. Nazarali Sahib, 877 (p).
 Ismail v. Hafiz Boo, 917 (i).
 Ismail Kani v. Nazarally, 25 (d).
 Ismail Khan v. Broughton, 784 (b).
 Ismail Khan v. Jaigun Bibi, 291 (u), 292 (g).
 Ismail Khan v. Kali Krishna, 815 (g).
 Ismail Khan v. Srimutty, 784 (p).

Ismail Mossajee v. Hafiz Boo, 113 (z), 920 (w).
 Ismail Shah v. Saleh Muhammad, 911 (l), 912 (z).
 Isri Prasad v. Jogat Prasad, 696 (n).
 Isri Prasad v. Rai Ganga Prasad, 477 (l).
 Iswara v. Ramappa, 845 (l).
 Iswarayya v. Subbanna, 332 (a).
 Itcharam Dayaram v. Raiji Jaga, 763 (f).
 Izhuvan v. Izhuvan, 563 (f).
 Izzat-un-Nissa Begam v. Partab Singh, 448 (e).
 Izzat-un-Nissa v. Kunwar Pertab, 625 (i).

J

Jabeda Khatun v. Mohommad Mozaffar, 784 (t).
 Jabeledali v. Prasanna, 263 (n), 263 (p).
 Jackman, *Re., Ex-parte*, Robinson, 656 (q).
 Jacks & Co. v. Joosab Mahomed, 810 (a), 906 (q).
 Jackson & Co. v. Northampton Street Tramways Co., 901 (c).
 Jackson & Haden's Contract, *Re.*, 385 (p), 414 (o).
 Jackson v. Jacob, 532 (c).
 Jacob v. Downs, 871 (a), 871 (d), 871 (e), 904 (c).
 Jacobs v. Davis, 931 (t).
 Jacobs v. Revell, 386 (k), 388 (c), 392 (n).
 Jaddar Nath Poddar v. Rup Lal Poddar, 374 (z).
 Jaddu Nath Poddar v. Rup Lal Poddar, 365 (d).
 Jadoonath v. Schone, 888 (l).
 Jado Singh v. Nartha Singh, 95 (y).
 Jado Singh v. Nathu Singh, 105 (v), 109 (q).
 Jadu Lal v. Janki Koer, 71 (q), 71 (r), 71 (s), 72 (d).
 Jadu Nath v. Rup Lal, 124 (w).
 Jadunandan v. Surajdeo, 525 (n).
 Jadunath v. Ruplal, 56 (w), 336 (x).
 Jaeger v. Mansions Consolidated, 831 (z), 832 (k).
 Jafar Hasan v. Ranjit Singh, 516 (f), 624 (b).
 Jaffer Meher Ali v. Budge Budge Jute Mills, Co., 30 (u), 32 (c), 70 (f), 70 (g), 76 (k), 80 (l), 189 (x).
 Jagabandhu v. Magnamoyi, 783 (e), 783 (j).
 Jagabhandu v. Radha Krishna, 357 (i).
 Jagal Kishore v. Kedar Nath, 610 (n).
 Jaganadham Pillai v. The Official Assignee, 518 (x).
 Jaganatha v. Ganga Reddi, 680 (b).

- Jagannadham v. Official Assignee, Madras, 510 (o).
 Jagan Nath v. Dibbo, 258 (x).
 Jagannath v. Dibbo, 60 (g), 263 (n).
 Jagannath v. Jaipal, 571 (o).
 Jagannatha v. Rama Rayer, 879 (u).
 Jagannath v. Jagjiwan, 652 (t).
 Jagannath v. Kalidas, 75 (y), 77 (s).
 Jagannath Kunwar v. Jaipal, 560 (a).
 Jagannath Marwari v. Mt. Chandni Bibi, 927 (m).
 Jagannath Prasad v. Surajmal, 616 (z).
 Jagat Nath Singh v. Lalta Prasad, 98 (d).
 Jagatchandra De v. Abdul Rashid, 308 (t), 541, (y), 544 (f).
 Jagatdhar Narain v. Brown, 744 (s).
 Jagatdhar Narain Prasad v. A. M. Brown, 717 (e), 719 (p), 729 (d).
 Jagat Mohini v. Rakhal Das, 441 (u).
 Jagat Narain Dassi v. Naba Gopal, 531 (m).
 Jagat Narain v. Mathura Das, 95 (f), 105 (v).
 Jagat Narain v. Naba Gopal, 532 (r).
 Jagat Narain v. Qutub Husain, 561 (i), 690 (t).
 Jagatpati Raju v. Sadrusannama Arad, 759 (x).
 Jagat Tarini v. Naba Gopal, 532 (h), 533 (t), 534 (e), 540 (k), 672 (u), 672 (z).
 Jagdeo Sahu v. Mahabir Prasad, 704 (h), 717 (b), 736 (j).
 Jagdeo Singh v. Ram Saran, 21 (u), 68 (y), 68 (z), 70 (a), 70 (z).
 Jagdeo Singh v. Mt. Raja Kuer, 103 (u).
 Jagdev Sahu v. Mahabir, 717 (b).
 Jagesar v. Deo Dat Pande, 111 (l).
 Jagganath Ramji, *In re.*, 96 (l).
 Jagger v. Jagger, 161 (i), 331 (q), 331 (u), 338 (x).
 Jagjivandas v. Imdad Ali, 67 (d).
 Jagjivandas v. Narayan, 819 (d).
 Jagjiwan Nanabhai v. Shridhar Balakrishna, 640 (d).
 Jagmohan v. Chaita, 489 (u).
 Jagmohan Das v. Inder Prasad, 249 (y).
 Jagmohan v. Prag Ahir, 109 (q).
 Jagmohan Singh v. Harbans Singh, 561 (d).
 Jagmohan Singh v. Emperor, 24 (o), 119 (w).
 Jagmohan Singh v. Sheoraj Kuar, 202 (l).
 Jag Sahu v. Mt. Ram Sakhi, 515 (b), 515 (x), 516 (f).
 Jag Sahu v. Mt. Ram Sakhi, Kuer, 514 (y).
 Jagu Sahu v. Mt. Ram Sakhi, 516 (h).
 Jag Sahu v. Mt. Ram Sakhi, 705 (u).
 Jahan Singh v. Hardat Singh, 112 (v).
 Jahar Lal v. Bhupendra Nath, 313 (z).
 Jai Gobind v. Abhairaj, 560 (a).
 Jaijit Rai v. Gobind Tiwari, 579 (u), 672 (v), 674 (s).
 Jaikaran Singh v. Sheo Kumar, 659 (d).
 Jaikaran Singh v. Sheo Kumar Singh, 563 (i).
 Jainabai v. R. D. Sethna, 174 (h).
 Jai Narain v. Munna Lal, 104 (b).
 Jai Narain v. Mahabir Prasad, 91 (f), 261 (z), 276 (c).
 Jai Narain v. Rashik Behari, 691 (z).
 Jai Narain Singh v. Muna Lal, 107 (m).
 Jai Narayan v. Kishan Dutt, 30 (d).
 Jai Narayan v. Kishun Dutta, 75 (t), 75 (y).
 Jai Narayan v. Kishun Dutta, 30 (v).
 Jai Pragash Singh v. Rupmanjari, Dasi, 737 (p).
 Jairam v. Bhilaji, 730 (p).
 Jairam v. Kuverbai, 173 (u).
 Jairam Luxman, *In re.*, 96 (l).
 Jaitha Bhima v. Haji Abdul, 505 (b), 505 (q).
 Jaiwanti Kumri v. Gajadhar Upadhya, 94 (w).
 Jamal v. Moola Dawood Sons & Co., 457 (a).
 James v. Biou, 550 (b), 550 (x).
 James v. Dean, 590 (l).
 James Fairclough v. Swan Brewery Co., Ltd., 545 (j).
 James v. Holmes, 925 (q).
 James v. Kerr, 554 (f), 554 (h), 554 (i).
 James v. Landon, 259 (d).
 James v. Rice, 506 (v).
 Jamiruddin Saodagar v. Hazi Mal Gani, 810 (b), 819 (b).
 Jamnabai v. Balakrishna, 227 (r).
 Jamnabai v. Dharsey, 159 (t).
 Jamnabai v. Dharsey Takersey, 159 (y).
 Jamnabai v. Khimji Vullubdass, 166 (n).
 Jamnadas Harinaran, *In re.*, 424 (q).
 Jamna Das v. Ram Autar, 526 (t).
 Jamna Das v. Ram Autar, Pando, 625 (h).
 Jamna Das v. Uma Shankar, 247 (u), 255 (g).
 Jamsetji v. Kashinath, 224 (w).
 Jamsetji Manekji v. Hari Dayal, 316 (j).
 Jamshed v. Burjorji, 423 (e), 423 (g), 453 (u).
 Jamshedji v. Husseinbhai, 87 (i).
 Jamshedji v. Soonabai, 167 (d).
 Janakai v. Narayanasami, 60 (o).
 Janaki Nath v. Kali Narain, 784 (r).

- Janardan v. Anant*, 571 (o), 743 (f), 760 (e).
Janardhan Vishnu Kulkarni v. Anant Lakshmanshet, 747 (l).
Jang Bahadur v. Bhagatram, 22 (s).
Jangi Singh v. Chandra Mol, 479 (g), 479 (h), 479 (i).
Janjira v. Mahammad Fakirulla, 100 (b).
Janki Das v. East Indian Railway Co., 921 (n).
Jankinath v. Nirodbaran, 13 (v).
Janki Kuar v. Sarup Rani, 752 (i).
Janki Prasad v. Baldeo Prasad, 845 (k).
Janki Prasad v. Kishen Dat, 38 (y), 378 (l).
Janki Prasad v. Sri Matra, 774 (c).
Janki Saran Syed Mahammad, 625 (i).
Janki v. Sheoadhar, 122 (i).
Janki Singh v. Mahanath Jagannath Das, 5 (i).
Janoji v. Jamoji, 672 (y).
Janoji v. Janoji, 673 (n).
Janson v. Driefontein Consolidated Mines, Ltd., 190 (n), 190 (t).
Jared v. Clements, 499 (s).
Jason v. Eyres, 547 (e).
Jascurn v. Prithichand, 435 (q).
Jasraj v. Sadashiv, 98 (h).
Jasudin v. Sakharam, 71 (l).
Jat Mal v. Hakim Mal, 30 (j).
Jati Kar v. Mokunda Deb, 68 (y), 472 (p).
Jati Kuar v. Mukunda Deb, 21 (u), 518 (c).
Jatindra Chandra v. The Ranpur Tobacco Co., Ltd., 6 (t).
Jatindra Mohan Tagore v. Ganendra Mohan Tagore, 39 (r), 139 (p), 140 (u), 153 (s).
Jatindra Nath Basu v. Peyer Deye Debi, 514 (y).
Jatindra Nath Chowdhri v. Prasanna Kumar Bannerjee, 862 (o).
Jatindra Nath Roy v. Narayan Das, 120 (j), 122 (e), 122 (f).
Jatuni v. Amar Krishna, 659 (g).
Jauhari Singh v. Ganga Sahai, 609 (b).
Jaunda Kuar v. The Court of Wards, 539 (w).
Javanmal v. Muktabhai, 13 (s).
Javerbhai v. Gordhan, 260 (o), 264 (y).
Jawahir Mal v. Indomati, 750 (t).
Jawahir Singh v. Baldeo Baksh Singh, 548 (m).
Jawahir Singh v. Someshwar, 515 (y), 516 (g).
Jayagavri v. Purshotamdas, 247 (a).
Jayanti v. Alamelu, 226 (f), 226 (j).
Jaynal Abedin v. Hyderali, 313 (y).
J. B. Bullen v. Lalit Jha, 825 (k).
J. D. Jones & Co., Ltd. v. Ranjit Roy, 755 (h).
Jeakes v. White, 406 (l).
Jee v. Audley, 143 (i), 145 (a), 149 (s).
Jeffreys v. Jeffreys, 199 (n).
Jeffreys v. Luck, 931 (s).
Jenkins and Commercial Electric Theatre Co.'s Contract, Re., 437 (h).
Jenkins v. Gething, 28 (c), 28 (l).
Jenkins v. Jackson, 831 (w).
Jenkins v. Jones, 636 (j), 636 (z), 641 (v).
Jenner v. Finch, 523 (d).
Jenner Fust v. Needham, 676 (l).
Jennings v. Brunt, 394 (k).
Jennings v. Jordan, 575 (u), 575 (v), 575 (w), 711 (s).
Jennings v. Jordon, 574 (p).
Jennings v. Moore, 264 (y).
Jennings v. Wards, 553 (b), 555 (n).
Jerkes, Ex-parte, Re., Official Receiver, 332 (w).
Jerman Gomez v. Ram Kumar, 816 (u).
Jerup Teja & Co. v. Peerbhoy, 634 (i), 637 (a), 640 (f), 641 (s).
Jethabhai v. Girdhar, 515 (m), 523 (n).
Jethalal v. Lalbhai, 296 (w), 302 (g).
Jethibai v. Putlibai, 504 (p).
Jewandas Jhawar, In re., 256 (o).
Jewan Ram v. Ratan Chand, 76 (n).
Jezeph v. Ingram, 321 (b), 321 (d).
Jhabba Ram v. Girdhari Singh, 620 (z).
Jhabbu Ram v. Girdhari Singh, 622 (g).
Jhampu v. Kutramani, 372 (t).
Jhand Singh v. Harnam Singh, 38 (d).
Jhanda Singh, In, 482 (l).
Jhanda Singh v. Wahid-ud-din, 481 (u), 482 (a), 483 (p), 484 (y), 484 (z), 485 (n), 485 (q).
Jharoo v. Raj Chunder, 317 (r).
Jhonstone v. Gopal Singh, 227 (y).
Jhonston v. Tucker, 567 (f).
Jhuma Lal v. Sham Narayan, 710 (p), 740 (m).
Jhumman v. Hussain, 924 (u).
Jhunam v. Dulia, 10 (w).
Jhunku Singh v. Chhotkhan Singh, 578 (p), 623 (o).
Jhunker Singh v. Chhot Khan Singh, 623 (m).
Jiban Krishna v. Sripati Charan Dey, 78 (m).
Jibanti v. Gokool, 886 (o), 887 (w).
Jibanti Nath Khan v. Gokool Chunder Chowdry, 12 (h).
Jijibhai v. Nagji, 260 (o).
Jinks v. Edwards, 786 (s), 827 (y).
Jinu Ram Das v. Mozaffer Hosain Shaha, 754 (g).
Jiteswari v. Sudha, 87 (f).
Jivandas v. Framjee, 506 (n).
Jivan Lal v. Dhunde, 529 (d).

- Jiva Ram *v.* Khen Koer, 707 (*x*).
 Jivraj Gopal *v.* Atmaram, 819 (*a*), 819 (*d*).
 Jivraj Joharmal *v.* Lalchand Shree-kison & Co., 940 (*v*), 940 (*w*).
 Jiwan Singh *v.* Misri Lall, 245 (*u*).
 Jnanendra *v.* Official Assignee of Calcutta, 333 (*e*).
 Jnanendra *v.* Shorashi, 84 (*w*).
 Jodh Ram *v.* Lajja Ram, 518 (*d*).
 Joel *v.* Mills, 201 (*i*).
 Jogamaya Dasi *v.* Tulsa, 240 (*n*).
 Jogamma *v.* Pothanna, 353 (*o*).
 Jogendra *v.* Dwarka Nath, 813 (*a*).
 Jogendra *v.* Fulkumari, 308 (*c*), 311 (*w*), 312 (*j*), 312 (*n*).
 Jogendra *v.* Kurpal, 355 (*q*), 355 (*u*), 888 (*n*).
 Jogendra Nath *v.* Debendra Nath, 312 (*m*).
 Jogendra *v.* Salamat, 246 (*e*), 246 (*m*), 247 (*n*).
 Jogesh Chandra *v.* Asaba Khatun, 145 (*k*).
 Jogesh Chandra *v.* Emdad Meah, 827 (*g*).
 Jogesh Chandra Roy *v.* Ananda Chandra Chaudhury, 805 (*m*).
 Jogesh Chandra Roy *v.* Annada Charan, 807 (*j*), 807 (*k*).
 Jogesh Chandra Roy *v.* Asaba Khatun, 231 (*d*).
 Jogesh Chandra Roy *v.* Mokbul Ali Chowdhury, 131 (*p*).
 Jogeshwar *v.* Janki Bai, 296 (*b*), 296 (*t*).
 Jogeshwar *v.* Janki, 291 (*c*).
 Jogeswar Narain *v.* Ram Chandra, 918 (*n*), 923 (*j*).
 Jogi Das *v.* Gangaram, 110 (*d*).
 Joginee Mohun *v.* Bhoot Nath, 518 (*x*).
 Johendro Chunder *v.* Dwarka Nath, 815 (*d*).
 John Brothers *v.* Holmes, 237 (*i*).
 Johnes *v.* Claughton, 417 (*d*).
 John *v.* Pink, 646 (*s*).
 Johnson *v.* Dipnose, 534 (*i*), 672 (*a*), 672 (*b*).
 Johnson *v.* Edgware, etc., Rly., Co., 883 (*w*).
 Johnson *v.* Jones, 288 (*n*).
 Johnson, *Re.*, 58 (*o*).
 Johnson *v.* Smart, 396 (*e*).
 Johnson & Tustin, *Re.*, 402 (*b*).
 Johnson *v.* Upham, 3 (*j*).
 Johnson *v.* Webster, 420 (*o*).
 Johnston *v.* Hill, *In re* Lawson, 143 (*i*).
 Johnston Foreign Patent Co., *Re.*, 749 (*f*).
 Johnson *v.* Evans, 559 (*h*).
 Johurra Bibee *v.* Sree Gopal, 227 (*s*).
 Joint and United Hindu Family of K. V. Tiruvalur *v.* P. L. P. K. R. M. Chettyar, 30 (*d*), 30 (*v*).
 Joitaram *v.* Ramkrishna, 925 (*s*).
 Jokhu Bhunja *v.* Sitla Bakhsh, 555 (*s*).
 Jolland *v.* Stainbridge, 36 (*z*).
 Jones *v.* Arthur, 531 (*m*), 532 (*i*), 532 (*s*).
 Jones *v.* Carter, 64 (*f*), 64 (*h*), 863 (*q*), 896 (*f*), 898 (*d*), 898 (*j*).
 Jones *v.* Chappell, 876 (*q*), 876 (*y*).
 Jones *v.* Edney, 391 (*g*), 393 (*d*).
 Jones *v.* Egerton, 925 (*u*).
 Jones Farrington *v.* Forrester, *In re.*, 696 (*i*).
 Jones *v.* Frost, 44 (*p*).
 Jones *v.* Gibbons, 565 (*y*).
 Jones *v.* Hawkins, 835 (*v*).
 Jones *v.* Ingham, 683 (*k*).
 Jones *v.* Jones, 203 (*t*).
 Jones *v.* Joseph, 865 (*r*), 867 (*g*).
 Jones *v.* Kearney, 649 (*j*).
 Jones *v.* Lavington, 829 (*h*), 829 (*z*), 835 (*y*), 836 (*d*), 836 (*f*).
 Jones *v.* Linton, 665 (*c*).
 Jones *v.* Maggs, 162 (*p*).
 Jones *v.* Mills, 899 (*p*).
 Jones *v.* Morgan, 775 (*k*).
 Jones *v.* Ogle, 219 (*s*).
 Jones *v.* Powles, 47 (*b*).
 Jones *v.* Randall, 189 (*f*).
 Jones *v.* Rhind, 682 (*t*).
 Jones *v.* Reynolds, 786 (*a*), 786 (*q*), 787 (*s*).
 Jones *v.* Smith, 33 (*s*), 35 (*q*), 36 (*y*), 40 (*p*), 42 (*i*), 45 (*e*), 472 (*w*), 682 (*z*).
 Jones *v.* The Administrator General of Bengal, 168 (*q*).
 Jones *v.* Westcomb, 195 (*q*), 195 (*s*).
 Jones' Will, *Re.*, 127 (*z*).
 Jones *v.* William, 37 (*h*), 42 (*l*), 504 (*c*), 682 (*a*).
 Jorden *v.* Money, 353 (*i*).
 Joseph Ezekiel *v.* Aaron Hye, 167 (*r*), 169 (*t*).
 Joseph *v.* Lyons, 472 (*v*).
 Joseph Sonche & Co., Ltd., *Re.*, 7 (*a*).
 Joshua *v.* Alliance Bank of Simla 36 (*g*), 38 (*z*), 50 (*y*), 378 (*m*).
 Jotindra Mohan *v.* Godadhur, 658 (*a*).
 Jotindra Mohun Lahiri *v.* Guru Pro-sunno Lahiri, 697 (*v*).
 Joti Lal *v.* Beni Madho, 60 (*n*).
 Jotoni Choudhurani *v.* Amor Krishna, 618 (*x*), 659 (*g*).
 Jowala Ram *v.* Hari Kishen, 105 (*o*), 105 (*p*).
 Joy Chandra Bannerji *v.* Sreenath Chatterji, 400 (*o*).

- Joy Chandra v. Sreenath, 245 (q), 245 (s).
 Joy Gobind Roy v. Bandhu Singh, 705 (q).
 Joykishen Mookerjee v. Collector of East Burdwan, 66 (r), 66 (v).
 Joykishen Mukerjee v. The Collector of Burdwan, 66 (r).
 Joyner v. Weeks, 790 (i), 873 (p).
 Joyram Chandra v. Bisnu Charan, 798 (t), 799 (z).
 Joy Sankari v. Bharat Chandra, 595 (r).
 J. Rajacharlu v. J. V. Venkataramaniah 101 (n).
 Juan Chandra Vas v. Hari Mohan Sen, 355 (x).
 Jugal Kishore v. Kedar Nath, 691 (a), 691 (e).
 Jugalkishore v. Lakshmandas, 166 (p).
 Jugal Kishore v. Ram Narain, 744 (p), 770 (d), 777 (e).
 Judgeo Singh v. Habibullah Khan, 697 (u).
 Juggarnath v. Pershad Surmah, 69 (j).
 Juggut Chunder v. Rada Nath, 77 (w).
 Jugjeewan Das v. Ramdas, 666 (d).
 Jugmohan Das v. Indar Prasad, 249 (r), 251 (t).
 Jugmohandas v. Pallonji, 851 (p).
 Jugmohan v. Hanbans Singh, 609 (e).
 Jugmohan v. Pallonjee, 292 (h).
 Jugul Kishore v. Banwari Lal, 429 (s).
 Jugul Kissore v. Kartic Chunder, 40 (x).
 Jugundra Nath Roy v. Hemanta Kumari Debi, 919 (e).
 Jull v. Jacobs, 181 (n), 195 (u).
 Jumant Ali v. Chowdhry, 907 (z).
 Jyotiprasad v. H. V. Low & Co., 400 (n), 402 (c).
 Jyoti Prakash v. Mukti Prakash, 610 (p).
 Jyotish Chandra v. Ramanath Bhadra, 794 (v).
- K**
- Kadakam v. Mekkath, 550 (h).
 Kadar v. Ismail, 377 (y).
 Kadir Baksh v. Jwala Prasad, 712 (l).
 Kadir Noidin v. Nepean, 674 (s).
 Kadir Moidin v. Nepean, 652 (s), 665 (a).
 Kadri Baksh v. Bhawani Prasad, 3 (a).
 Kailash Chandra v. Bejoy Kanta, 883 (z).
 Kailash Chandra v. Hari Mohan, 16 (e).
 Kailash Rai v. Mst. Jaga, 550 (h).
 Kairsley v. Duck, 883 (r).
 Kaishnaji v. Ravji, 488 (k).
 Kalachand v. Jatindra, 145 (d), 145 (z), 147 (j), 148 (k), 150 (v), 365 (g).
 Kalappa v. Shivaya, 563 (i), 659 (d).
 Kaleloola v. Nusserudeen, 167 (a), 167 (b).
 Kalian Singh v. Fazal Din, 433 (d).
 Kalian Singh v. Mt. Shanno, 338 (y).
 Kali Bakshi v. Ram Gopal, 920 (w).
 Kalianasundaram v. Karuppa, 927 (d).
 Kalidas v. Jugalkishna, 499 (i).
 Kali Das v. Kanhaiyalal, 921 (j).
 Kalidas v. Kanhaya Lal, 928 (u).
 Kalidas Mullick v. Kanhaya Lal, 117 (g).
 Kalidas v. Nathu Bhagwan, 615 (o).
 Kali Din v. Madho, 38 (d), 433 (z).
 Kalika v. Ajudhia, 490 (f).
 Kali Krishna v. Fuzlee Ali, 897 (p), 897 (x).
 Kali Krishna v. Golam Ally, 893 (u).
 Kalimuddin v. Reazuddin, 145 (h), 145 (j), 149 (u), 151 (q).
 Kalimuddin Shaik v. Baidyanath Saha, 769 (r).
 Kaliram v. Dulabram, 370 (b).
 Kali Shankar v. Nawab Singh, 102 (q), 111 (k).
 Kalka Prasad v. Chandan Singh, 24 (p).
 Kalka Singh v. Jagwant Kunwar, 56 (u).
 Kalka Singh v. Paras Ram, 514 (y).
 Kallan Khan v. Mardan Khan, 560 (a).
 Kallapa v. Venkatesh, 275 (t).
 Kallappa v. Balwant, 247 (o).
 Kalliyansundaram Pillai v. Subba Moopnar, 107 (m).
 Kallu v. Diwan, 886 (m), 887 (x).
 Kallu v. Faiyaz Ali Khan, 106 (i).
 Kallu v. Ganesh, 584 (b), 587 (w), 663 (x).
 Kallu v. Halki, 789 (c).
 Kallu v. Ram Das, 443 (q), 752 (k).
 Kally Das v. Monmohinee, 13 (t), 894 (g).
 Kally Dass v. Monmohini, 785 (h).
 Kalu v. Barsu, 102 (u).
 Kaluram v. Nagulal, 21 (w).
 Kalusa v. Madhorao, 51 (e), 74 (z).
 Kalu Singh v. Hansraj, 714 (k).
 Kalyan Das v. Jan Bibi, 6 (u), 290 (s), 291 (t), 299 (r).
 Kalyanasundaram v. Karuppa, 918 (r), 925 (r), 927 (g).
 Kalyanasundaram Pillai v. Karuppa Moopnar, 314 (j), 917 (z).
 Kalyanasundaram Pillai v. Krishnaswami Aiyar, 927 (j).
 Kalyani v. Krishnan, 34 (h), 41 (c).
 Kamal Krishna v. Chatoorbhuj, 423 (i).
 Kamal Narayan v. Shyamlal, 30 (g), 942 (q).
 Kamala Kant v. Abdul Barkat, 658 (w), 658 (y), 660 (r).
 Kamalakant Gopalji v. Madhavji Vaghji, 947 (y).

- Kamalamal v. Peru Meera, 5 (g).
 Kamala Mayee v. Nibaran Chandra, 82 (d).
 Kamala Nayak v. Ranga Ram, 856 (k).
 Kamala Nayak v. Ranga Rao, 598 (l).
 Kamal Krishna v. Chatoorbhuj, 423 (i).
 Kamal Kumari v. Kiran Chandra, 816 (t).
 Kamarajee v. Gunayya, 94 (n).
 Kamarunissa Bibi v. Hussaini Bibi, 924 (s).
 Kamawati v. Bigbijai, 920 (w).
 Kamaya Naik v. Devapa, 532 (h), 535 (r).
 Kameshwar Pershad v. Run Bahadur Singh, 104 (d).
 Kameswara v. Veeracharlu, 228 (e), 228 (f).
 Kameswaramma v. Sitaramanuja, 240 (n).
 Kamini Debi v. Ramlochan Sirkar, 562 (u).
 Kamini Kumar Roy v. Hira Lal, 329 (d), 329 (l), 329 (m).
 Kamla Prashad v. Bamdeo, 677 (x).
 Kamla Prashad v. Bamdeo Missir, 677 (p).
 Kampta Prasad v. Ramsaransingh, 796 (t).
 Kamta Prasad v. Ram Jag, 312 (s).
 Kamta Singh v. Chaturbhuj Singh, 460 (t).
 Kanai Lal v. Basanta Behari, 129 (t).
 Kanam v. Krishnam, 374 (a), 377 (y).
 Kanara v. Govindan, 514 (i).
 Kanaran v. Kuttooly, 556 (c).
 Kanchedilal v. Kanhai, 245 (q), 245 (t), 249 (r), 250 (c).
 Kandakuri Balasurya v. The Secretary of State, 3 (a).
 Kandarpamohan v. Akshaychandra, 922 (w).
 Kandasami v. Akkammal, 615 (k).
 Kandasami v. Nagalinga, 253 (q).
 Kandasami Nayakhar v. Venkata Reddiar, 723 (g), 735 (f).
 Kandasami v. Rangasami, 246 (y), 827 (w).
 Kandasamy v. Velayutha, 275 (n).
 Kandaswami v. Adimoola, 660 (t).
 Kandaswami v. Narayanaswami, 190 (h).
 Kandath Veetil v. Musaliyam, 924 (u).
 Kanderpa v. Jogendra Nath, 296 (t).
 Kandula v. Donga, 516 (u).
 Kandula v. Donga Pallaya, 515 (u).
 Kandula Vankiah v. Donga Pillaya, 491 (t), 556 (d), 742 (t).
 Kangal Chandra Pal v. Gopi Nath Pal, 735 (a).
 Kangali v. Surja Narain, 785 (f).
 Kangaya v. Kalimuthu, 515 (v).
 Kangayya v. Kalimuthu, 516 (j).
 Kanhai Lal v. Brij Lal, 60 (t).
 Kanhai Lal v. Palu Sahu, 249 (s).
 Kanhaiya Lal v. Gulab Singh, 723 (p).
 Kanhaiya Lal v. Jangi, 747 (b).
 Kanhaya Lal v. Devi Das, 41 (f).
 Kanhaya Lal v. National Bank of India, Ltd., 631 (e).
 Kanhiya Lal v. Ikram Fatima, 737 (p), 762 (h).
 Kanhu Lal v. Palu Sahu, 243 (x), 250 (m).
 Kanhyalal v. Narhar, 556 (x).
 Kaniz Fatima v. Narain Singh, 333 (f).
 Kaniz Fatma v. Imam Uddin, 430 (a).
 Kaniz Fatmia Begam v. Ram Nandam Dhar Dhar Dube, 754 (r).
 Kanjee v. Shanmugam, 343 (i).
 Kankala Kunta v. Mandlem, 354 (d).
 Kannan v. Krishnan, 373 (k), 373 (l), 375 (g).
 Kanna Kurup v. Sankara Varma, 514 (i), 515 (l), 742 (s).
 Kannaye Koll Sett v. Nistoriny, 598 (q).
 Kanni v. Achuda, 69 (k).
 Kanniappa v. Raju Chettiar, 543 (u).
 Kanni Lal v. Indarpal Singh, 704 (c).
 Kannu Mal v. Indarpal Singh, 780 (k).
 Kannyan Baduvan v. Ali Kutti, 882 (n).
 Kannye Loll v. Mistoriny, 666 (m).
 Kanta Chandra v. Ali Nabi, 60 (u).
 Kanthappa v. Sheshappa, 907 (y).
 Kanti Chandra v. Brojendra Mohan, 355 (u).
 Kanti Ram v. Kutubuddin, 22 (t), 22 (v), 55 (k).
 Kanwar Ram v. Ghugi, 10 (x).
 Kapadvanj Municipality v. Ochhavilal, 427 (h), 455 (m).
 Kapmiah Sivananjiah v. Sithay Goudar, 581 (h), 648 (f).
 Kapuri Sahu v. Mathura Das, 658 (b).
 Karalia v. Mansukhram, 375 (n).
 Karam Chand v. Shera, 491 (s).
 Karam Ilahi v. Sharfuddin, 924 (s).
 Karamat Ali Khan v. Ganeshi Lal, 495 (n).
 Karamat Khan v. Sami-ud-din, 282 (w), 283 (a).
 Karan Singh v. Bhub Singh, 110 (c).
 Karan Singh v. Mr. Rupawanti, 202 (o).
 Karim-un-nissa v. Phul Chand 22 (w).
 Kari Singh v. Emperor, 5 (s).
 Karnaya Naik v. Devapa, 653 (a).
 Karsandas v. Gopaldas, 423 (h), 450 (q), 453 (v).
 Karsandas v. Maganlal, 332 (x).
 Kartar Singh v. Mst. Mehr Nishan, 51 (l), 251 (q).
 Karu v. Pandia, 307 (i), 310 (r).

- Karuppiiah Pillai *v.* T. R. Hari Row, 442 (*m*).
 Kashaba *v.* Chandrabhagabai, 927 (*e*).
 Kashi Chandra *v.* Kailas Chandra, 58 (*x*),
 Kashi Chandra *v.* Priya Nath, 752 (*g*).
 Kashi *v.* Durga, 886 (*m*).
 Kashi Gir *v.* Jogendra Nath, 791 (*p*).
 Kashi Lal *v.* Shaikh Nurul, 621 (*s*).
 Kashiram *v.* Maheshwar, 544 (*a*).
 Kasi Vasi Chokkalinga *v.* Ramananan, 444 (*e*).
 Kasi Vishwatham *v.* Ramaswami, 659 (*i*).
 Kasturchand *v.* Jakhia, 481 (*u*), 483 (*p*), 484 (*d*), 485 (*l*), 485 (*m*), 485 (*n*), 485 (*o*), 485 (*p*), 485 (*q*), 485 (*s*), 485 (*t*), 485 (*u*).
 Kasturi *v.* Venkatachalapathi, 680 (*b*).
 Katar Singh *v.* B. Bishamber, 56 (*y*).
 Kathir *v.* Maremadissa, 308 (*c*), 316 (*k*).
 Kathir *v.* Mremadiss, 307 (*h*).
 Katie Graham *v.* The Colonial Government of British Guiana, 844 (*b*).
 Katwaree Chamar *v.* Ram Adhin, 23 (*f*).
 Katwaru Chamar *v.* Ram Adhin, 23 (*a*).
 Katyani Debi *v.* Uday Kumar, 799 (*j*).
 Katyayani *v.* Uday Kumar, 798 (*s*).
 Kauinunnessa Choudhrani *v.* Ekina Banoo 745 (*g*).
 Kaulesar Singh *v.* Raghoo Bir Singh, 556 (*v*).
 Kausalia *v.* Gula Kunwar, 122 (*i*).
 Kavali Sankara Rao *v.* Ramakrishnaya, 86 (*p*).
 Kaveri *v.* Ananthayya, 16 (*p*), 16 (*r*).
 Kaveriamma *v.* Lingappa, 288 (*j*), 288 (*k*).
 Kayastha Pathshala *v.* Bhagwati, 151 (*i*).
 Kazim Hussain *v.* Debi Dayal, 669 (*v*).
 Kearsley *v.* Phillips, 568 (*w*).
 Keates *v.* Cadogan, 824 (*v*).
 Keates *v.* Earl Cadojan, 385 (*v*).
 Keats *v.* Lyon, 237 (*d*).
 Kebell *v.* Philpot, 500 (*b*).
 Kedar Nath *v.* Atul Krishna, 167 (*u*).
 Kedarnath Bose *v.* Govinda Chandra Dass, 876 (*c*).
 Kedar Nath *v.* Dhankar Lal, 791 (*p*).
 Kedarnath Dutt *v.* Shamloll Khettry, 509 (*i*), 510 (*r*), 510 (*s*).
 Kedar Nath *v.* Emperor, 366 (*v*).
 Kedar Nath *v.* Govinda Chandra Dass, 876 (*f*).
 Kedar Nath *v.* Madu Sudan, 783 (*f*).
 Keech *v.* Hall, 601 (*d*).
 Keech *v.* Sandford, 590 (*k*).
 Keen *v.* Mear, 407 (*v*).
 Kehar Singh *v.* Jahangir Singh, 312 (*u*).
 Kehoe *v.* Hales, 758 (*v*).
 Kelley *v.* Rodgers, 830 (*l*).
 Kelly *v.* Barrett, 235 (*i*), 235 (*j*), 236 (*q*), 238 (*n*), 238 (*q*).
 Kelly *v.* Rogers, 834 (*g*).
 Kelu Nedungadi *v.* Krishnan, 514 (*i*).
 Kemalooti *v.* Muhamed, 908 (*q*).
 Kemp *v.* Bird, 230 (*r*).
 Kemp *v.* Sober, 802 (*k*).
 Kendall *v.* Beckett, 453 (*s*).
 Kendall, *Ex-parte*, 686 (*u*), 688 (*f*).
 Kennard *v.* Ashman, 825 (*y*).
 Kennedy *v.* De Trafford, 101 (*r*), 280 (*o*), 636 (*h*), 636 (*l*), 642 (*m*).
 Kennedy *v.* Green, 43 (*e*), 43 (*i*), 44 (*o*), 635 (*w*), 680 (*w*).
 Kensington (Lord) *v.* Bouverie, 664 (*t*), 676.
 Kensington, *Ex-parte*, 499 (*j*), 504 (*l*), 506 (*j*).
 Keppell *v.* Bailey, 804 (*t*).
 Kerakoose *v.* Serle, 78 (*i*), 945 (*b*).
 Ker *v.* Wauchope, 212 (*e*).
 Kerwick *v.* Kerwick, 228 (*b*), 336 (*d*), 922 (*d*).
 Kesar Kunwar *v.* Kewal Singh, 573 (*c*).
 Kesar Lal *v.* Harasit Ghose, 133 (*c*).
 Keshab Panda *v.* Bhobani Panda, 4 (*t*).
 Keshav *v.* Vinayak, 22 (*o*).
 Keshava *v.* Keshava, 513 (*u*).
 Keshavlal *v.* Adhyam Maganlal, 856 (*k*), 858 (*y*), 859 (*g*).
 Keshavlal *v.* Harant Ghose, 134 (*m*).
 Keshavram Dulavram *v.* Ranchhod Fakira, 569 (*y*), 574 (*k*), 611 (*s*), 726 (*e*).
 Keshri Mull *v.* Sukan Ram, 124 (*w*).
 Keshwar *v.* Sheonandan, 372 (*v*).
 Kesri *v.* Ganga Prasad, 379 (*z*).
 Kesri Mal *v.* Mumbarak, 728 (*y*).
 Kesri Mal-Umrao Singh *v.* Tansukh Rai Kidar Nath, 743 (*i*), 744 (*q*), 744 (*o*), 755 (*w*).
 Kettlewell *v.* Watson, 42 (*n*), 43 (*i*), 43 (*n*), 635 (*w*).
 Kevaldas *v.* Nagindas, 368 (*b*), 369 (*f*).
 Kevan *v.* Crawford, 67 (*f*), 331 (*r*), 331 (*s*).
 Keys *v.* Williams, 504 (*g*), 504 (*j*), 505 (*r*).
 Khadiram *v.* Shomnath, 76 (*j*).
 Khairulla *v.* Seth Dhanrupmal, 309 (*i*).
 Khajeh Solehman *v.* Salimullah, 141 (*x*).
 Khajooroonissa *v.* Rowshan Jehan, 924 (*a*), 924 (*t*).
 Khalilul Rahman *v.* Govind Persad, 111 (*e*).
 Khan Ali *v.* Pestonji, 312 (*j*).
 Khanchand *v.* Malloo, 749 (*l*).

- Khandas Narandas, In the matter of The Petition, 87 (n).
 Khandu Lal v. Fazal, 491 (s).
 Khankar v. Ali Hafez, 482 (e).
 Khasaba v. Chandrabhagabai, 927 (p).
 Khasim v. Carlier, 79 (q).
 Khater Mistri v. Sadruddi Khan, 895 (b).
 Khayali v. Husain, 819 (d).
 Khedu Rai v. Sheoparson Rao, 716 (a).
 Khemchand v. Malloo, 749 (o).
 Khemji Bhagwan Das Gajar v. Rama, 750 (u).
 Kherodemoney v. Doorgamoney, 365 (h).
 Khetra Mohan Das v. Biswa Nath, 74 (b), 74 (z).
 Khetra Nath v. Baharali, 133 (c).
 Khetterpal v. Khelal Kristo, 659 (i).
 Khettra Mohan Das v. Biswanath Bera, 939 (k).
 Khiali Ram v. Nathu Lal, 571 (o).
 Khiam v. Dheru, 94 (j).
 Khairajmal v. Daim, 541 (b), 563 (c).
 Khillu Ram v. Mst. Dhani Bai, 296 (v).
 Khimji v. Rama, 471 (g).
 Khirode Chandra v. Saroda Prosad, 274 (c), 274 (f).
 Khobhari Singh v. Ram Prosad Roy, 267 (l).
 Khodija Bibi v. Shah Muhammas, 324 (q).
 Khogendra Nath Chatterjee v. Sonathan Guha, 355 (x).
 Khuda Baksh v. Alimunnissa, 496 (v).
 Khushal v. Poonamchand, 511 (e), 719 (g).
 Khushal v. Punamchand, 730 (h).
 Khondakar v. Mohini, 837 (p).
 Khondiba v. Nana, 283 (c).
 Khub Lal v. Ajodhya, 102 (f).
 Khub Lal Singh v. Ajodhya Misser, 102 (x).
 Khuda Baksh v. Alim-un-nissa, 569 (a), 578 (n), 623 (o).
 Khudo Bakhsh v. Sheo Din, 819 (d).
 Khumbar Ali v. Ranga Rao, 947 (y).
 Khuni Lal v. Gobind Krishna, 60 (t).
 Khunni Lal v. Gobind, 51 (i).
 Khunni Lal v. Gobind Krishna, 132 (s), 911 (o).
 Khunni Lal v. Madan Mohan, 494 (v).
 Khursedji v. Pestonji, 921 (e).
 Khusalchand v. Ibrahim, 48 (o).
 Khusalchand v. Mahadevgiri, 169 (t).
 Khwaja Muhammad v. Muhammad Ibrahim, 243 (y), 250 (n), 252 (f), 252 (l).
 Kidar Nath v. Dungar Mal, 817 (e).
 Kidar Nath v. Durgamal & Sons, 7 (e).
 Kidar Nath v. Mathumal, 290 (q), 291 (x).
 Kidar Nath v. Math Mall, 301 (b).
 Kidney v. Coussmaker, 214 (l).
 Kiernander v. Benimadhab, 311 (d), 311 (e), 715 (z).
 Kikabhai v. Kalu Ghela, 815 (c).
 Kilby v. Betts, *In re-Stevens*, 162 (q).
 Kimpton v. Eve, 876 (x).
 King v. Bird, 602 (r), 602 (s).
 King Emperor v. Alexander, 909 (v).
 King v. Frost, 185 (q).
 King v. Midland Railway, 507 (t).
 King v. Smith, 270 (e), 417 (k), 546 (r).
 Kingbury v. Walter, 155 (b).
 Kingston Cotton Mills Co. v. Mouat, *Re. Mouat*, 338 (z).
 Kingston v. Preston, 800 (r).
 Kinnaird v. Trollope, 533 (v), 534 (m), 537 (o), 543 (w), 617, (p), 619 (g), 715 (u).
 Kinu Ram Das v. Mozaffer Hossain Shaha, 745 (a), 746 (z), 754 (o), 759 (r).
 Kinuram v. Nitye Chunder, 488 (o).
 Kiran Chandra Bose v. Dutt & Co., 310 (q).
 Kiran Chandra v. Dutt & Co., 287 (a), 310 (p), 601 (k).
 Kirat v. Debi Singh, 726 (m).
 Kirkinton v. Wood, 870 (v).
 Kirkwood v. Thompson, 639 (t).
 Kirpal Singh v. Sheombar Singh, 557 (r), 557 (s).
 Kirpa Singh v. Resalldar, 13 (w).
 Kirti Narayan v. Surendra Mohan, 621 (r).
 Kisanlal v. Abdulla, 9 (q).
 Kisan v. Manwar Sahib, 886 (k).
 Kishan Lal v. Ganga Ram, 471 (g), 472 (m), 480 (j), 515 (o), 750 (r), 750 (u), 753 (v).
 Kishan Lal v. Umrao Singh, 563 (d), 563 (f).
 Kishan Narain v. Pala Mal, 549 (v).
 Kishen Datt Ram v. Mumtaz Ali Khan, 478 (u).
 Kisen Gopal v. Bavin, 31 (o), 946 (u), 946 (w).
 Kishore Lal v. The Administrator General of Bengal, 906 (t).
 Kishori Dubain v. Mundra Dubain, 918 (n).
 Kishori Mohun Roy v. Ganga Babu Debi, 655 (i).
 Kishory Mohun v. Mahomed, 305 (u).
 Kishun Lal v. Hira Lal, 677 (g).
 Kisondas v. Dhondu, 190 (i).
 Kishorilal v. Krishna-Kamini, 3 (g), 3 (h), 6 (t).
 Kitchin, *Re., Ex-parte Punnett*, 647 (f), 648 (h), 664 (m).
 Kizhakkekath Kemalooti v. Pulikka-lakath Muhamed, 893 (b).

TABLE OF CASES.

lxiii

- Kizhakkinyakath Abdulla v. K. Moidin Kutti, 816 (n).
 Knight v. Bowyer, 33 (x).
 Knight v. Marjoribanks, 563 (l).
 Knight v. Mary, 861 (h).
 Knight v. Simmonds, 230 (y).
 Knight v. Williams, 889 (v).
 Knill v. Prowse, 797 (j).
 Kobhari Singh v. Ram Prosad, 271 (l).
 Kodi Shankara v. Moidin, 263 (n), 648 (e).
 Kodulal v. Beharilal, 21 (d), 781 (u).
 Kodusao v. Surajmal, 30 (u), 32 (c).
 Kokilambal v. Sundarammal, 250 (m).
 Kokilasari v. Mohunt Rudranand, 68 (s).
 Ko Kywetnee v. Ko Koung Bane, 472 (j), 473 (y).
 Kolathu Ayyar v. Ranga Vadhyar, 148 (l), 150 (y).
 Koman Nair v. Achutan Nair, 114 (w), 115 (y).
 Kommineri Appaya v. Mangala, 460 (q), 689 (p).
 Konchadi Shanbhogue v. Shiva Rao, 749 (j), 754 (b), 760 (e).
 Konchadi v. Shiva Rao, 501 (w), 502 (d).
 Kondama Naicker v. Kandasami Gounden, 60 (s), 105 (g), 106 (b), 106 (y).
 Kondayya v. Veeranna, 65 (m), 911 (u).
 Kondiba v. Nana, 40 (v), 250 (f), 283 (2).
 Kondi Munisami v. Dakshanamurthi, 307 (z).
 Kondu Bin Kanhoji v. Vishnu Moreshwar Bhat, 375 (i).
 Kondu Ramji v. Mahadev Gopal, 586 (q).
 Konwar Doorganath Roy v. Rau Chunder Sen, 69 (n).
 Koopmia v. Chidambaram, 731 (q).
 Ko Po Kun v. C. A. M. A. L. Firm, 761 (f), 764 (s).
 Kora Nayar v. Ramappa, 702 (k).
 Korapalu v. Narayana, 895 (u), 899 (k).
 Kota Balabadra v. Khetra Doss, 274 (h), 277 (w).
 Kotappa v. Raghavayya, 724 (x), 725 (d), 725 (i), 733 (j).
 Kotayya v. Kotappa, 759 (w).
 Kothari Narsimha Raju v. Bhupati Raju, 372 (p).
 Kowtah v. Yarudala Venkayya, 77 (y).
 Koylash Chunder v. Sonatun Chung, 5 (g).
 K. P. Kunhi Kiranath Chandu v. A. T. Ramunni, 946 (t).
 K. P. S. P. P. L. Firm v. C. A. P. C. Firm, 86 (s).
 Kraus v. Arnold, 532 (d).
 Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd., 551 (l), 551 (n), 552 (t), 552 (s), 553 (a), 569 (h).
 Krishna v. Aba Shetti, 124 (a).
 Krishna v. Akilanda, 21 (o).
 Krishna v. Dhirendra, 263 (n), 263 (q).
 Krishna Ayyangar v. Nallaperumal Pillai, 3 (a).
 Krishna Ayyangar v. Venkatarama, 639 (v).
 Krishna Ayyar v. Muthukumara-swami, 691 (d), 691 (e).
 Krishna Ayyar v. Muthukumara-sawmiya, 694 (c).
 Krishna Ayyar v. Muthukumara-swamy Pillai, 688 (i).
 Krishna v. Mammad, 549 (v).
 Krishna v. Mir Mahomed Ali, 301 (x).
 Krishna v. Mutta, 764 (n).
 Krishna Shetti v. Gilbert, 909 (x), 910 (k).
 Krishna Tanhaji v. Aba Shetti, 51 (i).
 Krishna Thanaji v. Aba Shetti Patil, 366 (l).
 Krishna v. Rayappa, 65 (m).
 Krishna v. Srinivasa, 302 (f).
 Krishna v. Subbanna, 827 (f).
 Krishna Kumari v. Rajendra, 119 (u).
 Krishna Patter v. Srinivasa Patter, 663 (w).
 Krishna Pillai v. Rangasami Pillai, 550 (i).
 Krishnabai v. Hari Govind, 902 (m).
 Krishnabai v. Parwatibai, 343 (h).
 Krishnabai v. Sawlaram, 306 (c), 314 (l), 315 (w), 316 (i).
 Krishnabhat v. Kapabhat, 21 (b).
 Krishnachandra v. Paba Model Company, Ltd., 609 (f).
 Krishnachandra v. President, Agency District Board, 9 (f), 9 (g).
 Krishna Chandra v. Rasik Lal, 258 (y), 271 (j).
 Krishna Charan v. Nitya Sundari, 906 (t).
 Krishna Das v. Dwarkadas, 5 (e).
 Krishna Das v. Venkatappa, 874 (e).
 Krishna Gopal v. Miller, 647 (e), 648 (k).
 Krishna v. Dino Mony, 305 (w).
 Krishna v. Gilbert, 885 (c), 890 (n).
 Krishna v. Hari, 493 (k).
 Krishna v. Jai Krishna, 328 (s).
 Krishnaji v. Ravji, 514 (c).
 Krishnaji v. Sangappa, 374 (a).
 Krishnaji v. Sitaram, 275 (k), 902 (s).
 Krishnaji Pandurang v. Gajanan Balvant, 22 (t).
 Krishnamma v. Mali, 368 (r), 428 (k), 440 (d), 440 (f).
 Krishnamma v. Suranna, 41 (a), 372 (r), 378 (r).
 Krishnamurthy v. Sathappa, 736 (j).
 Krishnan v. Ambu Kurup, 666 (e).
 Krishnan v. Perachan, 17 (b).
 Krishnan v. Sankara Varma, 260 (o).

- Krishnapa Singh v. Sir Raj Kuar, 918 (s).
 Krishnappa v. Abdul Khader, 309 (i).
 Krishnappa v. Shivappa, 308 (y).
 Krishnaramani v. Ananda Krishna, 159 (a).
 Krishnarao v. Babaji, 23 (g), 23 (h), 876 (d).
 Krishnarav v. Manaji, 862 (k).
 Krishnasami v. Natal Emigration Board, 901 (e).
 Krishnasami v. Ramasami, 338 (d).
 Krishnasami v. Venkatarama, 28 (s).
 Krishnasami Chettiar v. Ramasami Chettiar, 707 (z).
 Krishnaswami v. Subramania, 442 (l).
 Krishnaswami v. Thirumalai, 660 (o).
 Krishnaswami Naidu v. Karuppan Chettiar, 30 (e).
 Krishnaswamy v. Thippay Ramasamy, 706 (v).
 Krishnaya v. Mallya, 307 (a), 314 (k), 314 (o), 317 (r).
 Krishnayya v. Ponnuswami, 510 (s).
 Krishnier v. Arappuli, 666 (h).
 Krishraji v. Motilal, 307 (l).
 Kristna v. Mudaliar, 129 (v).
 Kristnasamy v. Official Assignee, 757 (p).
 Krishnamurthy v. Sathappa, 736 (j).
 Kristnaswami Iyengar v. Subramania Ganapathigal, 754 (p).
 Kristocomul Mitter v. Suresh Chunder, 86 (w).
 Kristodass v. Ramkant, 596 (d).
 Kristo Mohinee Dasi v. Kaliprosono Ghose.
 Kristo Nath v. Brown, 64 (z), 133 (h), 892 (l), 897 (m).
 Kristoni Mohini Dasi v. Kaliprosono Ghose, 759 (q), 759 (r).
 Kristoromani Dasi v. Narendra Krishna, 206 (h).
 Kshetra Nath v. Harasukdas, 36 (a), 46 (o), 510 (s).
 Kuchwar Lime and Stone Co., Ltd. v. Secretary of State for India, 781 (v), 817 (g).
 Kuddi Lal v. Aisha Jehan, 557 (o), 557 (p).
 Kuddi Lal v. Aisha, 673 (l).
 Kudhai v. Sheo Dayal, 560 (a).
 Kulachandra v. Jogendrachandra, 374 (t).
 Kuldip Singh v. Khotrani Koer, 132 (s).
 Kuloda Prosad Chatterjee v. Jageshar Koer, 227 (v).
 Kumakya Narain Singh v. Kherlik Ahmad, 907 (x).
 Kumar Arun Chandra v. Bhagaban Chandra, 827 (g).
 Kumara v. Srinivasa, 441 (o).
 Kumara Asima v. Kumara Kumara Krishna, 159 (u), 159 (z).
 Kumarchandra v. Narendranath, 133 (j).
 Kumar Raj Krishna v. Barabani Coal Concern, Ltd., 51 (l), 407 (t).
 Kumar Raj Krishna Prasad v. Barabani Coal Concern Ltd., 418 (s), 794 (c).
 Kumar Satya Niranjana v. Ram Lal Kaviraj, 875 (i).
 Kumini Ama v. Pakram, 491 (q).
 Kumini Ama v. Pakram Kolusheri, 513 (s).
 Kundamul v. Dyer, 12 (j).
 Kundan Lal v. Anund Sarup, 911 (s).
 Kundan Lal v. Bhagwati Saran, 96 (q).
 Kundanmal v. Wasudeo, 488 (p), 514 (a).
 Kundu v. Impichi, 514 (g).
 Kundummal v. Kashi Bai, 669 (p).
 Kundun Lal v. Deepchand, 811 (n).
 Kunhammad v. Etakarati Ammad, 833 (u).
 Kunhamuthy v. Ahmad, 167 (e).
 Kunhanujan v. Anjelu, 598 (o), 856 (k), 857 (t).
 Kunhayen v. Mayan, 837 (t).
 Kunhiraan Nambiar v. Khuni Kannan Nambiar, 837 (s), 837 (w).
 Kunhi Sou v. Mulloli Chattu, 220 (k).
 Kunhi Umah v. Amed, 317 (r), 518 (d).
 Kunhu Pothanassiar v. Raru Nair, 319 (i), 329 (c), 329 (d), 329 (e), 329 (f), 329 (p), 331 (o).
 Kunj Behari Lal v. Parsotam Narain, 597 (g).
 Kunja Lal v. Narasamba, 48 (s).
 Kunj Lal v. Narasamba, 48 (p).
 Kun Muhammad v. Narayanan, 301 (x).
 Kuppa v. Dorasami, 69 (i).
 Kuppa Krishna v. Mhasti Goli, 481 (t), 485 (l), 485 (m), 485 (n), 485 (r).
 Kuppier v. Periakaruppa Kavundan, 616 (g), 619 (i), 619 (m), 622 (j).
 Kuppamia Saheb v. Chidambaram Chetty, 723 (e), 724 (t), 731 (q), 735 (e), 735 (g).
 Kuppasami Pillai v. Mr. Karim, 908 (l).
 Kuppasami v. Papathi Ammal, 560 (z).
 Kuppaswami v. Chinnaswami, 370 (c).
 Kuralaia Nanubhai v. Mansukhram, 353 (s).
 Kuray Mal v. Puran Mal, 560 (a).
 Kurri Veerareddi v. Kurri Bapireddi, 240 (g), 350 (u), 351 (w), 353 (e), 354 (m), 357 (h), 369 (p), 370 (x), 449 (n), 451 (z).
 Kushal v. Punamchand, 729 (e).
 Kustooru Kumari v. Benderam Sen, 67 (b).

Kuverji v. Municipality of Lonavla, 921 (i).
 K. V. Galliara v. U. Thet, 39 (l), 249 (y).
 K. V. Kuniraman Menon v. M. T. Avuthala Kutti, 621 (o).
 K. Y. Chettyar Firm v. Jamila Bi Bi, 309 (g), 317 (r).

L

Lachiram v. Bholu, 313 (b).
 Lachman Prasad v. Sarman Singh, 261 (z).
 Lachman Singh v. Saliq Ram, 702 (a).
 Lachman v. Surendra, 525 (k).
 Lachmeswar Singh v. Manowar Hossein, 337 (k).
 Lachmi Kunwar v. Durga Kunwar, 103 (l).
 Lachmi Narain v. Babu Ram, 608 (x), 610 (m).
 Lachmi Narain v. Kunji Lal, 109 (u).
 Lachmi Narain v. Makund Singh, 79 (r).
 Lachmi Narain v. Turahunissa, 752 (k).
 Lachmi Narian v. Muhamad Yusuf, 561 (l).
 Lachmi Prasad v. Lachmi Narain, 297 (h).
 Lachumi Narayan v. Dharam Chand, 74 (z).
 Lacon v. Allen, 503 (m), 503 (n).
 Lacon v. Mertins, 347 (l).
 L. A. Creet v. Firm Gangaraj—Gulraj, 494 (j), 892 (z).
 Ladhomal v. Fleming Shaw & Co., 321 (j), 324 (e).
 Ladu v. Babaji, 488 (k).
 Ladu Narain v. Goberdhan, 263 (n), 263 (r).
 Lagunas Nitrate Company v. Lagunas Syndicate, 45 (z).
 Laing v. Meader, 531 (n).
 Lainson v. Lainson, 195 (u).
 Laird v. Pim, 459 (n).
 Lake v. Bell, 672 (y).
 Lake v. Braddock, 101 (j).
 Lake v. Craddock, 280 (e).
 Lakhmangouda v. Baswantrao, 68 (p).
 Lakhmichand v. Janardhan, 717 (b).
 Lakhmi Chand v. Kedar Nath, 86 (w).
 Lakhmichand Khetsey v. Ratanbai, 824 (u), 844 (a).
 Lakhmichand v. Ratanbai, 843 (u).
 Lakhmi Chand v. Partap Singh, 774 (e), 777 (h).
 Lakhmi Chand v. Pratap Singh, 774 (f).
 Lakhmidas v. Jamnadas, 548 (n), 563 (h), 688 (n), 693 (t), 694 (a).
 Lakhpati v. Rambodh Singh, 524 (x).
 Lakshan Chunder v. Sm. Nikunjamoni, 315 (b).

Lakshmana v. Ramchandra, 874 (e).
 Lakshmanaswami v. Rangamma, 58 (w).
 Lakshman Bhisaji v. Hari Dinkar Desai, 667 (t).
 Lakshmandas v. Dasrat, 38 (w), 40 (v), 316 (e), 378 (k).
 Lakshman v. Gopal, 659 (i).
 Lakshman v. Hari Dinkar, 550 (h).
 Lakshman v. Krishnaji, 525 (n).
 Lakshman v. Ram Chandra, 101 (m).
 Lakshman Ramchand Joshi v. Satyabhamabai, 757 (v).
 Lakshman v. Satyabhamabai, 226 (f), 226 (h), 227 (r).
 Lakshman v. Vasudev, 243 (a), 243 (w), 249 (w), 251 (y), 254 (e).
 Lakshmayya v. Appadu, 659 (d).
 Lakshmi Achi v. Narayansami, 735 (h), 736 (i).
 Lakshmiah Chetty v. Kothandarama, 227 (x), 336 (c), 922 (d).
 Lakshmi Doss v. Roop Laul, 328 (w).
 Lakshmi v. Krishna, 486 (x).
 Lakshmi Narain v. Mohamdi Begam, 663 (y).
 Lakshmi Narian v. Mohamdi, 669 (o), 669 (t), 670 (b), 670 (c), 673 (l).
 Lakshminaranappa v. Melothraman, 220 (l).
 Lakshmindrathirtha v. Raghavendra, 114 (p).
 Lakshmi v. Ramappa, 491 (n).
 Lakshmishankar v. Vaijinath, 166 (m).
 Lakshmi Venkayamma v. Venkata Narsimha Appa Rao, 352 (z), 353 (n).
 Lakshuman v. Madhab Krishna, 609 (a).
 Lala Bahadur Singh v. Rameshwar Prasad, 555 (u).
 Lala Batcha v. Arcot Narainswami, 531 (b).
 Lala Bharab Chandra v. Lalit Mohun Singh, 598 (q).
 Lala Bharuch Chandra v. Lalit Mohun Singh, 438 (p).
 Lala Dilawar v. Dewan Bolakiram, 460 (q).
 Lala Ganga Ram v. Mewa Ram Singh, 219 (t).
 Lala Gopi Chand v. Jodharj Deojit, 337 (i), 337 (o).
 Lala Himmat v. Lleuhellen, 441 (o).
 Lala Jugdeo v. Brij Behari Lal, 16 (u).
 Lala Kalyan Mal v. Ahmad Uddin Khan, 113 (b), 920 (w).
 Lala Mahabir Prasad v. Mt. Taj Begam, 659 (j).
 Lala Prabhu Lal v. Mylen, 243 (d).
 Lala Ram v. Dal Koer, 129 (v).
 Lala Ramjewan v. Dal Koer, 184 (i).
 Lala Ram Narain v. Radha Kishen, 756 (j).
 Lala Shiam v. Chootey Lal, 909 (f).

- Lalai Ram v. Anant Ram, 493 (s).
 Lal Bahadur v. Abharan, 563 (g).
 Lal Bahadur v. Ambika Prasad, 102 (t), 111 (m).
 Lal Bahadur v. Kamleshar Nath, 109 (p), 110 (x).
 Lal Bahadur v. Murli Dhar, 669 (v).
 Lal Bahadur v. Rameshwar, 519 (t), 520 (j).
 Lal Baijnath v. Chandrapal, 55 (g), 56 (x).
 Lalchand v. Hussainio, 30 (w), 332 (x).
 Lalchand v. Lakshman, 240 (f), 357 (h), 371 (i), 375 (n), 451 (y).
 Lali Jan v. Muhammad Shafi Khan, 129 (w), 130 (c), 135 (x).
 Laliteshwar v. Rameshwar, 56 (c).
 Lalit Mohan v. Chukkun Lal, 129 (v).
 Lalit Mohan v. Gopal Chuck Coal Co., Ltd., 820 (h).
 Lalit Mohan Roy v. Binodai Dabee, 753 (a).
 Lalit Mohun Singh Roy v. Chukkun Lal Roy, 132 (x).
 Lalji v. Janki Lal, 608 (t).
 Lalji Mal v. Mohan Lal, 494 (z).
 Lalji v. Nuran, 82 (x).
 Lallubhai v. Chimanlal, 384 (h), 384 (m), 389 (o), 389 (p), 389 (s), 392 (r), 392 (u), 405 (g), 406 (j).
 Lallu v. Jugmohan, 173 (u).
 Lallu Singh v. Chandra Sen, 32 (i).
 Lallu Singh v. Gur Narain, 928 (u).
 Lallu Singh v. Ram Nandan, 571 (o), 756 (l).
 Lal Narsingh v. Mahommad Yakub, 515 (r), 516 (j).
 Lal Singh v. Jai Chand, 327 (p), 327 (q).
 Lalta Prasad v. Jagdish Narayan, 481 (v).
 Lalta Singh v. Mathura, 625 (f).
 Lalu v. Bai Motan, 893 (u).
 Lalu v. Kashi, 757 (s).
 Lal Umrao v. Lal Singh, 22 (w).
 Lamas v. Bayley, 348 (a), 348 (c).
 Lamb v. Lamb, 216 (c).
 Lamb v. Vice, 239 (d).
 Lambourn v. McLellan, 849 (z), 850 (j).
 Lamplugh v. Lamplugh, 336 (a).
 Lancashire Loans Limited v. Black, 917 (g).
 Land, Building Investment & Cottage Improvement Co. v. Martin, *Re. Martin's Trusts, Re. Martin*, 72 (l).
 Lander & Bagley's Contract, *Re.*, 808 (g), 808 (h), 808 (i), 883 (a).
 Land Mortgage Bank of India v. Abdul Kasim, 467 (r).
 Land Mortgage Bank of India, Ltd. v. Vishnu, 293 (u), 304 (s).
 Landowner West of England, Etc. v. Ashford, 647 (g).
 Lane v. Cox, 825 (z), 842 (o).
 Lane v. Debenham, 89 (j).
 Lang, *In re.*, 479 (y).
 Lang v. Gale, 424 (r).
 Lang v. Heptullabhai, 543 (t).
 Lang v. Moolji, 87 (m).
 Lang Propeller, Ltd., *In re.*, 479 (z).
 Langridge v. Levy, 679 (n).
 Langstaffe v. Fenwick, 671 (n), 671 (t).
 Langston, *Ex-parte*, 499 (i), 506 (j).
 Langton v. Henson, 860 (r).
 Lanmia v. Mahomed Easin, 354 (k).
 Lanoy v. The Duke of Athol, 687.
 Lanyon v. Lanyon, *Re. Lanyon*, 199 (n), 203 (q).
 Larios v. Bonany, 470 (p).
 Latchmiammal v. Gangammal, 6 (t).
 Lathropp v. Marsh, 877 (j).
 Latter v. Dashwood, 675 (q), 675 (r).
 Laurie & Morewood v. John Dudin, 948 (f).
 Lavery v. Pursell, 348 (e), 363 (z).
 Lawby v. Hooper, 492 (g).
 Law Guarantee and Trust Society v. Governor and Company of Bank of England, 100 (a).
 Lawison v. Tremere, 259 (j).
 Lawrence v. Hull, 393 (z).
 Lawrence v. Maggs, 591 (t).
 Lawton v. Lawton, 28 (i).
 Laxman v. Bhagwan Singh, 356 (z).
 Laxman Ganesh v. Mathurabai, 774 (w).
 Laxmanlal v. Mulshankar, 189 (a).
 Laxmanrao v. Bhagwansingh, 379 (v), 427 (d).
 Laxman Rao v. Keshav, 518 (d).
 Laxman v. Ravji, 354 (c), 379 (u).
 Laxmi Chand v. Kastur, 515 (m).
 Laxmi Narain v. Mohmdii Begam, 112 (y), 920 (w).
 Laybourn v. Gridley, 394 (r).
 Laythoarp v. Bryant, 359 (u).
 Leach v. Thomas, 27 (z), 864 (f).
 Leader v. Homewood, 852 (y).
 Leader v. Moody, 834 (t), 835 (l).
 Leake v. Robinson, 154 (v), 154 (y), 155 (z), 156 (g), 182 (x), 183 (d).
 Leak v. Macdowall, 280 (i).
 Leatherdale v. Sweepstone, 531 (z).
 Leathes, *Ex-parte*, 507 (u).
 Lee v. Ardy, 30 (m).
 Lee v. Chilton, 36 (e).
 Lee Lim Ma Hook v. Saw Mah Hone, 309 (f).
 Leech v. Schweder, 237 (h), 831 (f).
 Leeds & County Bank v. Walker, 6 (x).
 Leelanund Singh v. Munooranjan Singh, 66 (t).
 Lees v. Fisher, 511 (c).
 Lees v. Whiteley, 286 (r), 668 (l).

- Legg v. Mathieson, 607 (l), 607 (m).
 Leggott v. The Metropolitan Railway Co., 439 (s).
 Le Gros v. Cockerell, 279 (t).
 Lehman v. McArthur, 857 (o).
 Leicestershire Banking Co., Ltd. v. Hawkins, 721 (i), 721 (n).
 Leigh v. Burnett, 648 (o), 649 (k).
 Leigh v. Dickeson 280 (q).
 Leigh v. Lloyd, 35 (m).
 Leigh v. Taylor, 26 (g), 27 (u).
 Lalanund Singh v. Government of Bengal, 66 (t).
 Le. Lievre v. Gould, 45 (y).
 Le Neve v. Le Neve, 42 (m).
 Leonard v. Baker, 322 (e).
 Leonard v. Leonard, 519 (f).
 Leon v. Hunt, 603 (b).
 Leroux v. Brown, 345 (z).
 Leschallas v. Woolf, 847 (e), 852 (v), 852 (x).
 Leslie v. French, 759 (r).
 Leslie v. French, *In re* Leslie, 758 (h).
 Leslie v. Thompson, 392 (s).
 Lester v. Foxcroft, 346 (b), 346 (d).
 Lester v. Garland, 187 (x), 188 (f), 198 (j).
 Lesturgeon v. Martin, 417 (f).
 Letts v. Hutchins, 619 (e).
 Levashoff v. Block, *re*. Korvine's Trust, 934 (u).
 Levy v. Sewill, *re*. Moss, 559 (l).
 Levy v. Stogdon, 452 (s), 453 (t).
 Lewell v. Angerstein, 28 (q).
 Lewin v. Guest, 407 (d).
 Lewis & Allenby, Ltd., v. Pegge, 855 (b).
 Lewis v. Baker, 790 (i), 791 (o).
 Lewis v. Bond, 35 (t).
 Lewis v. Lewis, 388 (c), 519 (q).
 Lewis v. Lewis, *In re*. Lewis, 188 (r).
 Lewis v. Moore, *Re*. Moore's Trusts, 199 (n).
 Lewis v. Stephenson, 35 (s).
 Lewkner v. Freeman, 330 (d).
 Leyland v. Illingworth, 384 (i), 394 (o).
 Lickbarrow v. Mason, 46 (s), 948.
 Liddiard v. Waldron, 841 (d).
 Liddell v. Norton, 397 (u).
 Lila Morji v. Vasudeo, 546 (w).
 Liles v. Terry, 921 (c).
 Lilford (Lord) v. Powys Keck, 746 (q).
 Limba v. Rama, 70 (y).
 Limbaji v. Rahi, 94 (j), 95 (b), 95 (h).
 Lim Charlie v. Official Receiver, 927 (i).
 Limji Nowroji v. Bapooji Ruttonji, 167 (d).
 Lincoln v. Wright, 481 (z), 482 (f).
 Lindeboom v. Camille, *In re*. Caus, 168 (h).
 Lindon v. Sharp, 321 (d).
 Lindsay Petroleum Co. v. Hurd, 398 (g), 679 (m).
 Lindsay's Trustees, 162 (u).
 Lindsey v. Cundy, 5 (q).
 Line v. Stephenson, 828 (m), 830 (k), 833 (r), 843 (x).
 Linga Reddi v. Sama Rau, 621 (l), 621 (r), 622 (c).
 Ling Reddi v. Samarao, 621 (h).
 Lippard v. Ricketts, 655 (l).
 Lipscomb v. Lipscomb, 697 (s).
 Liquidation Estates Purchase Co. v. Willoughby, 763 (v), 766 (v), 773 (v), 776 (d).
 Lisburne (Earl) v. Davies, 836 (o).
 Lister v. Lane & Neshan, 867 (v).
 Lister v. Lane, 865 (l), 866 (b).
 Lister v. Turner, 340 (t).
 Litvinoff v. Kent, 803 (b).
 Liverpool Corporation v. Wright, 190 (v).
 Lloyd v. Attwood, 504 (e), 505 (t).
 Lloyd v. Banks, 32 (k).
 Lloyds Bank v. Bullock, 682 (u).
 Lloyds Bank v. Cavendish, 941 (i).
 Lloyd's Bank, Ltd., & Lillington's Contract, *Re*., 410 (a).
 Lloyds Bank, Ltd. v. Swiss Bankverin, 34 (b).
 Lloyds Bank, Ltd. v. P. E. Guzdar & Co., 46 (m).
 Lloyd's Banking Co. v. Jones, 42 (p).
 Lloyd v. Branton, 193 (y), 203 (u), 203 (y).
 Lloyd v. Coote & Ball, 921 (c).
 Lloyd v. Crispe, 857 (n).
 Lloyd's Estate, *Re*., 777 (f).
 Lloyd's v. Harper, 239 (d).
 Lloyd v. Lloyd, 182 (x), 182 (z), 183 (d).
 Lloyd v. Mason, 765 (x).
 Lloyd v. Nowell, 376 (r), 376 (u).
 Lloyd v. Webb, 172 (j).
 Lloyd's Furniture, Palace, *Re*., 325 (u).
 Locke v. Evans, 758 (j).
 Lockey v. Lockey, 347 (f).
 Lock v. Furze, 835 (p).
 Lockhart v. Hardy, 617 (p), 626 (p).
 Locking v. Parker, 773 (v).
 Lodd Govindoss v. Muthiah Chetty, 441 (t), 444 (i), 444 (j).
 Lodha Singh v. Sundar Singh, 746 (l), 757 (m).
 Lofft v. Dennis, 843 (q).
 Loke Nath v. Achutananda, 306 (n), 307 (n).
 Lokenath v. Jahania, 22 (i).
 Loknath v. Shah Wahib, 377 (e).
 Loma Gomaji v. Visvanath Amrit, 699 (g), 744 (v).
 Lomax v. Bird, 533 (z), 550 (j).

Lomba Gomaji v. Vishvanath, 737 (o),
 768 (c), 774 (c).
 London & County Banking Co. v.
 London & River Plate Bank, 919 (w).
 London & County Banking Co. v.
 Nixon, 412 (w), 500 (d), 502 (l).
 London & Northern Estates Co. v.
 Schlesinger, 841 (g).
 London & Westminster Loan &
 Discount Co. v. Draje, 851 (t).
 London City v. Pugh, 877 (k).
 London Corporation v. Hedger, 877 (i).
 London County Council v. Allen,
 230 (x), 238 (q), 238 (r).
 London & South Western Railway
 Co. v. Gomm, 131 (m), 145 (d),
 145 (j), 145 (z), 149 (q), 230 (q),
 233 (s).
 Long v. Blackall, 139 (q).
 Long v. Long, 217 (l).
 Longley v. Hammond, 841 (f).
 Longmate v. Ledger, 93 (y).
 Loosemore v. Radford, 438 (n).
 Lootfulhuck v. Gopee Chunder, 223 (u),
 224, (v).
 Lopez v. Muddun Mohan Thakoor,
 582 (f).
 Loundes v. Lake, 385 (b).
 Loveday v. Chapman, 711 (r).
 Love Stewart, Ltd. v. Instone & Co.,
 Ltd., 376 (t).
 Low v. Burron, 144 (v).
 Lowe v. Pears, 190 (x).
 Lowery v. Walker, 925 (u).
 Low & Co., Hazarimull, 461 (z).
 Lowther v. Carlton, 241 (q).
 Lowther v. Clifford, 845 (r).
 Lucas v. James, 385 (x), 387 (r).
 Lucas v. Seale, 606 (i).
 Lucena v. Lucena, 185 (p).
 Luchmee Buksh v. Runjeet Ram,
 542 (m).
 Luchmeshar v. Dookh Mochan, 491 (p),
 492 (b), 492 (f), 497 (y).
 Luchmessur Singh v. Leclanund Singh
 120 (l).
 Luchmun v. Kalli Churan, 243 (y),
 251 (e).
 Lucy Moss v. Mah Nyein Mat,
 930 (e).
 Ludlow v. Bunbury, 127 (y).
 Lukhee Dabea v. Gokool Chunder
 Chowdry, 102 (x).
 Lurecott v. Wakeley & Wheeler, 865 (j),
 865 (n), 865 (p), 866 (a), 866 (b),
 866 (c).
 Lutar Ram v. Lal Ranjit Singh, 720 (y),
 725 (e).
 Luxmandas v. Dasrat, 315 (s).
 Lyle v. Richards, 416 (k).
 Lyne, *Ex-parte* 93 (g).
 Lyon & Co. v. London City & Midland
 Bank, 27 (n), 28 (p).

Lyon v. Reed, 888 (p).
 Lysney v. Selby, 385 (y).
 Lyttleton Times Co. Ltd. v. Warness,
 Ltd., 834 (a).

M

Macbryde v. Eykyn, 34 (g).
 Macclesfield, 347 (i).
 Macleod v. Kissan, 408 (m), 647 (c),
 648 (j).
 Macfarlane v. Macartney, *Re. Macart-*
ney, 213 (h).
 Mackaness v. Percival, 126 (s).
 Mackay v. Gould, *In re. Mackay*,
 188 (l).
 Mackenzie v. Childers, 146 (q), 421 (u).
 Mackenzie v. Gordon, 769 (a), 772 (a).
 Mackenzie v. Himalaya Assurance
 Co. Ltd., 145 (j).
 Mackins v. Percy Ibotson & Sons,
 607 (p).
 Mackintosh v. Gopee, 906 (w), 907 (d),
 907 (f).
 Mackintosh v. Trotter, 847 (i), 847 (o).
 Mackrett v. Symmons, 440 (c).
 Macleay, *In re*, 126 (m), 126 (p),
 126 (u), 127 (e).
 Macleod v. Jones, 639 (c).
 Macleod v. Kissan, 122 (g), 123 (m),
 287 (x), 601 (e), 310 (p).
 Macnaghten v. Bhekaree Singh, 598 (r).
 Macnaghten v. Lala Mewa Lall,
 598 (m).
 Macnaghten v. Rameshwar Singh,
 787 (j), 789 (v).
 Macneil v. Saroda Sundari, 33 (s),
 243 (w).
 Madam Pillai v. Badrakali, 124 (b),
 124 (d), 366 (w), 367 (p), 911 (t).
 Madan Gopal v. Lahiri Mal, 330 (r),
 331 (k).
 Madan Mohan v. Kanhai Lal, 473 (i).
 Madan Mohan v. Rakhachandra,
 103 (k).
 Madan Mohan Singh v. Raj Kishori,
 287 (g).
 Madappa Hedge v. Ram Krishna,
 615 (f), 615 (l).
 Madar Saheb v. Sannabawa, 133 (c),
 861 (b), 891 (r).
 Madavrao v. Balabhai, 923 (m).
 Maddison v. Alderson, 343 (o), 344 (w),
 348 (i), 349 (m), 350 (o), 350 (s),
 351 (y), 352 (a), 353 (i), 353 (j),
 353 (l), 354 (g).
 Maddison v. Chapman, 177 (w).
 Madhab v. Bejoy Chand, 854 (j),
 855 (d).
 Madhab v. Narottam, 861 (b).
 Madhab Chandra v. Bejoy Chand,
 15 (j), 16 (t), 82 (d), 900 (s), 910 (j).
 Madhab Rav v. Kashibai, 928 (u).

- Madhavi Amma *v.* Kunhi Pathumma, 703 (*q*), 703 (*s*).
 Madhavrao *v.* Kashibai, 22 (*k*), 455 (*q*), 923 (*p*).
 Madhavrao *v.* Saheb Rao, 483 (*p*), 484 (*c*), 485 (*o*), 485 (*p*), 485 (*q*).
 Madho Das *v.* Ramji, 314 (*p*).
 Madho Das *v.* Ramji Patak, 74 (*e*), 316 (*g*).
 Madho Das *v.* Ram Kishen, 501 (*y*).
 Madho Misser *v.* Sidh Vinaik, 755 (*s*).
 Madho Parshad *v.* Mehrban Singh, 112 (*p*), 109 (*v*), 111 (*k*), 225 (*y*), 261 (*z*), 276 (*c*), 450 (*s*).
 Madho Ram *v.* Gulam Mohiuddin, 742 (*z*).
 Madho Singh *v.* Pancham Singh, 769 (*r*).
 Madhubmoney Dassee *v.* Nude Lal Gupte, 598 (*t*).
 Madhu Sudan *v.* Kamini Kanta, 15 (*j*), 82 (*d*), 854 (*g*), 855 (*d*).
 Madhusudan *v.* Midnapore Zemindari Co., 134 (*k*).
 Madhwa *v.* Venkataramanjulu, 48 (*r*).
 Madley *v.* Booth, 393 (*h*), 410 (*c*).
 Madon Lal *v.* Muhammad Ali, 189 (*y*).
 Madonlal *v.* Shakra Girdhar, 595 (*u*).
 Madras Building Co. *v.* Rowlandson, 38 (*r*), 378 (*n*).
 Madras Deposit & Benefit Society *v.* Passanha, 632 (*p*), 635 (*m*).
 Madras & Southern Maratta Ry. Co., Ltd. *v.* Haridoss, 947 (*c*).
 Ma E. Khin *v.* Maung Sein, 100 (*b*).
 Ma E. *v.* Maung Po Ko, 584 (*v*).
 Mafatlal *v.* Kanialal, 202 (*k*).
 Magee *v.* Lavell, 415 (*g*).
 Ma Gin *v.* Mg. Lu Gale, 595 (*t*).
 Magniram *v.* Bakubai, 272 (*o*), 594 (*k*).
 Magniram *v.* Mehdi Hoosein, 38 (*a*), 460 (*u*), 461 (*w*), 461 (*x*), 462 (*h*), 691 (*g*).
 Magu Brahma *v.* Bholi Das, 40 (*x*).
 Magusud Ali Khan *v.* Abdullah Khan, 773 (*m*).
 Ma Gyi *v.* Maung Tat, 783 (*c*).
 Mahabir *v.* Sheo Shankar, 668 (*e*), 672 (*c*), 673 (*f*), 673 (*i*).
 Mahabir Pershad *v.* Moheswar Nath Sahai, 111 (*g*).
 Mahabir Pershad *v.* Ramyad Singh, 225 (*z*).
 Mahabir Prasad *v.* Awla Prasad, 105 (*v*).
 Mahabir Singh *v.* Kishori, 742 (*b*).
 Mahadaji *v.* Ganpatshet, 609 (*z*), 610 (*l*).
 Mahadaji *v.* Joti, 622 (*m*).
 Mahadeo *v.* Dharamnath, 855 (*f*).
 Mahadeo *v.* Sioram, 817 (*d*).
 Mahadeo Krishna Rupji, *In re.*, 107 (*q*).
 Mahadeo Prasad *v.* Mata Prasad, 62 (*i*).
 Mahadeo Prasad *v.* Mathura Chaudhari, 60 (*q*), 637 (*w*).
 Mahadeo Singh *v.* Har Baksh, 262 (*d*), 266 (*f*), 268 (*t*).
 Mahadeo Tewari *v.* Sitla Bakhsh Singh, 623 (*o*).
 Mahadev Prasad *v.* Mt. Dhanraj, 105 (*l*).
 Mahadev *v.* Ramchandra, 671 (*j*).
 Mahadev *v.* Sadashiv, 377 (*h*).
 Mahadevrao *v.* Sahebrao, 485 (*m*).
 Mahalakshimi *v.* Badan Singh, 469 (*b*), 751 (*f*).
 Mahalakshmammal *v.* Sriman, 769 (*y*), 771 (*p*).
 Mahalavu *v.* Kusaji, 22 (*u*).
 Mahalinga *v.* Ganapathi, 124 (*r*), 473 (*i*).
 Mahamad Musa *v.* Bagas Amanji, 496 (*p*).
 Mahamaya Debi *v.* Haridas Haldar, 595 (*w*).
 Mahamaya *v.* Haridas, 68 (*y*), 68 (*z*), 70 (*a*), 70 (*z*).
 Mahammad Afzal Khan *v.* Ghulam, Kasim Khan, 212 (*a*).
 Mahammad Ismail *v.* Suresh Chandra, 798 (*o*).
 Mahammad Khali *v.* Alathadi Maloor Kunhi Kannan Nair, 745 (*e*).
 Mahammad Khumbar Ali *v.* Ranga Rao, 947 (*y*).
 Mahananda Roy *v.* Saratmani Debi, 127 (*d*), 133 (*c*).
 Mahanta Bhagaban *v.* Bisweswar, 243 (*y*), 244 (*i*), 244 (*o*).
 Mahant Ganeshgir *v.* Fatechand Bania, 113 (*f*), 113 (*d*).
 Mahanth Ram Charan *v.* Naurangi Lal, 114 (*r*).
 Mahant Kesho Das *v.* Amar Dasji, 114 (*k*).
 Mahant Mahabir Das *v.* Jamuna Prasad, 96 (*p*).
 Mahanund *v.* Banimadhub, 105 (*s*).
 Maharaja Bahadur Kesho Prasad Singh *v.* Madho Prasad Singh, 765 (*g*).
 Maharaj Bhadur Singh *v.* Bal Chand Chowdhury, 231 (*d*).
 Maharaja Kesho Prasad Singh *v.* Chandrika Prasad Singh, 496 (*q*).
 Maharaja Kumar Gopal Saran *v.* Sita Devi, 918 (*k*), 925 (*q*).
 Maharaja Ram Narayan Singh *v.* Adhindra Nath Mukerjee, 525 (*i*).
 Maharaja Surja Kanta *v.* Sarat Chandra, 120 (*j*).
 Maharaja of Bobbili *v.* Venkataramanjulu Naidu, 276 (*a*), 276 (*b*).
 Maharaja of Jeypore *v.* Rukmini, 6 (*u*), 13 (*t*), 16 (*o*), 893 (*e*), 895 (*a*), 895 (*w*).

- Maharaja of Vizianagaram *v.* Sitaram, 752 (*k*).
 Maharaj Bahadur Singh *v.* A. H. Forbes, 768 (*n*).
 Maharaj Bahadur *v.* Balchand, 147 (*j*), 148 (*n*).
 Maharaj Bahadur Singh *v.* Bhalchand, 140 (*t*).
 Maharaj Rajaramji *v.* Ramnath, 151 (*f*).
 Maharana Fatesangji *v.* Desai Kallian-rayaji, 22 (*o*).
 Maharana Kunwar *v.* E. V. David, 333 (*f*).
 Ma Hawa Bi *v.* Sein Kho, 120 (*h*), 219 (*v*).
 Ma Huit *v.* Maung Po Pu, 436 (*x*).
 Mahdeo Chintaman *v.* Kirtikar, 374 (*d*), 375 (*k*).
 Mahdeo *v.* Ganeshram, 254 (*e*).
 Mahdeo *v.* Jainarain, 893 (*w*).
 Mahdeo Prasad *v.* Anandi Lal, 753 (*r*).
 Mahdevrao *v.* Sahebrao, 485 (*a*).
 Mahdho Parshad *v.* Mehrban Singh, 101 (*o*).
 Mahdo Singh *v.* Pancham Singh, 767 (*a*), 772 (*g*).
 Mahesh Datt *v.* Babu Ram, 711 (*t*).
 Mahesh Singh *v.* Chouharja Singh, 494 (*x*).
 Maheshwar Prasad *v.* Babu Ram, 586 (*k*).
 Mahim Chandra Dey *v.* Ram Dayal Dutta, 917 (*x*).
 Mahim Chandra *v.* Karmali, 799 (*d*).
 Mahipat *v.* Lakshman, 816 (*n*).
 Mahmood Ali *v.* Ali Mirza, 678 (*z*).
 Mahomed Abdul Hamid *v.* Jeraj Mal, 555 (*s*).
 Mahomed Ali Hoosain *v.* Nazar Ali, 482 (*e*).
 Mahomed Ali *v.* Maderisah, 55 (*g*), 56 (*x*).
 Mahomed Ali *v.* Venkatapathi, 433 (*g*).
 Mahomed Amir *v.* Jan Patel, 489 (*u*).
 Mahomed *v.* Bai Cooverbai, 38 (*w*).
 Mahomed *v.* Ezekiel, 579 (*v*).
 Mahomed *v.* Jijibhai, 488 (*k*).
 Mahomed Baksh *v.* Hooseini Bibi, 921 (*l*).
 Mahomed Favez *v.* Jamoo Gazeo, 795 (*h*).
 Mahomed Fazihzzaman *v.* Anwar Husain, 811 (*n*).
 Mahomed Gulab *v.* Mahomed Sulliman, 679 (*l*).
 Mahomed Habeeb Alum *v.* Anjuman Begum, 171 (*h*).
 Mahomed Hasham & Co., *In re.* 51 (*d*), 53 (*b*).
 Mahomed Hossain *v.* Sheo Darshan, 572 (*a*).
 Mahomed Ibrahim Hoosein Khan *v.* Ambika Persad Singh, 728 (*y*), 734 (*q*), 768 (*g*), 772 (*e*).
 Mahomed Ibrahim *v.* Ambika Pershad, 718 (*m*), 723 (*o*), 724 (*u*), 727 (*u*), 731 (*r*), 733 (*j*).
 Mahomed Ishaq *v.* Rup Narain, 669 (*y*).
 Mahomed Musa *v.* Aghore Kumar Ganguli, 124 (*u*), 343 (*h*), 379 (*w*), 351 (*x*), 352 (*b*), 353 (*i*), 353 (*m*), 354 (*h*), 354 (*w*).
 Mahomed Noor *v.* Ashiq Beg, 814 (*a*).
 Mahomed Rahimtulla *v.* Esmail Allarakhia, 653 (*f*).
 Mahomed Said *v.* Kunwar Darshan, 104 (*x*).
 Mahomed Shah *v.* Official Trustee of Bengal, 140 (*s*), 141 (*v*), 919 (*c*).
 Mahomed Shamsool *v.* Shewukram, 699 (*g*).
 Mahomed Siddique *v.* Li Kan Shoo, 384 (*n*), 389 (*m*), 400 (*n*), 428 (*l*).
 Mahomed Syedol Ariffin *v.* Yeoh Woi Gark, 5 (*e*).
 Mahomed Taki Reza *v.* W. A. Thomas, 694 (*z*).
 Mahomed Yusuf *v.* Hurgovandas, 84 (*g*).
 Mahomed Yusuf *v.* Secretary of State for India, 787 (*g*), 787 (*i*), 787 (*o*), 789 (*w*).
 Mahommed Afzal Khan *v.* Abdul Rahman, 658 (*v*).
 Mahraj Singh *v.* Balwant Singh, 110 (*c*).
 Mahraj Singh *v.* Sarup Kuar, 102 (*q*).
 Mahraj Sree Rao *v.* Raja Kaminayani, 758 (*c*).
 Mahram Das *v.* Ajudhia, 129 (*v*), 135 (*s*), 135 (*t*).
 Mahtab Rai *v.* Santa Lal, 561 (*d*).
 Ma Huit *v.* Maung Po Pu, 418 (*l*).
 Maida *v.* Kishan, 97 (*t*).
 Maidin Saiba *v.* Nagappa, 837 (*q*).
 Main *v.* Stack, 7 (*z*).
 Maina *v.* Bachchi, 747 (*j*), 753 (*s*).
 Maina Bibi *v.* Chaudri Wakil Ahmed, 714 (*g*), 740 (*k*).
 Mainland *v.* Upjohn, 553 (*d*), 554 (*f*), 554 (*i*).
 Main *v.* Stark, 7 (*z*).
 Maitland *v.* Chalie, 170 (*v*).
 Major *v.* Ward, 634 (*g*).
 Makhan *v.* Gayan, 105 (*l*).
 Makhan Lal *v.* Arun Bala, 783 (*f*).
 Makhan Lal Pal *v.* Bunkoo Behari Ghose, 36 (*u*), 371 (*o*).
 Makhan Mal *v.* Gokal Chand, 769 (*r*).
 Makhrana *v.* Bindeshri Prasad, 131 (*q*).
 Ma Kin *v.* Ma Bwin, 309 (*f*).
 Makkama Khadirsahab *v.* Masabi Abasali, 245 (*x*), 248 (*i*).
 Makkama *v.* Masambi, 252 (*b*).
 Makkan Lal *v.* Natthi, 773 (*m*).

- Makreth v. Dunn, 417 (e).
 Maksude Ali v. Sheikh Abdullah, 735 (h).
 Makund Lal v. Mt. Sunita, 82 (v).
 Makund Prasad v. Rajrup Singh, 130 (d).
 Makund Ram v. Ram Sarup, 16 (s).
 Ma Kyan v. Maung Min Din, 370 (a), 372 (y).
 Malik Ahmad Wali Khan v. Musammat Shamsi Jahan Begum, 732 (d), 740 (l).
 Malik Singh v. Shiam Lal, 312 (r).
 Malireddi v. Gopalakrishnayya, 732 (x), 768 (g).
 Malireddi Ayyareddi v. Gopalkrishnayya, 728 (y), 734 (r), 738 (a), 764 (s), 769 (r).
 Mallappa v. Janardan, 885 (c), 902 (p).
 Mallarkandi v. Narayana, 874 (z).
 Mallika v. Makhanlal, 893 (y).
 Mallikarjunadu v. Lingamurti, 780 (n), 780 (o), 780 (q).
 Mallikarjuna Sastri v. Narasimha Rao, 464 (k).
 Maloddee Noshyo v. Bullubee Kant Dhur, 819 (b).
 Ma Lon v. Ma Myo, 738 (x).
 Ma Lon v. Ma Nyo, 737 (p).
 Malzy v. Eichholz, 832 (k), 832 (l).
 Ma Ma E. v. Maung Tum, 356 (d).
 Ma Mi v. Kallander Ammal, 10 (b), 919 (b), 934 (d).
 Mammukutti v. Puzhakkal, 792 (x), 794.
 Mamraj v. Ramji Lal, 767 (w).
 Ma Mya May v. Mon Lon, 735 (a).
 Ma Myat Tha Zan v. Ma Dun, 353 (r).
 Ma Myo v. Maung Hlo 669 (v).
 Ma Myo v. Maung Hla Bu, 703 (n).
 Manavadan Thirumalpad v. Parry & Co., 889 (w).
 Mana Vikrama v. Karnavan Gopalan Nair, 746 (m).
 Man Bhari v. Naunidh, 918 (r).
 Manby v. Cremonini, 406 (p).
 Mancharji Pestanji v. Narayan Lakshumanji, 401 (v).
 Mancharji Sorabji Chulla v. Kongseoo, 40 (s), 40 (v).
 Manchershaw v. Kamrunisa, 656 (p).
 Manchershaw v. Ardeshir, 921 (n).
 Manchester Bonded Warehouse Co. v. Carr, 868 (w), 868 (x), 869 (h).
 Manchester Brewery Co. v. Coombs, 32 (d), 349 (k).
 Manchester Sheffield Lincolnshire Ry. Co. v. Anderson, 804 (o).
 Manchester Sheffield & Lancashire Ry. Co. v. Anderson, 833 (u).
 Manchester, Sheffield & Lincolnshire Ry. Co. v. North Central Waggon Company, 483 (u).
 Manchester Sheffield Lincolnshire Rly. Co. v. Anderson, 835 (i).
 Manchester Trust v. Furness, 34 (b).
 Mande v. Falaka, 237 (j).
 Maneckbai v. Hormasji, 525 (j).
 Maneckchand v. Ganeshlal, 48 (h).
 Maneckji v. Rustomji, 512 (e), 512 (k).
 Manecklal v. Saraspur Manufacturing Co., Ltd., 470 (t), 470 (z).
 Maneklal Manilal, *In re.*, 787 (n).
 Maneklal v. Saraspore Manufacturing Co., Ltd., 512 (l).
 Manesh Singh v. Chauharja, 621 (h), 621 (l).
 Mangalathammal v. Narayanaswami, 429 (w).
 Mangaldas v. Jewanram, 20 (j), 21 (p).
 Mangaldas v. Ranchhoddas, 211 (u).
 Mangal Singh v. Ghasita, 60 (u).
 Mangat Lal v. Ghasi Khan, 252 (n).
 Mangat Rai v. Dali Chand, 307 (s).
 Manghi v. Dial Chand, 469 (a), 746 (l), 757 (m).
 Mangladha v. Ganda Mal, 435 (r).
 Mangutlal Bagaria v. Upendra Mohan, 765 (f), 765 (h), 766 (s).
 Mangutlal v. Upendra Mohan, 768 (g).
 Mania v. Bachchi, 758 (z).
 Manichram v. Ratnasami, 827 (a).
 Manickam Pillai v. Audinarayana Pillai, 744 (x), 746 (u), 747 (c).
 Manickam v. Ramalinga, 60 (j).
 Manickbai v. Hormasji, 522 (z).
 Manickchand v. Rangappa, 623 (u).
 Manicklal v. Kadambini, 900 (t).
 Manika v. Ellappa, 310 (u).
 Manik Chandra v. Hari Mustri, 799 (h).
 Manickchand v. Rangappa, 469 (c).
 Manikkam Pillai v. Audinarayana Pillai, 747 (m).
 Manikkam Pillai v. Rettnasami Nadar, 811 (k).
 Manilal Hargovan, *In re.*, 96 (l).
 Mani Lal v. Koti Bhai, 492 (f).
 Manilal Ranchod v. Motibhai Hemabhai, 495 (g).
 Mani Lal Singh v. Trustees for the Improvement of Calcutta, 4 (r).
 Manindra v. Troyluckho, 38 (b).
 Manindra Chandra v. Jamahir, 429 (w).
 Manindra Chandra v. Kanlat Shaik, 794 (z).
 Manishanker v. Ramkrishna, 429 (v).
 Manjappa v. Krishnayya, 261 (b), 267 (j), 776 (u).
 Manjappa Roy v. Krishnayya, 639 (w).
 Manjaya Mudali v. Shanmuga Mudali, 275 (o), 275 (u), 276 (v), 276 (w), 276 (x), 276 (y).
 Manji v. Hoorbai, 33 (s), 34 (y), 40 (v), 249 (s), 253 (r), 384 (h).
 Manjunatha Shanbhaga v. Samayya, 655 (k).

- Manjunath *v.* Shankar, 68 (e).
 Mankamna *v.* Balkishan Das, 918 (m).
 Mankamna Kunwar *v.* Balkishan Das, 279 (u).
 Manks *v.* Whiteley, 775 (k).
 Manlove *v.* Bale, 491 (w), 591 (u).
 Manmal *v.* Dashrath, 40 (v).
 Manmatha *v.* Balai Chandra, 857 (u).
 Manmatha *v.* Nalinaksha, 858 (x).
 Manmatha Nath *v.* Hedait Ali, 30 (b), 77 (a).
 Manmatha Pal *v.* Surendra Nath, 796 (x).
 Manmohan *v.* Kesrichand, 471 (f), 473 (c), 473 (x).
 Manmoth Nath Mitter *v.* Anath Bandhu Pal, 82 (d).
 Mann, Crossman & Paulin, Ltd., *v.* Land Registry (Registrar), 152 (n), 790 (h).
 Manners *v.* Mew, 683 (d).
 Manning *v.* Lunn, 796 (q).
 Mann *v.* Stephens, 233 (x).
 Manohar Das *v.* Manzur Ali, 862 (m).
 Manohar *v.* Lakhmiram, 166 (j).
 Manohar Lal *v.* Ram Babu, 712 (k).
 Manohari *v.* Muhammad Ismail, 295 (r).
 Manorama *v.* Kali Charan, 166 (o).
 Manpal *v.* Sahib Ram, 312 (q).
 Mansa Debi *v.* Jiwan Lal, 757 (v).
 Mansa Ram *v.* Ancho, 5 (o).
 Manser *v.* Dix, 631 (m).
 Mansfield, *In re.*, 642 (f).
 Mansfield (Earl of) *v.* Blackburne, 849 (a).
 Mansingh Case, 108 (i).
 Man Singh *v.* Guman Singh, 489 (z).
 Man Singh *v.* Nowlakhbati, 83 (g).
 Mantel *v.* Mantel, 130 (h).
 Many *v.* Sitaram, 22 (h).
 Ma Myat Gyi *v.* Ma Ma Nyan, 476 (a).
 Ma Nyo *v.* Maung Hla, 672 (c).
 Ma Paw May *v.* S. R. M. M. A. Chettyar Firm, 39 (n).
 Ma Pyone *v.* Ma U. A., 356 (d).
 Ma Paw Mat *v.* Chettiar Firm, 327 (f).
 Ma Pwa Sein *v.* Maung Ba Saw, 925 (m), 925 (o).
 Marana Ammanna *v.* Pendyala Perubotulu, 529 (d), 561 (m).
 Marana *v.* Pendyala, 560 (b).
 Marangami *v.* Meera Labbai, 60 (j).
 Marangami Rowther *v.* Nagur Meera, 63 (u).
 Marappa Goundan *v.* Rangasami Goundan, 101 (n), 111 (j), 275 (m).
 Marcar *v.* Sigg, 506 (i).
 Mardan Singh *v.* Thakur Sheo Dayal, 697 (u).
 Margravine of Auspach *v.* Noel, 416 (r).
 Mariambai *v.* Fatmabai, 168 (m).
 Mariappa Pillai *v.* Raman Chettiyar, 333 (f), 333 (g).
 Markham *v.* Paget, 828 (r), 829 (f), 835 (w), 835 (z), 836 (e).
 Marks *v.* Whiteley, 763 (a).
 Marlborough (Duke) *v.* Godolphin (Earl), 141 (y).
 Marnillapalli *v.* Ponnukollu, 518 (w).
 Marquis of Bute *v.* Cunynghame, 692 (j), 697 (r).
 Marriot *v.* Anchor Reversionary Society, 636 (i).
 Marsh *v.* Granville, Earl, 389 (i).
 Marsh & Granville (Earl), *Re.*, 340 (n), 408 (i).
 Marshall & Salts Contract, *In re.*, 412 (t), 855 (v).
 Marshall *v.* Cave, 760 (h).
 Marshall *v.* Green, 22 (y).
 Marshall *v.* Schofield & Co., 840 (z).
 Marshall *v.* Shrewbury, 749 (h).
 Marshall *v.* South Staffordshire Tramways Co., 607 (q).
 Martand *v.* Dhondo, 563 (z).
 Martindale *v.* Booth, 321 (z), 330 (x).
 Martin *v.* Mitchell, 359 (v).
 Martin, *Re.*, *Ex-parte*, Dixon *v.* Tucker, 400 (q), 410 (b).
 Martin *v.* Roe, 852 (a), 853 (c).
 Martin *v.* Seamore, 264 (y).
 Martinez *v.* Cooper, 46 (j), 681 (o).
 Martinson *v.* Clowes, 639 (r).
 Martyb *v.* Clue, 804 (r).
 Martyn *v.* Podger, 321 (z).
 Martye *v.* Bradley, 846 (x), 849 (b).
 • Maru *v.* Hanso, 107 (u).
 Maruti *v.* Balaji, 483 (p), 484 (b), 484 (d), 485 (l), 485 (m), 485 (n), 485 (p), 485 (q).
 M. Shin *v.* Ma Thin Kya, 932 (f).
 Ma Sein Bye *v.* S. R. M. R. M. Chetty Firm, 510 (s).
 Ma Sein Nyo *v.* Maung San Pe, 481 (r), 481 (s), 485 (v), 490 (k).
 Ma Shin *v.* Maung Hman, 921 (l).
 Mashiter *v.* Smith, 854 (k).
 Maseyk *v.* Fergusson, 174 (a).
 Masihuddin *v.* Matu Ram, 93 (b).
 Masit Ullah *v.* Danodhar Prasad, 110 (b).
 Masituallah *v.* Umrao, 274 (c), 274 (e).
 Maskeylene & Cooke *v.* Smith, 323 (z), 325 (w), 326 (a).
 Mason, *Ex-parte*, *Re.* Errington, 625 (k).
 Mason *v.* Mason, *In re.* Mason, 162 (s), 195 (t).
 Mason *v.* Morley, 502 (k), 503 (t), 507 (z), 746 (r).
 Mason *v.* Westoby, 665 (z).
 Master *v.* Hansard, 236 (u), 239 (d).
 Masummat Kesar *v.* Masummat Munna, 451 (w).
 Matadeen Roy *v.* Mussodun Singh, 524 (x).

- Mata Din v. Ahmad Ali*, 95 (c), 96 (j).
Mata Din v. Iftikhar Husain, 734 (r).
Mata Din v. Karim Hussain, 16 (p).
Mata Din v. Kazim, 378 (l).
Mata Din v. Kazim Husain, 51 (c), 55 (k), 366 (t), 574 (n).
Mata Prasad v. Nageshar Sahai, 59 (f), 129 (u).
Matangini Dassee v. Chooney Money Dassee, 757 (w).
Matania v. National Provincial Bank Ltd., 830 (o).
Mataprasad v. Kunnon Devi, 630 (z).
Mathews v. Goodday, 749 (g).
Mathews v. Keble, 162 (o), 163 (w).
Mathews v. Smallwood, 898 (i).
Mathews v. Usher, 63 (x).
Mathews v. Wallwyn, 510 (v), 565 (t).
Mathewson v. Ram Kanai, 152 (o), 231 (h).
Mathewson v. Shyam Sunder, 17 (z), 219 (z).
Ma Thin Myaung v. Maung Gyi, 925 (i), 928 (u), 928 (v).
Mathison v. Clarke, 614 (b).
Mathu v. Achu, 31 (k), 77 (b).
Mathumsa Rowthan v. Apsa Bin, 303 (n).
Mathura Das v. Jadubir Thapa, 23 (c).
Mathura Kuar v. Dharam Samaj, 920 (r).
Mathura Kurmi v. Jagdeo Singh, 481 (v), 482 (c), 483 (p), 484 (a), 484 (e), 485 (n), 485 (q).
Mathura Mohan v. Ram Kumar, 371 (j).
Mathuraman v. Ponnuswamy, 60 (u).
Mathura Prasad v. Anandi, 248 (g), 252 (l).
Mathura Prasad v. Dasai Sahu, 317 (r).
Mathura v. Rajakumar, 261 (z).
Mati Lal v. Darjeeling Municipality, 883 (q), 906 (r), 906 (s).
Mati-ullah Khan v. Banwari Lal, 767 (w).
Matlub Hasan v. Mt. Kalawati, 152 (q), 750 (q), 758 (a), 759 (y).
Matru Mal v. Durga Kunwar, 777 (g).
Matson v. Dennis, 540 (c).
Matthey v. Curling, 838 (a), 839 (r), 840 (z), 841 (c), 841 (g), 842 (h).
Matthews v. Wallwyn, 476 (g), 476 (x).
Matura Subba Rao v. Surendra Nath, 145 (j), 151 (g).
Maud Anderson, In re, 816 (z).
Mauldan v. Rughunandan Pershad Singh, 370 (e).
Maugham v. Ridley, 499 (x).
Maula Bakhsh v. Hafizuddin, 920 (o).
Maung Aung Ba v. Ma Nyun, 302 (h), 302 (i).
Maung Ba Sein v. Maung Htoon Shwe, 791 (r).
Maung Ba Tin v. Maung Po Kin, 272 (p).
Maung Ba Tu v. Ma Thet Su, 277 (d), 277 (p).
Maung Hal Maung v. Maung Po Htai, 358 (r), 922 (u).
Maung Hlaw v. M. N. S. Chettyar Firm, 38 (d).
Maung Hoe Kyin v. Pe Hla Gyi, 369 (o).
Maungh Kyin v. Ma Shew La, 482 (d), 483 (p), 485 (h).
Maung Myat Tha Zan v. Ma Dun, 356 (d).
Maung Po Kin v. Maung Shwe Bye, 13 (o).
Maung Po Kiu v. Maung Kyauk Ye, 622 (f).
Maung Po Sin v. Ma Nyein (i), 356 (d).
Maung Po Te v. Maung Shwe Ko, 401 (y).
Maung Po Yin v. Maung Tet Tee, 371 (j).
Maung Shan v. U. Po, 476 (c).
Maung Shewe v. Maung Tha, 356 (d).
Maung Shwe Goh v. Maung Inn, 149, (p), 365 (e), 365 (f), 365 (g), 374 (a), 374, (z), 383 (c), 383 (f).
Maung Shew On v. N. K. R. P. Mudaliar, 582 (m).
Maung Shwe On v. Ponniah Mudaliar, 582 (l).
Maung Tub Ya v. Mung Aung Dun, 749 (m).
Maung Tun Sein v. Ko Tu, 13 (q).
Maung Tun Ya v. Maung Aung Dun, 518 (a), 561 (h).
Maung Yan v. Maung Po Ka, 625 (f).
Maung Ye v. M. A. S. Firm, 81 (q).
Mawson v. Fletcher, 413 (j).
Maxfield v. Burton, 42 (p).
Maxwell v. Ashe, 649 (h).
Mayan Thariyakatt v. Ithikampar-ambil, 816 (n).
Mayappa v. Kolandaivelu, 704 (g).
Mayashankar v. Burjorji, 6 (t), 6 (u), 528 (v), 562 (n), 691 (a).
May v. Borup, 814 (s).
Mayer v. Murray, 665 (u), 665 (v), 676 (h), 676 (z).
Mayilaraya v. Subbaraya Bhut, 513 (o), 546 (u).
Ma Yait v. Mahomed Ebrahim, 57 (f), 75 (p).
Ma Yait v. Official Assignee, 55 (n), 57 (g), 57 (h).
Ma Yin Hu v. Ma Chit May, 127 (h), 130 (b), 930 (j).
Mayner v. Payne, 235 (i).
May v. Platt, 398 (e).
Mayson v. Clouet, 454 (k).

- Mayularayar v. Subbaraya Bhat, 491 (r).
 Mazhar Husain Khan v. Abdul Hadi Khan, 167 (y).
 M'Carogher v. Whieldon, 631 (l), 636 (g).
 McDowell v. Ragava Chetty, 566 (b).
 McEacharn v. Colton, 804 (m).
 McGrory v. Alderdale Estate Co., 394 (q).
 Mc Henry v. Davies, 682 (q).
 McMahon v. McMahon, 499 (w), 500 (x).
 Mc Mahon v. Mc Mahon, *Re. Mc Mahon*, 507 (x).
 Mc Manus v. Cooke, 358 (j).
 McQueen v. Farquhar, 88 (q).
 McRacharn v. Colton, 854 (g).
 M'Donald v. Hanson, 86 (n).
 Mead, In the Goods of, 524 (t).
 Meadows v. Parry, 196 (a).
 Mechelen v. Wallace, 795 (g).
 Meek v. Kettlewell, 57 (l).
 Meenakshi Ammal v. Ammini Ammal 319 (b), 337 (i).
 Meenakshi v. Chidambaram, 826 (o), 828 (i), 834 (w).
 Meenakshisundara v. Rattnasami, 469 (n), 470 (u), 495 (o).
 V. M. Meerkanni Rowther v. A. V. Pariya Karuppan, 459 (o).
 Meghji v. Tyeballi, 406 (k), 415 (b), 434 (i).
 Meghji Vallabhdas v. Dayalji & Co., 906 (r), 906 (u).
 Megh Lal v. Raj Kumar, 15 (e), 785 (i), 785 (y), 824 (o), 874 (f), 901 (w), 910 (i).
 Meghraj v. Abdullah, 441 (m), 442 (g).
 Meghraj v. Krishna, 28 (w), 697 (u).
 Meghraj v. Krishna Chandra Bhatta-
 charji, 691 (y).
 Mehdi Hasan v. Muhamma Hasan, 924 (a).
 Meher Ali v. Artunnessa, 355 (v).
 Mehrban Kahn v. Makhna, 552 (o), 556 (d), 769 (r).
 Mehta v. Godadhar Rao, 858 (x).
 Meiyyalu v. Anjalay, 927 (e).
 Melbourne Banking Corporation v. Brougham, 563 (m), 563 (n), 563 (o).
 Melbourne v. Cottrell, 469 (h).
 Meller & Co. v. Holme, 869 (j).
 Mellor v. Lees, 553 (x).
 Mellor v. Walmsley, 415 (h), 416 (m).
 Mellush v. Brown, 506 (g).
 Melzak v. Lilienfeld, 35 (u), 809 (m).
 Merbai v. Perozbai, 921 (e).
 Mercantile Bank of India v. Central Bank of India, 948 (h).
 Mercer, *Ex-parte, Re. Wise*, 335 (n).
 Mercer v. Hall, 193 (b).
 Mercier v. Mercier, 336 (a).
 Merrett v. Schuster, 414 (y).
 Merrick's Trust, *Re.*, 170 (u).
 Merwanji Muncherji Cama v. Syed Sirdar Ali Khan, 621 (p).
 Merwanji Muncherji Cama v. The Secretary of State for India in Council, 51 (l), 250 (j), 251 (q).
 Messent v. Reynolds, 829 (w).
 Mestyn v. West Mestyn Coal & Iron Co., 829 (y).
 Metropolitan Counties, Etc., Society v. Brown, 27 (c).
 Metropolitan District Ry. Co. v. Cosh, 120 (m).
 Metters v. Brown, 632 (u), 632 (v), 632 (w), 633 (c).
 Meux v. Cobley, 875 (g), 875 (j).
 Meyer v. Charters, 33 (w).
 Meynell v. Surtees, 303 (o).
 Mg Po v. Mg Tet, 374 (b).
 Mian Pir Bux v. Sardar Mahomed Tahar, 356 (e), 357 (h).
 Micholls v. Corbett, 413 (e).
 Middlemore v. Goodhall, 803 (k), 804 (n).
 Middleton v. Pollock, 326 (c), 327 (f).
 Middleton v. Pollock, *Ex-parte Elliott*, 325 (x), 502 (l).
 Midgley v. Coppock, 428 (o).
 Midland Banking Co. v. Chambers, 722 (u).
 Midnapore Zamindary Co., Ltd. v. Abdul Zalli Mia, 94 (l).
 Midnapore Zemindari Co., Ltd. v. Shib Narayan, 799 (a).
 Mi Hla Zan v. Pa Pa Ye, 928 (v).
 Milboun v. Lyons, 230 (x).
 Milbourn v. Lyons, 238 (o), 238 (q).
 Mile End Old Town Vestry v. Whitby, 845 (s).
 Miles v. Easter, 236 (u).
 Miles v. Tobin, 34 (c), 34 (e).
 Milford Haven Railway and Estate Company v. Mowatt, 463 (i).
 Milk v. Towers, *In re. Melton*, 722 (u).
 Millar v. Taylor, 3 (d).
 Miller v. Babu Madho Das, 501 (y).
 Miller v. Brindabun, 29 (f).
 Miller v. Burt, 868 (a).
 Millett v. Davey, 667 (d).
 Mills v. Finlay, 500 (c).
 Miln v. Walton, 765 (z).
 Milner and Organ's Contract, *Re.*, 415 (z).
 Milnes v. Duncan, 36 (b).
 Milroy v. Lord, 921 (m), 922 (r).
 Minshall v. Lloyd, 846 (u).
 Minakshi Achi v. Chinnappa Udayan, 753 (z).
 Minakshi Achi v. Sadasiva Udayan, 753 (z).
 Minakshi Nayudu v. Immudi Kanaka Ramaya Gounden, 111 (g).
 Mina Kumari v. Bijoy Singh, 326 (y).

- Minet v. Leman, 912 (y).
 Minter v. Carr, 573 (z), 574 (d), 575 (v), 772 (d).
 Minter v. Wraith, 157 (j).
 Mirams, *Re.*, 78 (d).
 Mir Mahomed v. Kishori Mohan, 243 (y).
 Mir Muhammad v. Natwar Lal, 787 (i).
 Mir Sarwarjan v. Fakhruddin Mahomed, 97 (v), 112 (s).
 Mirza Ahmad Baig v. Model Mills Nagpur, Ltd., 744 (l), 744 (m).
 Mirza Ali Reza v. Tara Soondaree 711 (c).
 Mirza Ladik Husain v. Nawab Saiyed Hashim, 924 (v).
 Mirza Sadiq Husain v. Mahomed Karim, 71 (k).
 Mirza Yad Ali v. Tuka Ram, 560 (v).
 Misri Lal v. Mozhar Hossain, 24 (l), 24 (m), 52 (p), 472 (r).
 Misser's Case, 108 (f).
 Mitarjit Mahton v. Leakut Mosain, 374 (t).
 Mitchell v. Loe, *re. Hocking*, 143 (i).
 Mitchell v. Moseley, 121 (o).
 Mitchell v. Neale, 425 (t).
 Mitchell v. Phillips, 738 (z).
 Mitchell v. Steward, 803 (c).
 Mithibai v. Meherbai, 117 (j).
 Mithiram Bhat v. Somanath Naickar, 749 (c).
 Mithu Lal v. Kishan Lal, 739 (d).
 Mitta Kunth v. Neerajan, 70 (y).
 Mocatia v. Murgatroyd, 763 (q).
 Modern Railway Co. v. Page, 6 (x).
 Modhu Sudan v. Rooke, 785 (v).
 Modun Mohun v. Ashad Ally, 494 (v).
 Modun Mohun Chowdhry v. Ashad Ally Bepari, 486 (w).
 Moeser v. Wisker, 453 (r).
 Moeshlal v. Mohant Bawan Das, 732 (h).
 Mofazzal Karim v. Mohammad, 745 (b).
 Mofezuddin v. Abed Ali, 925 (g).
 Moffat v. Parsons, 531 (x).
 Moffatt v. Hammond, 771 (l).
 Mofiz Shaikh v. Rasik Lal, 25 (d).
 Mogender Chunder Ghose v. Kamini Dasi, 759 (r).
 Moggridge v. Thackwell, 166 (f).
 Mogridge v. Clapp, 397 (v).
 Mogul Steamship Co. v. McGregor, Gow & Co., 188 (j).
 Mohammad Ali v. Bismillah Begum, 320 (u).
 Mohammad Ali Khan v. Nissar Ali Khan, 211 (t), 212 (c).
 Mohammad Afzal Khan v. Malik Abdul Rahman, 659 (i).
 Mohammad Ashkar v. Mohammad Abdul, 219 (u).
 Mohammad Ejaz Husain v. Mohammad Iftikhat Husain, 95 (c).
 Mohammad Ishaq v. Mohammad Yusuf, 318 (t), 320 (m), 320 (t).
 Mohammad v. Madad Ali, 82 (v).
 Mohammad Sadiq v. Fakhr Jahan Begam, 924 (v).
 Mohammad Sher Khan v. Seth Swami Dayal, 558 (e).
 Mohammad Yawar Husain v. Hakim Wazir Hasan, 372 (c).
 Mohammed Shabbar v. Harnath Kuar, 69 (o).
 Mohanlal v. Mohomad Sujat, 735 (c), 735 (f), 736 (j), 736 (m), 769 (r).
 Mohan Lal v. Niranjana Das, 202 (o).
 Mohan Lal v. Prasadi Lal, 561 (d), 610 (l).
 Mohanlal v. Ratan, 94 (p).
 Mohanlal v. Wadhwa Singh, 659 (i).
 Mohan Roy v. Gour Mohan Mallik, 59 (h).
 Mohan Singh v. Hat Singh, 919 (h).
 Mohan Singh v. Pandit Seeba Ram, 271 (l).
 Mohan Singh v. Sewa Ram, 56 (v), 260 (l), 260 (n), 262 (e), 268 (q), 270 (d), 731 (s), 743 (h).
 Mohanlal v. Ratan, 94 (p).
 Mohant Ram Das v. Thakur Singh, 496 (u).
 Mohanund v. Nafur, 95 (y).
 Moharbir Pershad v. Gunghadar Pershad, 14 (b).
 Mohari Bibi v. Shyama Bibi, 87 (e).
 Mohendra Kumar v. Gagan Chandra, 134 (p).
 Mohendra Nath Banerji v. Rani Sm. Harshamukhi Dassi, 91 (y).
 Mohendra Nath v. Kali Proshad, 52 (r).
 Mohesh Chunder Bannerji v. Ram Prosunno Chowdry, 759 (o).
 Mohesh Lal v. Bawan Das, 767 (v).
 Mohesh Lal v. Mohant Bawan Das, 723 (g), 735 (c), 735 (h), 735 (z), 764 (q), 771 (u), 774 (e).
 Mohideen v. Muhammad, 323 (b), 324 (c), 331 (n).
 Mohideen v. Muhammad Mustappah, 320 (l), 324 (l).
 Mohini Chandra v. Anil Bandhu, 811 (c).
 Mohini Debi v. Purna Sashi, 744 (n), 744 (s), 757 (x).
 Mohini Mohan Roy v. Ramadas Paramhansa, 231 (b).
 Mohini v. Sarat, 577 (h).
 Mohit Narayan v. Kamal Nath, 807 (u).
 Mohmad Sujat v. Mt. Chandbi, 243 (b), 245 (g), 250 (g), 250 (i), 251 (p), 252 (i).
 Mohammad Sher v. Seth Bisheshwar, 668 (j).

- Mohomed Ibrahim v. Ambika Pershad, 764 (q).
 Mohori Bibee v. Dharmodas Ghose, 41 (h), 94 (h), 97 (w), 262 (m), 635 (v).
 Mohsiiddin Ahmed v. K. Ahmed, 95 (c).
 Mohun Lall Sookool v. Goluk Chander Dutt, 669 (q).
 Moidin v. Avaran, 379 (z), 439 (w).
 Moitheensa v. Apsa Bibi, 297 (j).
 Mokhoda Debi v. Umesh Chandra, 263 (n).
 Mokoonda Rajendur Dutt v. Sham Chunder Mitter, 135 (v).
 Mokoondo Lall v. Ganesh Chandra, 159 (v).
 Mokund Lall Sookul v. Goluck Chunder Dutt, 673 (l).
 Molden v. The Coy. Re. Magneta Time Co., Ltd., 536 (b), 537 (r).
 Mollayya v. Krishnaswami, 227 (x), 227 (y), 246 (a), 251 (r).
 Molyneux v. Hawtrey, 46 (u), 388 (f), 390 (x).
 Moneypenny v. Daring, 157 (h).
 Monica Kitheria v. Subraya Hebbara, 598 (o).
 Monica v. Subraya, 856 (g), 857 (t), 858 (b), 858 (x), 858 (y).
 Monikar v. Subraya, 598 (l).
 Monindra Chandra v. Troylukcho, 45 (h).
 Monk v. Noyes, 865 (u).
 Monmatha v. Matilal, 75 (w).
 Mon Mohini v. Raghoonath Misser, 876 (e).
 Monmotha v. Mohendra Nath, 887 (d).
 Monohar Das v. Hazarimull, 653 (c), 739 (g).
 Monosseh v. Shapurji, 92 (n).
 Montefiore v. Guedalla, 941 (i).
 Montefiore v. Menday Motor Components Co., 190 (o).
 Monypenny v. Dering, 141 (z), 147 (d).
 Moody v. Mathews, 649 (h), 649 (i).
 Mool Chand v. Ganga Jal, 10 (x).
 Moolla Cassim v. Moolla Abdul, 186 (w).
 Moore, In the Goods of, 522 (w).
 Moore, Re., Ex-parte, Powell, 499 (n).
 Moor v. Denn, 119 (z).
 Moore v. Gibbon, Re. Gibbon, 770 (f).
 Moore v. Gray, 500 (i).
 Moore v. Moore, 934 (a).
 Moore v. Painter, 667 (u).
 Moore v. Ullicoat's Mining Co., Ltd., 64 (f), 892 (y).
 Moore v. Wingfield, Re. Wilmee's Trusts, 139 (p), 145 (e), 185 (l).
 Moos v. Gallimore, 601 (i).
 Moos, In re., 619 (e).
 Moottora Kant v. The India General Steam Navigation Co., 3 (b).
 Mora Joshi v. Ramchandra Dinker Joshi, 712 (d).
 Morarji v. Nenbai, 168 (j).
 Moreland v. Richardson, 287 (e).
 Moreshwar v. Dattu, 41 (d).
 Moreshwar Balkrishna v. Dattu, 41 (v).
 Morgan, Ex-parte, 507 (y).
 Morgan, Re. Ex-parte, Sanders, 506 (k).
 Morgan v. Edwards, 211 (y).
 Morgan v. Fernandez, 787 (i), 789 (w).
 Morgan v. Hardy, 866 (f), 869 (n).
 Morgan v. Hunt, 833 (q).
 Morgan v. Jeffreys, 545 (p), 547 (i), 548 (k), 555 (m).
 Morgan v. Lariviere, 31 (u).
 Morgan v. Marquis, 99 (r).
 Morgan v. Russell, 407 (v).
 Morgan v. The Government of Hyderabad, 37 (l), 386 (n), 426 (y).
 Morice v. Bishop of Durham, 168 (k), 920 (p).
 Morland v. Cook, 35 (k), 46 (w).
 Morley v. Bird, 280 (c), 540 (b).
 Morley v. Cook, 402 (e), 414 (t), 415 (a).
 Morley v. Morley, 565 (x), 766 (m), 775 (k), 775 (p).
 Mormsey v. Ismay, 65 (k).
 Moroney, Re. 325 (v), 327 (f).
 Moro Raghunath v. Balaji Trimbak, 693 (t).
 Morphett v. Jones, 347 (u), 359 (a).
 Morrell v. Fisher, 415 (e).
 Morris v. Barrett, 91 (b).
 Morris v. Edgington, 834 (d).
 Morris v. Islip, 675 (l).
 Morris v. Morris, 325 (w).
 Morrish v. Marshall, 467 (w).
 Morrison v. Chadwick, 797 (e), 863 (s).
 Morse v. Merset, 367 (m).
 Morse v. Tucker, 835 (q), 835 (r).
 Moru Narsu v. Hasan, 311 (z).
 Moser, In re, 850 (l), 863 (a).
 Moss v. Gallimore, 663 (e).
 Mostyn v. Mostyn, 920 (z).
 Mostyn v. West Mostyn Coal and Iron Co., 386 (j), 399 (l), 400 (p), 833 (r), 836 (b).
 Mothiar Mira Taraga v. Ahmatti, 703 (p), 703 (t).
 Motibhai v. Desaibhai, 12 (k).
 Moti Chand v. Ikram-Ullah Kahn, 81 (s).
 Motichand v. Sagun, 282 (w), 283 (d), 467 (s).
 Moti v. Laldas, 104 (x).
 Moti v. Lal Das, 108 (v).
 Moti Lal v. Bhagwan Das, 444 (n).
 Motilal v. Chandra Kumar, 816 (r), 893 (g).
 Moti Lal v. Kanabuldin, 317 (r).

- Motilal v. Kasambhai, 521 (l).
 Moti Lal v. Radhey Lal, 30 (c), 30 (i), 30 (j), 76 (k).
 Motilal v. Poona Cotton and Silk Mfg., Co., 17 (x).
 Motilal v. Seth Jamnadas, 457 (a), 459 (l).
 Motilal v. Utam, 326 (y), 329 (d).
 Moti Lal v. Yar Muhammad, 826 (t), 828 (j), 830 (i).
 Motiram v. Seth Lakhmichand, 819 (s).
 Motiram v. Vitai, 480 (k), 493 (q), 515 (z), 750 (s), 750 (u).
 Moti Ram v. Bharat National Bank, Ltd., 501 (u).
 Moti Shah v. Gandharp Singh, 60 (u).
 Motivahoo v. Vinayak, 406 (o), 433 (f).
 Motivahu v. Purshotam Dayal, 227 (x), 336 (c).
 Mottayappan v. Palani, 483 (p).
 Mott v. Issott, *In re Wright*, 200 (b).
 Motumal v. Manghomal, 330 (s).
 Moule v. Garrett, 858 (a).
 Moulvies Sayyad v. Mst. Bebee Ultaj Fatima, 366 (c), 922 (d).
 Mountfort, *Ex-parte*, 499 (u).
 Mower's Trusts, *Re.*, 696 (m).
 Moxon v. Berkeley Mutual Benefit Building Society, 696 (l).
 Moson v. Burgess, 499 (q).
 Moxon v. Townshend, 865 (t).
 Moyse v. Gyles, 280 (l).
 M. P. L. M. P. Chetty v. Ma Ngwe Sin, 921 (l).
 Mst. Amira Bibi v. Shaikh Mahomed, 324 (q).
 Mst. Azizunnisa v. Siraj Hussain, 930 (h).
 Mst. Chandi Bibi v. Mohanram, 774 (h).
 Mst. Powri v. Shiwa, 30 (c), 30 (i).
 Mt. Akram-un-Nissa v. Mt. Mustafa-un-Nissa, 319 (a).
 Mt. Aziz Fatma v. Mukund Lal, 310 (p), 310 (r).
 Mt. Banti v. Mandu, 231 (c).
 Mt. Bhagwati v. Nandu Mal, 791 (p).
 Mt. Bibi Makbulunnissa v. Mt. Bibi Untunnissa, 942 (s).
 Mt. Fatima v. Raza Ali Khan, 316 (h).
 Mt. Gomti v. Meghraj Singh, 485 (v), 490 (k).
 Mt. Hamidan v. Nanhe Lal, 94 (j).
 Mt. Hardei v. Bhagwan Singh, 60 (u).
 Mt. Izzat-un-Nissa Begam v. Kunwar Pertab Singh, 430 (y).
 Mt. Jaidevi v. Shripati, 735 (b).
 Mt. Janak Dulari v. Bishamber Nath, 13 (v).
 Mt. Jugeshri Kuer v. Aftab Chand, 555 (u).
 Mt. Kaniz Fatma v. Imamuddin, 448 (a).
 Mt. Kasturi v. Baliram, 38 (s), 134 (p), 249 (w).
 Mt. Kesai v. Mt. Munna, 449 (l), 455 (r), 745 (i).
 Mt. Krishna Bai v. Debisingh, 328 (s).
 Mt. Kundan v. Thakur Lal, 529 (c).
 Mt. Lahani v. Bala, 13 (s).
 Mt. Lakpat Kuer v. Durga Prasad, 433 (g), 435 (r).
 Mt. Mohammadi Bibi v. Kashi Upadhya, 7 (d).
 Mt. Mumtaz Begum v. Mt. Lachhmi, 480 (q), 481 (t), 483 (s), 485 (j).
 Mt. Mushrafi Begum v. Kundan Lal, 112 (x), 920 (w).
 Mt. Muniram Bibi v. Amjad Ali Shah, 368 (d).
 Mt. Nakula v. Kokaya, 30 (c), 74 (i).
 Mt. Nando v. Pandit Ram, 549 (v).
 Mt. Nasiban v. Mohammad Sayed, 817 (f).
 Mt. Pran Dei v. Sat Deo Tiwari, 38 (d).
 Mt. Raijai v. Irbhan, 312 (u).
 Mt. Rais-un-nissa v. Zorawar Sah, 756 (l).
 Mt. Ramadulari v. Upendranath, 308 (z).
 Mt. Ramjhari Kuer v. Gokhul Singh, 13 (s).
 Mt. Rasulan Bibi v. Nand Lal, 249 (y), 250 (e), 250 (i), 252 (m).
 Mt. Ratna Koer v. Mt. Nanhaki, 704 (i).
 Mt. Rupa Telin v. Bisamber Telin, 372 (q).
 Mt. Sahodra v. Badri Prasad, 248 (l), 254 (b), 254 (d).
 Mt. Salu Bai v. Bajat Khan, 262 (m), 272 (o).
 Mt. Sarja v. Mt. Tulsi, 374 (q), 927 (h).
 Mt. Savitribai v. Nanhelal, 730 (o).
 Mt. Takimossee Kooer v. Mohesh Singh, 496 (r).
 Mt. Udey Kunwar v. Mt. Ladu, 594 (j).
 Mt. Waji-hun-nissa v. Valmiki, 38 (u).
 Mt. Zohra Bibi v. Ganesh Prasad, 327 (g).
 Mubarakunnissa v. Raza Khan, 243 (y), 252 (e).
 Muchiram v. Ishan Chunder, 50 (a).
 Mudara v. Muthu, 131 (l).
 Muddun Thakoor v. Kantoo Lall, 110 (b).
 Mudge, *Re.*, 57 (m).
 Mudit Narayan Singh v. Ranglal Singh, 109 (o).
 Muhammad v. The Legal Remembrancer, 100 (e).
 Muhammad v. Queen Empress, 9 (m).
 Muhamed Sumsool v. Shewukram, 744 (w).

Muhammad Abbas *v.* Muhammad Hamid, 691 (*f*), 699 (*l*).
 Muhammad Abdul *v.* Dilsukh Rai, 563 (*d*).
 Muhammad Abdul Majid *v.* Fatima Bibi, 135 (*x*).
 Muhammad Abdus Samad *v.* Qurban Husain, 102 (*q*).
 Muhammad Munwar Sultan *v.* Sham-un-nessa Begum, 92 (*u*).
 Muhammad Said *v.* Bishambhar Nath, 94 (*j*).
 Muhammad Shafi *v.* Muhammad Abdul Aziz, 100 (*c*).
 Muhammad Muzmullallah *v.* Mithu Lal, 6 (*z*).
 Muhammad Akbar *v.* Izzat-un-nissa, 542 (*m*).
 Muhammad-din *v.* Mt. Sardar, Bibi, 251 (*w*), 252 (*l*).
 Muhammad Hafiz *v.* Muhammad Zakariya, 549 (*v*).
 Muhammad Hamid-ud-din *v.* Shib Sahai, 681 (*c*).
 Muhammad Hassan *v.* Lafdar Mirza, 924 (*u*).
 Muhammad Husain *v.* Sheodarshan Das, 653 (*d*).
 Muhammad Husam *v.* Mul Chand, 542 (*h*).
 Muhammad Ishaq *v.* Rup Narain, 677 (*o*), 677 (*p*).
 Muhammad Jafar *v.* Mazhar-ul-hasan, 273 (*u*).
 Muhammad Jan *v.* Fazal-ud-din, 240 (*j*).
 Muhammad-Mahomed Ali *v.* Kalyan Das, 724 (*q*).
 Muhammad *v.* Mango, 327 (*q*).
 Muhammad Mian *v.* Bharat Singh, 698 (*y*).
 Muhammad Mushtaq *v.* Banke Lal, 535 (*r*).
 Muhammad *v.* Nathu, 787 (*b*).
 Muhammad Sadik Khan *v.* Masiban Bibi, 239 (*y*), 267 (*m*), 458 (*b*).
 Muhammad Sadiq *v.* Ghaus Muhammad, 735 (*h*).
 Muhammad Shafi *v.* Muhammad Said, 245 (*q*), 250 (*b*).
 Muhammad Sher Khan *v.* Raja Seth Swami Dayal, 742 (*u*), 742 (*w*), 742 (*z*).
 Muhammad Sher Khan *v.* Raja Seth Swami, 558 (*y*), 702 (*c*).
 Muhammad Sidiq *v.* Ghans Muhammad, 733 (*m*), 776 (*l*).
 Muhammad Siddiq *v.* Muhammad Nasir, 446 (*w*), 526 (*t*).
 Muhammad Sulaiman *v.* Sakina Bibi, 247 (*u*), 250 (*k*), 251 (*q*).
 Muhammad Tabarak *v.* Dulip Narain, 724 (*a*).

Muhammad Tabarak Ali Khan *v.* Dalip Narain Singh, 731 (*w*).
 Muhammad Talib *v.* Inayati Jan, 353 (*u*), 375 (*p*).
 Muhammad Raza *v.* Abbas Bandi Bibi, 18 (*i*), 129 (*w*), 127 (*q*).
 Muhammad Yahiya *v.* Rashid-ud-din, 698 (*b*).
 Muhammad Yakub *v.* Nazir Ahmed, 92 (*t*), 92 (*u*).
 Muhammad Yunus *v.* Muhammas Ishaq, 100 (*c*).
 Muhammad Zaki *v.* Munnu, 366 (*n*).
 Muhammad Abdul *v.* Jairaj Mal, 555 (*u*), 572 (*w*).
 Muhammas Sheriff *v.* Syed Kassim, 548 (*o*).
 Muhammed *v.* Maru, 301 (*x*).
 Muhamud *v.* Ali Koya, 513 (*r*).
 Mukat Singh *v.* Missa Paras Ram, 895 (*v*).
 Muktabai *v.* Antaji, 938 (*f*).
 Muktakeshi Pal *v.* Ramani Mohan, 691 (*b*).
 Mukteswar Trigunait *v.* Barakar Coal Co., Ltd., 343 (*m*).
 Mukund Prasad *v.* Rajrup Singh, 930 (*j*).
 Mula Ram *v.* Jiwindia Ram, 33 (*w*), 331 (*k*).
 Mulchand *v.* Babaji, 531 (*a*).
 Mulchand *v.* Kashibullav, 24 (*u*).
 Mulchand Kuber *v.* Lallu Trikarn, 763 (*h*).
 Mulibai *v.* Shewaram Menghraj, 938 (*f*).
 Mulji *v.* Macleod, 254 (*d*).
 Mul Kunwar *v.* Chattar Singh, 435 (*r*).
 Mullens *v.* Miller, 387 (*o*).
 Miller *v.* Trafford, 146 (*m*).
 Milliner *v.* Midland Railway Co., 146 (*y*).
 Mullings *v.* Trinder, 405 (*e*), 411 (*m*).
 Muller *v.* Trafford, 805 (*z*).
 Mul Raj *v.* Fazal Imam, 248 (*e*), 251 (*o*), 252 (*l*), 254 (*f*).
 Mulraj *v.* Indar Singh, 263 (*n*).
 Mulraj Khatau *v.* Vishwanath, 357 (*h*), 743 (*d*), 939 (*r*), 944 (*z*).
 Multanmal *v.* Budhumal, 435 (*r*), 435 (*t*).
 Mulumedi Jogannadhiah *v.* Narasimhan Setty, 940 (*z*).
 Mumford *v.* Stohwasser, 398 (*y*).
 Munayya *v.* Krishnayya, 442 (*i*).
 Muncharan *v.* Pranshankar, 69 (*s*).
 Muncherji Furdoonji *v.* Noor Mahmomedbhoy Jairajbhoy Peerbhoy, 633 (*b*), 640 (*g*).
 Munchersha *v.* Kamrunissa, 667 (*r*).
 Mundancheri *v.* Achutan, 114 (*w*).
 Muneo Dutt *v.* William Campbell, 825 (*m*).
 Munia Konan *v.* Perumal Konan, 81 (*n*), 98 (*y*).

TABLE OF CASES.

lxxix

Municipal Corporation *v.* Secretary of State, 783 (d).
Municipal Officer, Aden *v.* Haji Esmail, 539 (x).
Municipal Permanent Investment Building Society *v.* Smith, 601 (p).
Munir-up-Nissa *v.* Akbar Khan, 443 (q), 444 (n), 446 (v).
Munlappa Chettiar *v.* Vellachamy, 523 (h).
Munna *v.* Suklal, 296 (v).
Munni Babu *v.* Kunwar Kamta, 458 (f).
Munni Kunwar *v.* Madon Gopal, 81 (n), 98 (y).
Munnoolal *v.* Baboo Rut Bhoobun Singh, 492 (a).
Munshi *v.* Daulat, 560 (a), 711 (a).
Munshi Gobind *v.* Lal Jagdeep, 56 (w).
Munshi Lal *v.* Ahmad Mirza, 206 (i).
Munshi Lal *v.* The Notified Area of Baraut, 818 (k), 818 (r).
Munuswami *v.* Sagalaguna, 150 (a).
Munuswami Naidu *v.* Sagaloguna, Nayudu, 32 (f).
Muragesa Chetti *v.* Chinnathambi Goundan, 818 (h).
Murat Singh *v.* Phoku Singh, 755 (v).
Murat Singh *v.* Ram Lal, 489 (u).
Murid Hussain *v.* Jowala Sahai, 131 (k), 135 (r), 135 (x).
Murlidhar Pande *v.* Lachmi Pande, 92 (s).
Murlidhar *v.* Parmanand, 295 (l).
Murlidhar *v.* Pern Raj, 182 (v), 617 (j).
Murphy *v.* Hurly, 869 (i).
Murray *v.* Dunn, 230 (n).
Murray *v.* Murat Singh, 115 (a), 272 (o).
Murrell *v.* Goodyear, 265 (a), 404 (b), 413 (d), 458 (i).
Murthy Khandan *v.* Anantanarayana Patter, 556 (y).
Murugesu *v.* Chinnathambi, 909 (u).
Musadee Mahomed Cassum Sherazee *v.* Meerza Ally Mahomed Shoostry, 87 (h).
Musafir Rai *v.* Mussammut Lagan Barta Kuar, 550 (a).
Musahar Sahu *v.* Hakim Lal, 322 (o), 327 (f).
Musaheb Zaman Khan *v.* Inayat-ul-lah, 615 (l).
Musa Miya *v.* Kadar Bux, 924 (z), 934 (c).
Musammatt Jaibai *v.* Rowaram, 85 (y).
Muschamp *v.* Bluet, 126 (i), 127 (v).
Musgrave *v.* Brooke, 204 (b).
Mushrafi Begam *v.* Lala Kundan, 525 (k).
Mussi Reddi *v.* Venkata Row, 945 (k).
Musst Ketki *v.* Dinabandhu Patnaik, 582 (k), 583 (o).
Mutasaddi *v.* Harkash, 25 (v);
Muteeram *v.* Gopal, 102 (d).

Muthaminal *v.* Razu Pillai, 737 (r).
Muthar Sahib *v.* Kadir Sahib, 947 (y).
Mutha Venkatachelapati *v.* Pyanda Venkatachelpati, 486 (e).
Muthkumara Chetti *v.* Anthony Udayar, 94 (n).
Muthukrishna *v.* Veeraraghava, 939 (n), 947 (x).
Muthukumaraswami *v.* Govinda, 696 (n).
Muth Goundan *v.* Chellappa Goundan, 451 (z).
Muthia Chetty *v.* Sinna Velliam, 444 (b), 444 (d).
Muthiah Chettiar *v.* Doraiswami Pillai, 272 (r).
Muthiah *v.* Official Receiver, 518 (t).
Muthia Raja *v.* Appala Raja, 595 (r), 659 (i).
Muthia *v.* Virammal, 757 (v).
Muthi Vija *v.* Venkatachallam Chetti, 474 (n), 477 (l), 477 (p).
Muthukaruppan *v.* Muthu, 373 (k).
Muthukaruppan *v.* Muthu Sambhan, 372 (x), 373 (p), 374 (r).
Muthukumara Chetty *v.* Anthony Udayan, 129 (v).
Muthusami *v.* Somoo Kandiar, 86 (p).
Muthusami Iyer *v.* Dharma Raja, 433 (b).
Muthusami Naidu *v.* Prince Alagai, 79 (y).
Muthusawmy Jagavera Yettappa Naicker, Zemindar of Yetteyapooram *v.* Vencataswara Yettaya, 746 (s).
Muthuswami *v.* Loganatha, 343 (i).
Muthuswami Pillai *v.* Sandana Volan, 264 (w).
Muthuveera *v.* The Secretary of State for India, 295 (i).
Muthuveeru *v.* Vythilinga, 60 (j).
Muthuvelu Mudaliar *v.* Vythilinga Mudaliar, 481 (u), 482 (b), 489 (w).
Muthuvelu *v.* Vythilinga, 483 (n), 483 (p).
Mutsaddi Lal *v.* Bhola Nath, 71 (w),
Mutsaddi Lal *v.* Mohammed Hanif, 369 (q).
Muttu Lal *v.* Nandu Lal, 609 (f).
Muttu Lal Pal *v.* Nandu Lal Neogi, 690 (w), 697 (u).
Mutual Life Assurance Society *v.* Langley, 942 (l).
Mutu Ramanandan *v.* Vava Levvai, 141 (x).
Mycock *v.* Beatson, 456 (u).

N

Naba *v.* Cholim, 784 (n).
Nabadweepchandra Das *v.* Lokenath Ray, 927 (q).
Naba Kumari *v.* Behari Lal, 784 (r).

- Naba Kumari Debi *v.* Behari Lal Sen 857 (*w*).
- Nabakumar *v.* Fateh Singh, 93 (*g*).
- Nabin Chand *v.* Raj Coomar, 754 (*v*).
- Nabin Chandra *v.* Munshi Mander, 435 (*r*).
- Nabin Chandra *v.* Nabab Ali, 150 (*w*).
- Nabin Chandra *v.* Prankrishna De, 4 (*u*).
- Nabin Chandra *v.* Rajani Chandra, 145 (*b*), 148 (*l*), 149 (*t*), 150 (*x*).
- Nabinchandra Saha Paramanick *v.* Krishna Barna Dasi, 459 (*l*).
- Nabin Chund Naskar *v.* Raj Coomar Sarkar, 750 (*u*).
- Nadershaw *v.* Shirinbai, 653 (*i*), 702 (*u*), 707 (*y*).
- Nadha Prasad *v.* Usuf, 816 (*s*).
- Nadirshaw *v.* Serenbai, 654 (*x*).
- Nafar Chandra *v.* Ram Lal, 122 (*h*).
- Nafar Chandra *v.* Shukur Sheikh, 255 (*i*), 337 (*m*).
- Nafor Chandra *v.* Ratan Mala, 159 (*s*).
- Nagamma *v.* Venkataramayya, 523 (*n*).
- Nagappa *v.* Badridas, 30 (*n*), 77 (*r*).
- Nagappa *v.* Venkat Rao, 902 (*m*).
- Nagarathna Mudaliar *v.* Chidambaram Chettiar, 319 (*y*).
- Nagarusu *v.* Tangatur, 468 (*w*).
- Nagasami Aiyar *v.* Ramasami Aiyar, 272 (*r*).
- Nagathal *v.* Arumugam Pillai, 703 (*o*), 704 (*a*).
- Nagalkal *v.* Arumugham Pillai A.I.R. 703 (*w*).
- Nagayyar *v.* Govindayya, 723 (*j*).
- Nagayyar *v.* Thudunuchi Govindayya, 727 (*t*).
- Nagendra *v.* Satadal, 797 (*a*).
- Nagendran Chettiar *v.* Lakshmi Ammal, 307 (*r*).
- Nagendra Nath *v.* Rabindra Nath, 68 (*q*).
- Nagesh *v.* Balvantrav, 40 (*v*).
- Nageshar *v.* Mata Prasad, 128 (*m*), 132 (*s*).
- Nageshar Prasad *v.* Raja Pateshri, 250 (*c*).
- Nageshar Rai *v.* Nand Lal, 584 (*v*), 584 (*w*).
- Nageshar *v.* Raje Pateshri, 251 (*z*).
- Nageshwar Bux Roy *v.* Bengal Coal Co., Ltd., 122 (*c*).
- Nageswara *v.* Srinivasa, 503 (*p*), 504 (*c*), 504 (*n*), 510 (*r*), 510 (*s*).
- Nagia *v.* Muthacharry, 70 (*y*).
- Nagindas *v.* Mohomed, 95 (*y*).
- Nagindas *v.* Mahomed Yusuf, 105 (*v*).
- Nagindas Maneklal *v.* Mahomed Yusuf, 109 (*q*), 110 (*w*).
- Nagle *v.* Baylor, 32 (*m*).
- Nahanchand *v.* Modi, 23 (*h*).
- Nahananda *v.* Mongala, 22 (*g*).
- Naima Khatun *v.* Sardar Basant, 442 (*d*).
- Naim-ul-haq *v.* Muhammad, 141 (*x*).
- Nainapillai *v.* Ramanathan, 292 (*j*), 296 (*c*), 784 (*t*).
- Nainappa *v.* Chidambaram, 560 (*z*), 710 (*p*).
- Nainappa Chetti *v.* Chidambaram Chetti, 720 (*a*), 741 (*p*).
- Najibulla *v.* Nusir Mistri, 39 (*k*).
- Nakchedi Ram *v.* Ram Charitar Rai, 622 (*i*), 622 (*j*).
- Nallana Gaundan *v.* Palani Gaundan, 556 (*e*).
- Nallappa *v.* Ramalingachi, 403 (*r*).
- Namasivaya *v.* Kadir Ammal, 70 (*f*).
- Namasivayam *v.* Nellayappa, 377 (*b*).
- Nanak Ram *v.* Mehin Lal, 5 (*g*).
- Nanammal *v.* The Collector of Trichinopoly, 73 (*r*).
- Nana *v.* Rautmal, 335 (*s*).
- Nanbat Rai *v.* Dhaunkal Singh, 377 (*b*), 377 (*y*).
- Nanchand *v.* Bapusaheb, 48 (*v*).
- Nanda Lal *v.* Abdul Aziz, 38 (*z*).
- Nanda Lal Roy *v.* Abdul Aziz, 678 (*c*).
- Nanda Lal Roy *v.* Dharendra Nath Chakravarti, 725 (*g*).
- Nandi *v.* Sarup Lal, 291 (*b*), 296 (*t*).
- Nandi Singh *v.* Sita Ram, 928 (*b*).
- Nandkishore *v.* Kanee Ram, 60 (*l*).
- Nand Kishore *v.* Ahmed Ata, 252 (*d*).
- Nand Kishore *v.* Anwar Husain, 378 (*l*).
- Nand Kishore *v.* Lallu, 312 (*k*).
- Nand Kishore *v.* Ram Sarup, 219 (*v*).
- Nand Kishore *v.* Suraj Prasad, 927 (*e*), 927 (*p*).
- Nand Lal *v.* Dharmadeo, 468 (*x*), 755 (*v*).
- Nand Singh *v.* Mahant Pratap Das, 132 (*a*).
- Nangunni *v.* Nedungadi, 730 (*h*).
- Nangunni Kovi Umma *v.* Nedungadi, 730 (*j*).
- Nani Bibee *v.* Hafizullah, 40 (*y*), 378 (*r*).
- Nanjamma *v.* Nacharammal, 298 (*m*).
- Nanjappa *v.* Peruma, 296 (*t*).
- Nanjappa Gounden *v.* Peruma Gounden, 291 (*a*).
- Nanjappa *v.* Perumal Goundan, 294 (*e*), 294 (*z*).
- Nanjunda *v.* Kanagaraju, 101 (*n*).
- Nanku Prasad *v.* Kanta Prasad, 455 (*t*).
- Nanku Prasad *v.* Kamta Prasad, 625 (*h*).
- Nannu Lal *v.* Ram Chandra, 17 (*a*).
- Nannu Mal *v.* Ram Chandra, 296 (*d*), 586 (*o*), 586 (*p*), 647 (*a*), 647 (*d*), 648 (*f*).

- Nannu Mal v. Ram Charan*, 777 (g).
Nanomi Babuasin v. Modhun Mohun, 110 (b), 111 (g).
Nanu v. Manchu, 702 (j).
Nanu v. Raman, 15 (h).
Nanu Nair v. Ashta Moorthi, 666 (f).
Naorang Singh v. Meik, 830 (i).
Naoroji v. Kazi Sidick, 182 (z).
Napier v. Williams, 100 (z).
Narihari v. Siva Korithan Naidu, 260 (q).
Narahari Sahu v. Korithan Naidu, 268 (p), 268 (u).
Narahari Sahu v. Sira Korithan Naidu, 268 (u).
Narain v. Bhai Lal Thakur, 55 (l).
Narain v. Dataram, 40 (y).
Narain v. Jagan, 546 (w).
Narain Das v. Musammat Dhania, 81 (n), 98 (y).
Narain Dass v. Murli Dhar, 743 (j), 743 (k).
Narain Mundul v. Hookte Mahato, 815 (i).
Narain Mullick v. Badi Roy, 66 (z).
Narain Pershad v. Narain Singh, 737 (p).
Narain Prasad v. Sarnamsingh, 110 (d), 112 (p), 225 (a), 225 (y).
Narain Singh v. Har Gopal Tewari, 272 (s).
Narain Singh v. Mohammad Khalil-ul-Rahman, 688 (m).
Naranappa v. Samacharlu, 15 (i).
Naranjan Singh v. Dharm Singh, 62 (s).
Naran Purshotam v. Dolatram, 515 (m).
Narasimha v. Seshayya, 546 (v).
Narasamma v. Subbarayudu, 39 (k).
Narasangji v. Ranchhodbhai, 14 (y).
Narasappah v. Hussain, 17 (w).
Narasayya v. Rajah of Venkatagiri, 291 (u), 292 (g), 301 (x).
Narasiah v. Venkataramiah, 472 (j).
Narasimha v. Seshayya, 555 (z), 667 (q), 674 (b).
Narasimha v. Venkatalingam, 115 (z).
Narasimha Swami v. Venkatalingam, 52 (v), 52 (w), 919 (f).
Narasimha Swami v. Venkatalingum, 920 (u).
Narasimham v. Madhava, 60 (j).
Narasimma v. Anantha, 69 (h).
Narasingerji Gyanagerji v. Panugant Parthasaradhi, 481 (u).
Narasingerji v. Panuganti, 482 (m), 483 (p), 485 (i), 485 (l), 485 (q).
Narsingerji v. Panuganti Parthasarathi, 489 (w).
Narasingha v. Prolhadman, 21 (u).
Narasimham v. Narayana 327 (p).
Narayan Ayyar v. Venkataramana Ayyar, 489 (s).
Narayana Ayyar v. Subbaraya Ayyar, 175 (m).
Narayanna Ayyar v. Venkata Ramana, 749 (o).
Narayana v. Balaguruswami, 119 (b), 119 (r).
Narayan v. Ali Saiba, 861 (b).
Narayanbhat v. Davlata, 783 (f).
Narayana Chetty v. Logalinga Chetty, 919 (u).
Narayana Kavirayan v. Kandasami Goundan, 437 (i).
Narayana Kutty v. Pechiammal, 714 (d).
Narayana Kutti v. Pechiammal, 728 (b), 730 (f).
Narayana Kutty Goundan v. Pechiammal, 730 (g), 730 (h).
Narayana v. Vasudeva, 902 (q).
Narayanan v. Muthia Servay, 789 (z), 818 (n).
Narayana v. Raghavammal, 476 (h).
Narayana Reddi v. Peda Rama Reddi, 432 (u).
Narayan v. Bapu, 378 (k).
Narayan Budhaji v. Posha Jama, 718 (m).
Narayan v. Bapu, 38 (w).
Narayan v. Chintaman, 80 (k).
Narayan v. Daji, 292 (g).
Narayan v. Davlata, 784 (m).
Narayan v. Ganesh, 293 (t), 293 (v), 296 (g).
Narayan v. Gangaram, 48 (j).
Narayan v. Ganoji, 477 (r).
Narayan v. Kalgaunda, 67 (d).
Narayan v. Lakshmandas, 282 (w), 283 (c), 283 (d), 524 (d), 524 (f), 748 (b).
Narayan v. Murti, 734 (x).
Narayan v. Nathaji, 274 (y).
Narayan v. Nathmal, 724 (y), 725 (f).
Narayan v. Pandurang, 784 (h).
Narayan v. Purushottam, 247 (q).
Narayan v. Satvaji, 48 (i), 48 (j), 48 (o).
Narayan v. Syed Hafiz, 307 (p), 719 (r).
Narayana v. Vasudeo, 21 (y).
Narayan v. Vithoba, 119 (t).
Narayan Budhaji v. Posha Jama, 724 (u), 731 (r).
Narayan Dasappa v. Ali Saiba, 133 (c), 891 (r).
Narayan Das v. Jatindra Nath, 25 (a).
Narayan Ganesh v. Baliram, 59 (f).
Narayan Kondaji v. Govind Krishna, 317 (r).
Narayan Laxman v. Gopalrao Trimbak, 189 (e).
Narayan Ramkrishna v. Vighneshwar, 481 (u).
Narayan Sahu v. Kishun Sahu, 703 (r).
Narayan Singh v. Nirajan Chakravarti, 66 (u).

- Narayana v. Rama, 246 (y).
 Narayana v. Viraraghavan, 322 (p).
 Narayand Ayyar v. Biyari Bivi, 659 (i).
 Narayana Pattar v. Viraraghavan, 325 (u).
 Narayana Pillay v. Ramaswamy, 29 (h).
 Narayana Sa v. Balaguruswami Nadar, 25 (d), 28 (x).
 Narayanasami v. Veeramili, 825 (h).
 Narayanaswami Ayyar v. Rama Aiyar 292 (f), 296, (a), 302 (k), 302 (l).
 Narayan Vankoba v. Pandurang Kamat, 739 (e).
 Narayanan v. Ravunni, 95 (a).
 Narayanan Chetty v. Muthiah Chetty, 111 (u).
 Narayen v. Syed Hafiz, 770 (b), 773 (p).
 Narayen Khandu v. Kalgaunda Birdar Patel, 594 (l).
 Narbadabai v. Mahadeo, 72 (g), 226 (i), 933 (q).
 Narendra v. Manindra, 799 (k).
 Narki v. Lal Sahu, 186 (v).
 Naro Gopal v. Paragowda, 111 (m).
 Narotam v. Tapesra, 98 (n).
 Narotam Das v. Sheo Pragash, 614 (f).
 Narottamdas v. Sheo Pragash Singh, 514 (y).
 Narottam Das v. Thakur Sukhraj, 658 (w), 658 (y).
 Narpat v. Ram Saran, 515 (a), 516 (f), 516 (g).
 Narpat v. Ram Saran Das, 624 (b).
 Narsagounda v. Chawagounda, 327 (q).
 Narsingh Partab v. Mohammad Yacub, 742 (a).
 Narsingh v. Rupan, 558 (w).
 Narsingh Rao v. Maha Lakshmi, 204 (e).
 Narsing Shivabakas v. Pachu Ram-bakas, 435 (q).
 Narsingh v. Vaman, 67 (i).
 Naru Hari v. Tai, 108 (y).
 Naru Hari v. Tai Kom Devji, 108 (x), 108 (z).
 Nash v. Eads, 636 (e), 636 (k), 638 (h).
 Nash v. Wooderson, 393 (e), 399 (h).
 Nasib Ali v. Wajid Ali, 924 (s).
 Nasib Ali v. Munshi Wajid Ali, 924 (s).
 Nasiben v. Preosunker, 20 (j).
 Nasir Khan v. Tara Chand, 38 (d), 378 (p).
 Nasiruddin v. Alimahomed Husain, 733 (n).
 Nasirul Haq v. Faiyazul, 59 (e).
 Nasrang Singh v. Meik, 835 (o).
 Nataraja v. Rangaswamy, 13 (v).
 Nataraja v. The South Indian Bank of Tinnevelley, 22 (w).
 Natesa Aiyar v. Appavu, 452 (f).
 Natesa Iyer v. Appavu, 452 (h), 452 (p).
 Natesa v. Gopalaswami, 17 (y), 152 (p).
 Natesa v. Tangavelu, 23 (e).
 Natesa v. Vengu, 826 (u).
 Natesa Thevan v. District Board of Tanjore, 297 (k), 301 (x), 303 (p).
 Natesa Vanniyan v. Gopalaswami Mudaliar, 231 (e), 431 (n), 432 (w).
 Natha v. Dhunbaiji, 21 (x), 320 (o), 323 (y).
 Natha v. Maganchand, 329 (d), 331 (h).
 Natha Gulab & Co. v. Shaller, 921 (m).
 Nathaji Anandrav v. Nana, 315 (x).
 Nathaji Anandrav v. Nana Sarjerao, 314 (q).
 Nathan Lal v. Durga Das, 743 (o), 743 (j), 748 (x).
 Nathoo v. Budhu, 428 (j).
 Nathubhai v. Mulchand, 48 (j), 48 (l).
 Nathu v. Gulabchand, 102 (s), 370 (b).
 Nathu v. Hansraj, 76 (k).
 Nathu Gangaram v. Hunsraj Morarji, 70 (f).
 Nathu Khan v. Thakur Burtonath Singh, 429 (u), 429 (v).
 Nathu Krishnamma v. Annangara, 611 (s).
 Nathu Krishnamma v. Annangara Chariar, 726 (l), 727 (w).
 Nathu Miah v. Nand Rani, 29 (g).
 Nathuwath v. Kolli Vallapil, 666 (f).
 National Bank of Australasia v. United Hand-in-Hand, Etc., 637 (p), 637 (q), 638 (i), 638 (l), 665 (y).
 National Bank of Australasia v. United Hand-in-Hand and Bank of Hope Co., 637 (z).
 National Bank of India, Ltd. v. R. C. Nazir & Co., 510 (r).
 National Bolivian Navigation Co. v. Wilson, 43 (k), 43 (l).
 National Insurance Co., Ltd. v. Haridas 17 (c).
 National Insurance Co. v. Haridas Bosee, 30 (m), 945 (c).
 National Provincial Bank of England, *In re Rees, Ex-parte*, 722 (r), 722 (u).
 National Provincial Bank of England, *Ex-parte, In re Sass*, 722 (q).
 National Provincial Bank of England v. Games, 654 (d), 655 (e).
 National Provincial Bank of England v. Jackson, 680 (w).
 National Telephone Co., Ltd. v. Postmaster-General, 3 (k).
 Nattu Krishnama Chariar v. Annangara Chariar, 574 (f).
 Natvarlal v. Ranchhod, 179 (a), 181 (r).
 Naubat Lal v. Mahadeo Prasad, 461 (a) 461 (c).
 Naubat Rai v. Dharmkal Singh, 458 (b).
 Naubat Rai v. Dhaunkal Singh, 239 (x), 267 (m).
 Naunihal v. Rameshar, 202 (g).
 Nauratan Lal v. Stephen, 320 (n).
 Navacoti v. Loyalinga, 97 (x), 98 (a).

TABLE OF CASES.

lxxxiii

- Nava Kishore, *v.* Madan Mohan, 806 (*d*).
 Nava Kishore Das *v.* Madan Mohan Das, 805 (*i*), 805 (*k*).
 Navalram *v.* Javerilal, 784 (*s*).
 Navrangh Singh *v.* A. S. Meik, 826 (*t*).
 Nawab Azmat Ali *v.* Jawahir Singh, 694 (*z*).
 Nawab Jahan *v.* Mirza Shujanddin, 690 (*w*).
 Nawab Jahan Ara *v.* Mirza Shujaiddin Bukht Bahdur, 699 (*i*).
 Nawab Mirza *v.* Nawab Fakr Jahan, 920 (*y*), 924 (*x*), 924 (*y*).
 Nawab Mirza Mohammad *v.* Nawab Fakar Jahan, 925 (*f*).
 Nawab Sindhee Nuzur Ally Khan *v.* Raja Ojoodhyaram Khan, 397 (*u*).
 Nawab Sidhee *v.* Raja Ojoodhyaram 563 (*i*), 659 (*d*).
 Naylor & Anr. Collinge, 849 (*d*).
 Naylor, Benzon & Co. *v.* Krainische Industrie Gesellschaft, 190 (*n*).
 Nazir Hasan *v.* Matin-uz-zima, 55 (*i*), 74 (*x*).
 Neah *v.* Mackenzie, 826 (*n*).
 Neale *v.* Mackenzie, 840 (*a*).
 Neelakandaha *v.* Ananthakrishna, 514 (*h*).
 Neelakantam Iyer *v.* Maddasamy Tevan, 749 (*c*).
 Neelamegna *v.* Govindan, 693 (*v*).
 Neelima Basu *v.* Joharlal Sarkar, 525 (*j*).
 Nelliappa *v.* Punnaivanam, 114 (*k*).
 Nellore *v.* Dwarapally, Municipal Council, 428 (*n*), 448 (*i*).
 Nesbitt *v.* Berridge, 713 (*u*).
 Netropal Singh *v.* Kalyan Das, 133 (*n*), 891 (*r*).
 Nettleton *v.* Stephenson, 161 (*f*).
 New's Case, 176 (*s*).
 New Chile Gold Mining Co., *Re.*, 44 (*u*).
 New, *In re*, 89 (*o*).
 Newburgh (Earl) *v.* Morton, 685 (*r*).
 Newby *v.* Sharpe, 834 (*y*), 863 (*w*).
 New Prince & Garrard's Trustee *v.* Hunting, 327 (*k*), 500 (*d*), 502 (*l*).
 New *Re*, *Ex-parte* Farley, Lavender & Owen, 506 (*e*).
 New River Co. *v.* Crumpton, 897 (*t*).
 Newton *v.* Allin, 841 (*c*), 863 (*s*).
 Newton *v.* Beck, 119 (*d*).
 Newton *v.* Charlton, 722 (*i*).
 Newton *v.* Chorlton, 721 (*i*), 721 (*n*).
 Newton *v.* Harland, 879 (*h*).
 Newton *v.* Newton, 502 (*v*).
 Newton Chambers & Co., Ltd. *v.* Hall, 121 (*o*).
 Niamat Ali *v.* Asmat Bibi, 912 (*g*).
 Nicholas *v.* Ridbey, 722 (*z*).
 Nichols *v.* Nixey, 157 (*q*).
 Nicoll *v.* Chambers, 407 (*r*), 408 (*f*).
 Nicol *v.* Verelst, 7 (*d*).
 Nicholson *v.* Smith, 807 (*l*).
 Nidha Sah *v.* Murli Dhar, 468 (*t*), 826 (*q*).
 Nidhee Singh *v.* Bissonath, 247 (*c*).
 Nijalingappa *v.* Chanbasawa, 588 (*a*).
 Nihala Ram *v.* Punnun Ram, 71 (*z*).
 Nil Madab *v.* Narattam, 133 (*c*), 133 (*i*).
 Niladhri Sahu *v.* Mahant Chaturbh Das, 114 (*m*), 114 (*o*).
 Nilkant *v.* Suresh Chandra, 560 (*u*), 608 (*t*).
 Nilakant Banerji *v.* Suresh Chand Malik, 549 (*t*).
 Nilamadhab *v.* Narattam, 134 (*p*), 891 (*r*).
 Nilcomal Pramanick *v.* Kamini Koomar Basu, 489 (*r*).
 Nijalingappa *v.* Chanbasawa, 291 (*z*), 293 (*s*), 585 (*e*), 585 (*f*), 588 (*a*).
 Nilkamal *v.* Kamakshya, 273 (*v*), 274 (*b*), 274 (*f*).
 Nilkant Sein *v.* Shekh Jaenodden, 673 (*m*).
 Nilmadhab Parhi *v.* Hara Proshad, 440 (*g*), 441 (*h*).
 Nilmadhab *v.* Haran Prosad, 368 (*a*).
 Nilmani Addy *v.* Dinendranath Das, 402 (*f*), 403 (*n*).
 Nilmoni *v.* Bashanta, 332 (*b*).
 Nilmoni Singh *v.* Bakranath Singh, 66 (*t*), 66 (*v*), 66 (*x*).
 Nilratan Mandal *v.* Ismail Khan, 784 (*p*).
 Nilu *v.* Asirbad Mandal, 611 (*q*).
 Nim Chand *v.* Jagabandhu, 124 (*r*), 473 (*i*).
 Niras Purbe *v.* Most Tetri, 252 (*b*), 252 (*g*).
 Nisar Ahmad *v.* Rehmat Begam, 918 (*l*).
 Nisar Husain *v.* Sundar Lal, 13 (*v*), 310 (*p*).
 Nisbet & Potts' Contract, *Re.*, 240 (*n*), 231 (*f*), 231 (*g*), 237 (*k*).
 Nitai *v.* Champaklata, 368 (*u*).
 Nityahari Roy *v.* Dunne, 120 (*k*).
 Nitya Gopal *v.* Nani Lal, 21 (*u*), 55 (*s*), 68 (*t*), 68 (*u*).
 Nitye Gopal *v.* Nagendra Nath, 525 (*j*).
 Nizam-ud-din *v.* Abdul Ghafar, 136 (*y*).
 Nizamuddin *v.* Mamtozuddin, 13 (*u*).
 Nizamudin *v.* Abdul Gopan, 924 (*d*).
 Nizamudin *v.* Rice, 551 (*k*).
 Noakes & Co. *v.* Rice, 552 (*p*), 553 (*v*), 553 (*z*), 572 (*u*).
 Nobin Chandra *v.* Nabab Ali, 148 (*l*), 240 (*l*).
 Nobin Chandra *v.* Rajani Chandra, 240 (*m*).

- Nobin Chandra *v.* Surendra Nath, 288 (*m*).
 Nobin Chunder *v.* Romesh Chunder, 48 (*t*), 48 (*n*), 48 (*p*).
 Nobin Chunder Roy *v.* Rup Lall Das, 759 (*m*).
 Nobin Krishna Bose *v.* Mon Mohun Bose, 730 (*m*).
 Noble *v.* Edwards, 457 (*a*).
 Nobokishore *v.* Harinath, 104 (*x*).
 Noel *v.* Rockcort, 532 (*q*).
 Noel *v.* Sandbrook, *Re* Sandbrook, 199 (*n*).
 Noel *v.* Ward, 568 (*r*).
 Nogendra *v.* Benny Krishna, 919 (*g*).
 Nordenfelt *v.* Maxim Nordenfelt Guns & Ammunition, Co., 190 (*n*), 191 (*i*).
 Norender *v.* Dwarka Lal, 608 (*v*).
 Norender Narain *v.* Dwarka Lal, 711 (*c*).
 Norendra Nath *v.* Kamal Basini, 184 (*h*).
 Norris *v.* Wilkinson, 502 (*h*), 504 (*e*), 505 (*r*), 505 (*s*).
 Northumberland Avenue Hotel Co. *In re*, 348 (*e*).
 North British Mercantile Insurance Co., *v.* London Liverpool and Globe Insurance Co., 285 (*k*).
 Northern Countries of England Fire Insurance Co., *v.* Whipp, 36 (*e*), 679 (*t*), 683 (*d*).
 North London and General Property Co., Ltd. *v.* Moy Ltd., 297 (*3*).
 North of England Pure Oil-cake Co. *v.* Archangel Maritime Insurance Co., 285 (*l*).
 North Stafford Steel Iron & Coal Co., (Burslem) Ltd. *v.* Camoys (Lord), 898 (*g*).
 Norton *v.* Yates, 286 (*t*).
 Norwich Corporation *v.* Norfolk Railway Co., 188 (*h*).
 Noshirwan *v.* Sharoshbanu, 98 (*k*), 98 (*l*).
 Nottidge *v.* Derring, 400 (*q*).
 Nottingham Brick Co. *v.* Butler, 240 (*n*).
 Nottingham Patent Brick & Tile Co. *v.* Butler, 46 (*t*), 233 (*w*), 236 (*p*), 237 (*e*), 385 (*p*), 389 (*q*), 400 (*p*).
 Noyes *v.* Paterson, 408 (*h*).
 Noyes *v.* Pollock, 664 (*i*), 674 (*t*), 676 (*g*).
 Noyna Misser *v.* Rupikun, 874 (*e*).
 Nowroji Padamji *v.* Putlibai, 184 (*j*).
 Nripendra *v.* Ashutosh, 332 (*b*).
 Nripendranath Chatterji *v.* Jhumak Mandar, 752 (*g*).
 Nrisingha Charan *v.* Rajniti Prasad, 480 (*n*).
 Nrisinha *v.* Batasi, 798 (*u*).
 Nuddyarchand *v.* Meahan, 836 (*k*).
 Nuddyarchand *v.* Meajan, 837 (*q*).
 Nugenderchunder Ghose *v.* Kaminee Dasee, 758 (*k*).
 Nagenderchunder *v.* Sreemutty Kaminee, 666 (*e*).
 Nugent *v.* Nugent, 87 (*f*), 87 (*l*).
 Nund Kishore *v.* Kanee Ram, 56 (*b*), 60 (*j*), 60 (*q*).
 Nundo Kumar *v.* Banomali, 291 (*v*), 292 (*q*), 301 (*x*).
 Nunn *v.* Wilsmore, 332 (*v*).
 Nur Mahomed *v.* Dinshaw, 242 (*s*).
 Nur Mahomed *v.* Natwar Lal, 789 (*w*).
 Nuring *v.* Roghoobur, 33 (*r*).
 Nursing Dass Kothari *v.* Chuttoo Lall Misser, 399 (*j*).
 Nursingh *v.* Raghobar, 36 (*z*).
 Nussey *v.* Provincial Bill Posting Co., 237 (*h*).
 Nutt *v.* Easton, 642 (*l*).
 Nyaunglebin *v.* Maung, 694 (*a*).
 Nyaunglebin Co-operative Bank *v.* Maung Ba U., 563 (*h*).
 Nyaunglebin Co-operative Bank *v.* Maung, *AIR*, 697 (*x*).
 Nynakka *v.* Vavana, 403 (*s*).
- O
- Oakden *v.* Pike, 404 (*w*), 404 (*x*), 412 (*z*), 413 (*c*).
 Oakes *v.* Bear, 504 (*c*).
 Oakes *v.* Turquand & Harding, 328 (*u*).
 Obai *v.* Ramalinga, 820 (*i*).
 Oasem Bux *v.* Bhagwandeem, 585 (*f*).
 Obhaya Charan *v.* Koilash Chunder, 889 (*x*).
 Obla Sundarachariar *v.* Narayana Ayyar, 510 (*m*), 510 (*s*).
 O'Brien *v.* Lewis, 921 (*a*).
 Ocean Accident Guarantee Corporation *v.* Illford Gas Co., 663 (*b*).
 Ockenden *v.* Henley, 452 (*o*).
 O'Driscoll *v.* Manchester Insurance Committee, 77 (*b*).
 Offen *v.* Harman, 412 (*x*), 436, (*y*).
 Official Assignee *v.* Abdul Hussain, 287 (*c*).
 Official Assignee *v.* Fakirji Cowasji, 755 (*y*), 940 (*z*).
 Official Assignee *v.* Moolla, 365 (*g*), 365 (*h*).
 Official Assignee *v.* N. P. A. K. Chettayar Firm, 86 (*w*).
 Official Assignee of Bombay *v.* Chimniram, 472 (*o*), 473 (*d*).
 Official Assignee, Bombay *v.* Registrar Small Causes Court, Amritsar, 256 (*o*).
 Official Assignee of Bombay *v.* Sundarachari, 333 (*f*), 334 (*i*).

Official Assignee of Madras *v.* Mary Dalgairins, 13 (*v*).
 Official Assignee of Madras *v.* Veda-valli, 196 (*y*).
 Official Receiver, *Ex-parte*, *Re.* Morrit, 643 (*o*), 473 (*w*).
 Official Receiver *v.* Bastiao Souza, 333 (*h*).
 Official Receiver Coimbatore *v.* Palani-swami, 333 (*f*).
 Official Receiver of Cudappa *v.* Kalawa Subbamma, 310 (*u*).
 Official Receiver, Trichinopoly *v.* Lakshman Aiyar, 944 (*a*).
 Official Receiver of Trichinopoly *v.* Samasundaram, 86 (*p*).
 Official Receiver *v.* P. L. K. M. R. M. Chettyar Firm, 238 (*t*).
 Official Receiver *v.* Tirathdas Mewaram, 749 (*n*).
 Ogilvie *v.* Foljambe, 407 (*w*), 407 (*x*).
 Ogilvie *v.* Jefferson, 501 (*o*).
 O'Halloran *v.* King, *Re.* Bown, 131 (*j*).
 Okhoymoney Dasee *v.* Nilmoney Mullick, 195 (*r*).
 Ok Kyi *v.* Ma Pu, 356 (*d*).
 Oldfield (or Bowles) *v.* Round, 385 (*w*), 386 (*f*).
 Oliver *v.* Hinton, 35 (*k*), 42 (*l*), 42 (*q*), 46 (*d*), 46 (*r*), 46 (*w*), 508 (*e*), 678 (*p*), 681 (*m*), 681 (*p*), 683 (*b*).
 Oliver *v.* King, 324 (*n*).
 Oliver's Settlement, *In re*, 141 (*a*).
 Omar Tyab *v.* Ismail Tyab, 84 (*l*), 98 (*x*).
 Omrao Begum *v.* The Secretary of State for India in Council, 747 (*i*).
 Onkar *v.* Gavardhan, 515 (*q*).
 Onkar Prasad *v.* Badri Das, 806 (*g*).
 Onkar Ramshet *v.* Goverdhandas, 479 (*d*).
 Onslow *v.* Anon, 864 (*e*).
 Onward Building Society *v.* Smithson, 259 (*h*), 259 (*j*).
 Oodit Parkash *v.* Martindell, 621 (*h*), 621 (*l*).
 Ooma *v.* Nittya Chand, 907 (*z*).
 Oo Noun *v.* Moun Htoon Oo, 505 (*a*), 509 (*v*), 510 (*s*), 511 (*f*).
 Openshaw *v.* Evans, 867 (*m*).
 Opera, Ltd., *In re*, 607 (*s*).
 Orby *v.* Trigg, 146 (*o*), 555 (*p*).
 Ord *v.* Noel, 88 (*v*).
 O'Reilly *v.* Thompson, 348 (*b*), 348 (*d*), 359 (*w*), 360 (*i*), 360 (*l*).
 Orme *v.* Wright, 631 (*g*), 637 (*y*), 639 (*p*).
 Osborne *v.* Bradley, 46 (*v*), 230 (*x*), 234 (*b*).
 Osman Ali *v.* Faijian, 677 (*w*).
 Otter *v.* Lord Vaux, 639 (*u*), 660 (*n*), 763, 770 (*e*), 775 (*s*).
 Ouslow *v.* Corrie, 858 (*x*).

Owen *v.* Body, 327 (*j*).
 Owen *v.* Crouch, 653 (*n*), 654 (*r*), 672 (*x*).
 Owen *v.* Delamere, 616 (*w*).
 Owen *v.* Davies, 347 (*m*).
 Owen *v.* Flack, 710 (*k*).
 Owen *v.* Homan, 765 (*w*).
 Owen *v.* Williams, 591 (*t*).
 Oxford (The Earl of) *v.* Rodney (Lady), 625 (*h*), 625 (*l*).

P

Paban Khan *v.* Badal Sardar, 525 (*m*).
 Packer *v.* Scott, 144 (*y*).
 Padamjee & Co. *v.* Moos, 472 (*q*).
 Padarath Halwari *v.* Ram Nain, 525 (*p*).
 Padbury *v.* Clark, 215 (*x*), 216 (*g*), 217 (*m*), 217 (*n*).
 Padgaya *v.* Baji Babaji, 477 (*o*).
 Padmanabh *v.* Khemu, 660 (*o*).
 Padmanabha *v.* Sitarama, 488 (*n*).
 Padmanabhaya *v.* Ranga, 897 (*i*).
 Padmanappa *v.* Sitarama Ayyar, 146 (*p*).
 Padmanund *v.* Hayes, 925 (*t*).
 Padmanund Singh *v.* Rama Proshad Mohi, 130 (*a*), 134 (*p*).
 Page *v.* Midland Railway Company, 422 (*y*), 431 (*l*).
 Page *v.* Norfolk, 376 (*r*).
 Page *v.* Public Trustee, *In re* Wilkin-son, 200 (*c*), 202 (*j*).
 Pagi Mania *v.* Desai Lallubhai, 820 (*e*).
 Pahlwan Singh *v.* Ram Bharose, 928 (*u*), 928 (*w*).
 Paine *v.* Hyde, 187 (*d*).
 Paine *v.* Meller, 374 (*w*), 447 (*x*).
 Pakija Bibi *v.* Adhar Chandra, 274 (*g*).
 Pal Singh *v.* Bhola Singh, 55 (*k*).
 Palamalai Mudaliyar *v.* The South Indian Export, Co., Ltd., 322 (*g*), 329 (*n*), 331 (*l*), 331 (*n*), 733 (*o*).
 Palaneappa Chetty *v.* Ma Shine, 619 (*h*).
 Palani *v.* Masakonon, 112 (*q*).
 Palani *v.* Selambara, 373 (*k*), 373 (*l*).
 Palaniandi Chetty *v.* Appavu Chettiar, 328 (*x*).
 Palaniappa *v.* Lakshmanan, 472 (*u*), 746 (*o*), 755 (*y*).
 Palaniappa *v.* Sreemath Devasika-mony, 113 (*g*).
 Palani Chetti *v.* Subramanyan, 308 (*v*).
 Palani Konan *v.* Masakonon, 276 (*v*).
 Palanivelappa Kaundan *v.* Mannaru Nsakar, 101 (*n*).
 Palikandy *v.* Krishnan Nair, 55 (*f*), 73 (*n*).
 Pall *v.* Gregory, 479 (*i*), 498 (*f*).
 Pallayya *v.* Ramavadhanulu, 6 (*t*), 52 (*w*), 919 (*f*), 919 (*l*).
 Pallikandi Katapmath Mammad *v.* Matancheri Mammad, 724 (*s*).
 Pallikelagatha Marcar *v.* Sigg, 914 (*p*).

- Palma v. Hendrie, 619 (g).
 Palmer v. Ekins, 258 (b).
 Palmer v. Goren, 839 (j).
 Palmer v. Hendrie, 536 (e), 536 (j),
 617 (p), 626 (p), 715 (u).
 Palmer v. Holdford, 145 (i), 157 (h).
 Palmer v. Locke, 405 (l).
 Palmer v. Rich, 280 (h).
 Palmer v. Wright, 567 (o).
 Palmer v. Young, 590 (n).
 Pal Singh v. Bhola Singh, 589 (d).
 P. Amman Pariyayi v. M. P. Pakran
 Haji, 759 (w).
 Pandai Pathan v. Ramasami Chetti,
 909 (s), 909 (t).
 Panagotis v. S. S. Pontiac, 5 (m).
 Panambatta v. Kalathipodkil, 666 (h).
 Pancham Singh v. Ali Ahmad, 720 (y).
 Pancham Singh v. Balak Ram, 247 (b).
 Panchanan v. Surendra Nath, 68 (v).
 Panchanan Bose v. Chandi Charan
 Misra, 786 (p).
 Panchu Charan v. Bnode Behai Haldar,
 816 (r).
 Panchubala Deby v. Jatindra Nath,
 129 (s).
 Pandarinath v. Govind, 103 (t).
 Pandarvun v. U. Sandama, 925 (l).
 Pandharinath v. Ramchandra, 95 (y).
 Pandia Chinna Thambiar v. Veerappa
 Pandian, 220 (m).
 Pandir Bangaram v. Karumoory
 Subbaraju, 263 (n).
 Pandit Chandrika v. B. B. & C. I.
 Ry., Co., 793 (m).
 Pandit Har Narain v. Pandit Sidhnath,
 292 (i).
 Pandiyan v. Vellayappa, 556 (d).
 Pandiyan Pillai v. Vellayappa, 293 (r).
 Pandoorang v. Balkrisehn, 511 (a).
 Pandoo Vithoji v. Goma Ramji,
 101 (m).
 Pandu v. Goma, 101 (l), 275 (r).
 Pandurang v. Bhagwandas, 101 (m).
 Pandurang v. Bhaskar, 273 (x), 275 (k),
 275 (n).
 Pandurang v. Bhimrav, 122 (j).
 Pandurang v. Dadabhoy, 534 (c).
 Pandurang v. Mahadaji, 704 (b).
 Pandurang v. Markandeya, 246 (c),
 524 (x).
 Pandurang v. Moreshwar, 780 (k).
 Pandurang Balaji v. Mahadev Gopal,
 438 (g), 444 (h), 444 (k).
 Pandu Vittoji v. Goma Ramji, 275 (i),
 275 (j), 275 (m).
 Pangati Ramarayanimgar v. Maha-
 rajah of Venkatagiri, 569 (b), 569 (c),
 571 (o), 579 (z).
 Panigatan v. Raman Nair, 666 (h).
 Pan v. Lovegrove, 401 (t).
 Pan Kuer v. Ram Narain, 149 (t).
 Pannalal v. Rajaram, 714 (z).
 Pannell v. City of London Brewery
 Co., 904 (b).
 Pannu Ram v. Ghulam Hussain,
 555 (s).
 Panther Lead Co., Re 888 (r).
 Papala Chakrapani v. Latchmi Achi,
 477 (i), 477 (j).
 Papamma v. Pratapa, 479 (c), 470 (e),
 480 (j), 480 (l).
 Papaya v. Ramana, 67 (m).
 Papiiah Naidu v. Naganatha, 9 (s).
 Papiiah Naidu v. Raja of Ramnad,
 501 (a).
 Papireddi v. Narasareddi, 369 (p).
 Paradine v. Jane, 870 (q).
 Paramanick's Case, 25 (b).
 Parameshri v. Vittappa, 133 (i), 891 (r).
 Parameshwar Singh v. Mt. Sureba,
 887 (z).
 Parameshwar Pandey v. Raj Kishore
 Prasad, 571 (m), 571 (n).
 Param Hans v. Randhir Singh, 520 (k).
 Parangodan v. Perumtoduka, 458 (f).
 Parangodan Nair v. Perumtoduka,
 454 (h).
 Paras Ram v. Mewa Kunwar, 13 (s).
 Paras Ram Singh v. Pandobi, 740 (i).
 Parasharam v. Rama, 39 (m).
 Parashram v. Govind, 22 (v).
 Parashar v. Ganu, 293 (o).
 Parasurama v. Puthuswamy Pillay,
 433 (e).
 Parasurama v. Thirumal, 89 (u).
 Parayad Das v. Mohunth Kriparam,
 69 (g).
 Parbati v. Baijnath, 927 (o).
 Parbati Charan v. Bandeali Akon,
 820 (h).
 Parbati Charan v. Gobinda Chandra,
 493 (l).
 Parbati Charan Roy v. Gobinda
 Chandra Kundu, 615 (l).
 Parbhu Lal v. Chattar, 38 (d).
 Parbhu Narain Singh v. Ramzan,
 133 (j).
 Parbhu Ram v. Jhalo Kuer, 541 (v).
 Parbuttey v. Mudho, 21 (e).
 Parch v. Ward, 567 (p).
 Pardo v. Bingham, 6 (x).
 Paresh Nath v. Nabogopal, 22 (q).
 Pargan Pandey v. Mahatom Mahato,
 515 (b), 515 (x), 516 (f), 622 (v),
 622 (w), 623 (s).
 Parkash Narain v. Raja Birendra,
 327 (p), 335 (r).
 Parken v. Whitby, 367 (o).
 Parker v. Best, *In re Best*, 695 (g).
 Parker v. Jackson, 478 (v), 579 (t).
 Parker v. Jones, 890 (h).
 Parker v. Sowerby, 182 (z), 183 (b).
 Parker v. Watkins, 653 (m), 654 (q).
 Parker v. Webb, 804 (s).
 Parker v. Whyte, 35 (u), 240 (n).

- Parkinson v. Hanbury, 635 (t), 665 (b).
 Parkum Chirathodi v. Narayanan, 89 (k).
 Parmanand v. Birkhu, 24 (s).
 Parmanand v. Lokman Dass, 705 (s).
 Parmanand v. Mata Din, 584 (z), 585 (d).
 Parmanand v. Sahib Ali, 550 (j).
 Parmenter v. Webber, 791 (o), 859 (o), 861 (d).
 Parmeshri v. Vittappa, 133 (c), 861 (b).
 Parmeshwar v. Masummat Sureba, 887 (f).
 Parnell v. Tyler, 639 (q).
 Parr v. Lovegrove, 402 (l).
 Parry v. Wright, 775 (s).
 Parsharam v. Sadashiv, 324 (r).
 Parsotam v. Janki Bai, 279 (v).
 Parsotam v. Mulu, 608 (t).
 Parsotam v. Sanchi Lal, 305 (w).
 Parsotam Das v. Jaijit Singh, 655 (g), 702 (a).
 Partab v. Nehal Singh, 279 (w).
 Partab Bahadur v. Gajadhar Baksh, 578 (m), 578 (o).
 Partab Bahadur Singh v. Gajadhar Baksh, 491 (u), 494 (d).
 Partab Bahadur Singh v. Gajadhar Singh, 623 (n).
 Partab Singh v. Bohra Nathu, 102 (t).
 Partap Chand v. Saiyida Bibi, 243 (w), 249 (r), 250 (j).
 Parthasarathy v. Subbaraya, 34 (y), 41 (b), 331 (o).
 Parthasarathy v. Thiruvengada, 168 (j).
 Partington v. Woodcock, 602 (w).
 Partriche v. Powlet, 280 (k).
 Partridge v. Partridge, 198 (m), 201 (h).
 Partridge v. Rhodena Goldfields, Ltd., 942 (n).
 Parvati v. Dayabhai Muncharam, 61 (g).
 Parvati v. Kisansing, 317 (r).
 Parvathi Ammal v. Govindaraja, 308 (z), 311 (a).
 Parvati Ammal v. Venkatarama Iyyer, 718 (h), 724 (v), 724 (w), 724 (x), 724 (z), 725 (d), 733 (j).
 Parvati Devanna Jagadal v. Shrinivas Ramchandra Patil, 757 (x).
 Pary v. Davis, 898 (f).
 Paschand v. Paschand, 228 (c), 228 (d).
 Patch v. Wild, 675 (p).
 Patel Ranchod Morar v. Bhikabhai, 374 (y).
 Pateshri v. Nageshar, 251 (z).
 Pateshri Pertab v. Nageshar, 249 (r).
 Pathammal v. Syed Kalai, 441 (u).
 Patha Muthammal v. Esup Rowether, 760 (b).
 Patman v. Harland, 35 (x), 38 (e), 240 (u), 397 (v).
 Patrick v. Milner, 453 (u).
 Patten v. Bond, 729.
 Pattabhiramier v. Vencatarow, 487 (g), 487 (i).
 Paul v. Nathaniel Gopal, 228 (b).
 Paul v. Nathaniel, 923 (g).
 Paul v. Paul, 256 (l).
 Pauncefoot v. Blunt, 330 (c).
 Paya Matathil v. Kovamel, 714 (h).
 Paya Matathil v. Kovamel Amina, 714 (z).
 Payne v. Cardiff Rural District Council, 634 (f).
 Payne v. Haine, 867 (i).
 Peacock v. Dickerson, 531 (s).
 Peacock v. Frigout, *Re. Abbott*, 147 (f), 157 (i).
 Peacock v. Monk, 322 (f).
 Pearce v. Brooks, 190 (k).
 Pearce v. Bulteel, 322 (k), 322 (m), 329 (p).
 Pearce v. Morris, 537 (o), 710 (j), 710 (q), 712 (g), 714 (z).
 Peari Pasi v. Gauri Lal, 946 (q).
 Peaks v. Moseley, 155 (b).
 Pearneenath Brohmo v. Juggessuree, 757 (v).
 Pearse v. Prothero, *Re. Price, Ex-parte*, 503 (s).
 Pears v. Morris, 535 (x).
 Peary Lal v. Madhoji, 223 (p), 288 (k), 288 (m), 288 (o).
 Peary Mohun Mukerjee v. Narendra Nath Mukerjee, 752 (o).
 Peary Mohan Mukerji v. Monohar Mukerji, 89 (m).
 Peary Mohan v. Sreenath, 521 (m).
 Pechu Vadhiar v. The Secretary of State for India, 641 (d).
 Peda Venkanna v. Sreenivasa, 338 (d).
 Peek Gurney, 208 (p).
 Peek's Trusts, *Re.*, 173 (v).
 Peel v. Gurney, 678 (f).
 Peerkha Lalkra v. Bapu Kashiba, 239 (z), 267 (m), 458 (b).
 Peer Mahomed v. Mahomed Ebrahim, 375 (m).
 Pegg v. Wisden, 413 (a).
 Pellatt v. Boosey, 863 (r).
 Pell v. De Winton, 474 (m).
 Pell v. Gregory, 614 (a), 614 (b), 488 (p), 492 (b).
 Pell v. Stephens, 617 (n).
 Pema Gaoli v. Ganpat Rao, 473 (a).
 Pembroke v. Thorpe, 360 (k).
 Pemmarazu v. The Secretary of State for India, 826 (p), 826 (u).
 Pemsell & Wilson v. Tucker, 239 (c), 390 (u).
 Pengall v. Ross, 346 (e), 347 (h), 347 (n).
 Peninsular and Oriental Steam Navigation Co. v. Shand, 558 (b).
 Pennant's Case, 898 (a).
 Penniall v. Harborne, 839 (l).

lxxxviii THE TRANSFER OF PROPERTY ACT.

- Pennington, *Re., Ex-parte Cooper*, 331 (q).
 Penny v. Pidcock, *Re. Pidcock*, 500 (d), 502 (l).
 Penrhyn v. Robarts, *Re Penrhyn's (Lord) Settlement Trusts*, 4 (b), 5 (k).
 Penry's Administratrix v. Brown, 849 (c), 867 (j).
 Penton v. Robart, 847 (k).
 Penwarden v. Roberts, 521 (m).
 Pergash Koer v. Mahabir Pershad, 16 (p).
 Pergash Lal v. Akbouri Balgobind Ghose, 223 (s), 862 (m).
 Perhloed Sein v. Doorga Persaud Tewarree, 52 (s).
 Periamurugappa v. Manicka Chetty, 307 (u), 308 (d), 308 (z), 316 (u).
 Perianna Servaigaran v. Marudai-nayagam Pillai, 621 (q), 654 (a), 723 (c), 723 (m), 735 (c).
 Periyanan v. Govind Rao, 114 (j).
 Perkins v. Bradley, 506 (d).
 Perkinson v. Hanbury, 636 (c).
 Perlathail Subba Rau v. Mankude Narayana, 491 (r), 495 (i), 495 (k), 513 (p), 513 (q).
 Perria Karuppan v. Subramania, 895 (c).
 Perrett and Bennett—Stanford's Arbitration, *Re.*, 814 (p).
 Perry v. Barker, 626 (p), 626 (q).
 Perry v. Phelps, 58 (r).
 Perr-Herrick v. Attwood, 682 (s), 682 (t).
 Pertab Chander Ghose v. Mohendra-nath Purkait, 375 (g).
 Peru Bepari v. Ronuo Maifarash, 28 (s), 118 (o).
 Perumal v. Kaveri, 723 (e), 724 (t), 731 (q), 735 (c), 735 (g).
 Perumal Ammal v. Perumal Naicker, 123 (o), 468 (y), 511 (y), 917 (y), 926 (w), 926 (x).
 Perumal Ammal v. Perumal Nayaker, 136 (o), 336 (s), 940 (y), 946 (q).
 Perumal Pillai v. Raman Chettiar, 610 (n), 610 (o), 691 (a), 691 (e).
 Pestonji v. Hormasji, 532 (g).
 Peter v. Nicolls, 341 (c).
 Peter Nicholl v. Tarinee, 874 (e).
 Petherpermal Chetty v. Muniandi Servai, 336 (z).
 Pethu Ayyar v. Sankaranarayana, 307 (j), 317 (r).
 Pethu Ayyar v. Sankaranarayana Pullai, 309 (l).
 Peto v. Hammond, 35 (k), 46 (r), 46 (w), 714 (b).
 Petrie v. Bury, 431 (j).
 Peytons Settlement, *Re.*, 88 (z).
 Peyton v. Ayliffe, 714 (n).
 Peyton v. Bladwell, 190 (z).
 Peyton v. Bury, 199 (p), 199 (q).
 Phattechand v. Uma, 757 (u).
 Phemdari Lal v. Arya Prithi Nidhi, 919 (j).
 Phene v. Popplewall, 888 (r).
 Phillips v. Alderton, 360 (h).
 Phillips v. Bridge, 901 (e).
 Phillips v. Caldcleugh, 426 (y).
 Phillips v. Doelittle, 903 (j).
 Phillips v. Evans, 567 (h).
 Phillips v. Eyre, 6 (x).
 Phillips v. Gutteridge, 768 (h), 771 (o), 773 (r).
 Phillips v. Hartley, 787 (j).
 Phillips v. Homfray, 445 (q).
 Phillips v. Mullings, 256 (m).
 Phillips v. Probyn, 190 (h).
 Phillips v. Silvester, 425 (u).
 Phillips v. Vaughan, 723 (i).
 Phipps v. Ackers, 180 (g).
 Phipps (P) & Co., (Northampton & Towcester Breweries), Ltd. v. Rogers, 814 (t).
 Phirozshaw v. Bai Goolbai, 220 (i).
 Phool Chand v. Ram Nath, 12 (j).
 Phul Chand v. Akbar Yar Khan, 167 (w).
 Phul Chand v. Chand Mal, 470 (r).
 Phul Chand v. Lakku, 917 (b).
 Phul Chand v. Lakkhu, 928 (u).
 Phul Chand v. Mt. Surji, 769 (r).
 Phul Kuar v. Murlidhar, 516 (f).
 Phul Kuar v. Musli Dhar, 467 (r).
 Phul Kuer v. Rambhanjan, 428 (q).
 Phulmani Chandrain v. Nageshwar Prasad, 712 (i).
 Phulmani Chandrain v. Nageshwar Prasad, 737 (s).
 Phulwanti v. Janeshar, 57 (g).
 Pichai Konar v. Narasimha, 732 (g), 734 (r).
 Pichaiyappa v. Govindaraja, 730 (h), 734 (r).
 Pichi Naidu v. Jefferson, 151 (k).
 Pickard, Pickard v. Waters, 187 (e).
 Pickard v. Sears, 262 (i), 678 (e), 680 (a).
 Pickersgill v. Rodger, 212 (e), 217 (i).
 Pickett v. Loggon, 369 (h).
 Picking v. Vowles, 591 (t).
 Pigot v. Cubley, 473 (f), 633 (a), 643 (o).
 Pile v. Pile, *Ex-parte*, Lambton, 472 (k), 507 (t).
 Pilmore v. Hood, 385 (z).
 Pilu v. Babaji, 104 (x), 104 (y), 106 (d).
 Pindoe v. U. Hpa, 356 (d).
 Pindiprolu v. Pindiprolu, 56 (c), 60 (j).
 Pinero v. Judson, 786 (r), 788.
 Pinto v. Narayan, 622 (x).
 Piramu Ammal v. Serunatha Ammal, 727 (x).

- Pir Bakhsh's Case, 343 (*r*).
 Pir Bakhsh *v.* Mahomed Tahar, 365 (*g*).
 Pir Bakhsh *v.* Mahomed Tahee, 379 (*a*).
 Pirthiraj Singh *v.* Rukmin Kunwar, 460 (*v*).
 Pitambar *v.* Rajaram, 430 (*g*).
 Pitcher *v.* Tovey, 795 (*e*).
 Pitt *v.* Pitt, 770 (*f*), 770 (*g*), 775 (*m*), 776 (*c*).
 Platt *v.* Mendel, 770 (*e*), 776 (*v*).
 Playne *v.* Scriven, 519 (*p*), 519 (*q*).
 Pledge *v.* Buss, 721 (*j*).
 Pledge *v.* White, 569 (*e*), 575 (*q*), 575 (*z*).
 P. L. T. A. R. Chettyar A Firm *v.* Maung Kyaing, 252 (*l*).
 Plumb *v.* Fluitt, 33 (*v*), 35 (*n*).
 Pocock *v.* Gilham, 802 (*n*), 802 (*u*).
 Pohkar *v.* Dulari, 51 (*f*), 51 (*i*).
 Pokhar Singh *v.* Dulari Kunwar, 60 (*v*), 62 (*r*).
 Pokhpal Singh *v.* Bishan Singh, 541 (*d*).
 Pokree Saheb Beary *v.* Pokree Beary, 653 (*n*), 672 (*w*).
 Pole-Carew *v.* Western Counties and General Manure Co., 28 (*g*), 852 (*x*).
 Polglass *v.* Oliver, 531 (*z*).
 Ponambala Chetti *v.* Muthuswami Pillai, 712 (*n*).
 Ponnambala *v.* Annamalai, 563 (*h*), 694 (*z*).
 Ponnambala *v.* Sivagnan, 59 (*f*).
 Ponnammal *v.* Pichai Thevan, 734 (*v*).
 Ponnusami *v.* Thata, 102 (*u*).
 Ponnusami *v.* Shrinivasa, 691 (*b*).
 Ponnusami Mudaliar *v.* Srinivasa, 562 (*n*).
 Ponnaya Goundan *v.* Muthu Goundan, 371 (*h*).
 Pontet *v.* The Basingstoke Canal Co., 616 (*e*).
 Pontifex *v.* Foord, 873 (*t*).
 Poole's Case, 847 (*m*), 847 (*y*).
 Poole *v.* Adams, 447 (*y*).
 Poole *v.* Bentley, 786 (*p*), 786 (*t*), 788.
 Poole *v.* Hill, 418 (*o*).
 Pooley Hall Colliery Co., *Re.*, 752 (*n*).
 Poothakka *v.* Annamalai, 30 (*s*).
 Pope *v.* Biggs, 287 (*d*), 287 (*y*), 601 (*f*), 663 (*g*).
 Pope *v.* Day, 832 (*h*).
 Pope *v.* Garland, 397 (*m*).
 Pope *v.* Official Assignee, 238 (*t*).
 Popham *v.* Damfield, 187 (*y*).
 Popham *v.* Bampffield, 206 (*i*).
 Popleton *v.* Buchanan, 392 (*p*), 455 (*o*).
 Poppleton *v.* Buchanan, 402 (*j*).
 Port Canning Land Improvement Corporation *v.* Katyani Debi, 785 (*a*), 786 (*t*), 786 (*x*), 786 (*b*), 789 (*v*).
 Porter *v.* Clinton, 336 (*h*).
 Postman *v.* Mill, 388 (*a*).
 Potter, *Re. Ex-parte* Chippendale, 503 (*w*).
 Potter *v.* Edwards, 554 (*e*).
 Potter *v.* Potter, 347 (*g*).
 Potts *v.* Smith, 831 (*f*), 835 (*m*).
 Poulette (Earl) *v.* Hood, 422 (*z*).
 Poulton *v.* Moore, 261 (*x*).
 Poulton *v.* Poultney, *In re* Poultney, 186 (*t*).
 Powell, *Ex-parte, Re.*, Moore, 503 (*u*).
 Powell *v.* Browne, 424 (*o*).
 Powell *v.* Eason, 715 (*x*).
 Powell *v.* Hellicar, 185 (*o*).
 Powell *v.* Helmsley, 237 (*m*), 239 (*a*), 241 (*p*).
 Powell *v.* Kempton Park Racecourse Co., 4 (*r*).
 Powell *v.* Smith, 883 (*y*).
 Powley *v.* Walker, 864 (*e*).
 Powney *v.* Blomberg, 532 (*h*).
 Prabhakar *v.* Pandurang, 641 (*e*), 670 (*g*).
 Prabhaker *v.* Pandurang, 670 (*z*).
 Prabhu Mal *v.* Banwari Lal, 119 (*s*).
 Prabhu Narain Singh *v.* Ramzan, 231 (*a*).
 Pradyumna Kumar *v.* Pramatha Nath, 168 (*i*).
 Praed *v.* Gardiner, 687 (*a*), 722 (*x*).
 Prafulla *v.* Bhabani, 109 (*k*).
 Prafulla Chunder Mullick *v.* Jogendra Nath, 167 (*s*).
 Prag Din *v.* Nankan Singh, 659 (*g*).
 Prag Narain *v.* Kadir Bakhsh, 893 (*a*), 893 (*w*), 893 (*x*).
 Pramatha Nath *v.* Chanpa Dasi, 809 (*r*).
 Pramatha Nath *v.* Pradyumna, 52 (*c*).
 Pramatha Nath *v.* Rajah Bejoy, 783 (*g*).
 Pramoda Nath Roy *v.* Ramani Kanta Roy, 862 (*n*).
 Pranal Anni *v.* Lakshmi Anni, 760 (*a*).
 Pranballabh *v.* Bhagabanchandra, 560 (*z*), 562 (*o*).
 Pranjivan *v.* Bajju, 311 (*a*).
 Pranjivandas *v.* Chan Ma Phee, 499 (*l*), 501 (*r*).
 Pranjivandas Mehta *v.* Chan Ma Phee, 506 (*q*), 507 (*v*), 507 (*u*).
 Pran Kraishns *v.* Surath Chandra, 274 (*b*).
 Pran Mohan *v.* Hari Mohan, 354 (*v*), 921 (*k*).
 Pran Mohan Das *v.* Hari Mohan Das, 922 (*u*).
 Pran Nath *v.* Jadu Nath, 520 (*d*), 524 (*d*), 524 (*e*).
 Prannath *v.* Madhu, 895 (*w*).
 Prannath Sarkar *v.* Jadu Nath Saha, 748 (*a*), 750 (*u*).
 Pranpati *v.* Harihar, 623 (*o*).
 Prasaddas *v.* Bonnerjee, 646 (*p*).

- Prasaddas v. K. B. Bannerjee, 87 (c).
 Prasaddas v. K. S. Bonnerjee, 78 (f), 87 (a).
 Prasanna Kumar Haldar v. Girish Chandra, 623 (o).
 Prasanna Kumar v. Srikantha Rout, 260 (s), 272 (n).
 Prasanno v. Ashutosh Ray, 76 (i).
 Pratap Bahadur Singh v. Gajadhar Bakhsh, 623 (p).
 Pratap Bahadur Singh v. Gajadhar Bakhsh Singh, 623 (t).
 Pratap Chandra v. Peary Mohan, 710 (p).
 Pratap Das v. Nand Singh, 132 (v).
 Pratap Narain v. Harihar, 895 (r).
 Precious v. Reddie, 814 (l).
 Preece v. Corrie, 791 (o).
 Prees v. Cock, 541 (z).
 Prem Chand v. Mohshoda Debi, 223 (s).
 Prem Chand v. Purnima Dasi, 658 (y).
 Premdas v. Sheoprasad, 114 (q).
 Premier Rinks, Ltd. v. Amalgamated Cinematographs Theatres, Ltd., 855 (c).
 Premji v. Haji Cassum, 296 (y).
 Prem Krishna v. Jadunath, 523 (n).
 Premsukdas v. Peekhan, 311 (a), 725 (e), 737 (r).
 Prem Sukh v. Bhupia, 889 (x).
 Prem Sukh v. Mangal Chand, 611 (s).
 Prentice v. Elliot, 863 (p).
 Preonath v. Asutosh, 38 (z), 378 (m).
 Preonath Shaha v. Madhu Sudan, 482 (e).
 Prescott v. Phipps, *Re. Aloock*, 559 (m).
 President and Governors of Magdalen Hospital v. Knotts, 269 (w).
 Price v. Jenkins, 340 (m).
 Price v. North, 392 (s).
 Price v. Perrie, 547 (f).
 Prideaux v. Lonsdale, 256 (l).
 Prior v. Moore, *In re Moore*, 142 (h), 143 (j).
 Prior v. Ongley, 812 (u).
 Prisk v. Mitchell, *Re. Davery*, 157 (j).
 Pritchard v. Wilson, 634 (h), 640 (g).
 Privy Council, *The*, 353 (k).
 Priya Sakhi v. Manbody, 479 (e), 542 (l).
 Probodh Chandra v. Road Oils, 755 (x).
 Probodh Kumar v. Gillanders Arbuthnot & Co., 418 (m).
 Professional Life Assurance Co., *Re.*, 688 (g).
 Profulla Chandra v. Nanda Lal, 813 (e).
 Prohlad v. Biswas Nath, 366 (o).
 Prokash Chandra Husan Banu, 660 (q).
 Prokash Chandra Ghoso v. Hasan Banu Bibi, 543 (v), 618 (z), 619 (e), 619 (f).
 Promada v. Srigobind, 784 (q).
 Promoda Nath v. Asiruddin Mandal, 783 (e).
 Promode Ranjan v. Aswini Kumar, 134 (p).
 Promotha Nath v. Jagannath, 313 (z).
 Promotho Nath v. Kali Prasanna, 12 (e), 17 (e), 886 (l).
 Promotho Nath Mitter v. Kali Prasanna, 3 (h).
 Promotho Nath Mitter v. Kali Prasanna Chowdhry, 909 (b).
 Propert v. Parker, 801 (e), 808 (b), 808 (d).
 Proplad Teor v. Kedar Nath, 837 (q).
 Prosanna Kumar v. Girish Chandra, 666 (n).
 Prosser v. Edmonds, 75 (u).
 Prosser v. Edwards, 31 (l).
 Prosser v. Watts, 35 (o), 397 (t).
 Prosunno Coomaree v. Rutton Bepary, 784 (m).
 Prosunnon Coomar v. Jagun Nath, 784 (m).
 Prosunno Kumar Bose v. Jamaluddin Mahomed, 735 (a).
 Prosunno Kumari v. Golab Chand, 113 (g).
 Protap Chandra v. Jagadish Chandra, 80 (i).
 Protap Chandra v. Judisthir Das, 271 (j).
 Protap Chandra Dhar v. Peary Mohan Dhar, 713 (q).
 Protector Loan Co. v. Grice, 615 (s).
 Proudfoot v. Hart, 865 (m), 865 (o), 866 (z), 866 (z).
 Prout v. Cock, 728 (a).
 Provincial Bill Posting Co. v. Law Moor Iron Co., 27 (b).
 P. R. P. R. Somasundram Chettiar v. Y. P. N. Nachiappa Chettiar, 754 (h).
 Pryce Jones v. Williams, 403 (n).
 Prytherch v. Williams, *In re. Prytherch*, 663 (a).
 Public Trustee v. Dixon, *In re. Grove*, 199 (x).
 Public Trustee v. Duchy of Wancaster, 398 (d).
 Public Trustee v. Mabey, *Re. Hume*, 182 (x).
 Puchcha Lal v. Kunj Behari Lal, 355 (w).
 Puckett & Smith's Contract, *Re.*, 384 (l), 385 (x), 394 (p), 395 (a), 395 (y).
 Pudumjee & Co. v. Moos, 756 (j).
 Pugh v. Acton, 850 (l).
 Pugh v. Arton, 847 (a), 847 (z).
 Pugh v. Carttar, 79 (p).
 Pulin Chandra v. Bolai Mandal, 104 (x).
 Pullamma v. Pradosham, 659 (i).

Q

Pullen v. Palmer, 280 (b).
 Pulliak Chetty v. Varadarajalu, 60 (t).
 Pulsford v. Hunter, 173 (y).
 Pulteney v. Darlington (Lord), 217 (j).
 Punardeo Narain Singh v. Ram Sarup Roy, 4 (a).
 Puncha Thakur v. Bindeswari, 68 (a).
 Puncha Thakur v. Bindeswari, Thakur, 58 (s), 58 (x).
 Puninthavelu v. Bhashyam Ayyangar, 472 (j).
 Punjab & Sind Bank, Ltd. v. Kishen Singh Gulab Singh, 91 (e), 647 (z).
 Punjab & Sind Bank, Ltd. v. Kishen Singh, 648 (i), 769 (y), 771 (p), 777 (h).
 Punjab Banking Co., Ltd. v. Muhammad Hassan, 38 (t).
 Punjaram v. Harisao, 76 (k).
 Punnayya v. Venkatappa, 28 (u).
 Punnett, *Ex-parte*, *Re*. Kitchin, 472 (k), 472 (l).
 Puran Chand v. Monmotho Nath, 313 (d).
 Purmanandas Jeewandas, *In re*., 874 (f).
 Purmanandas v. Dharsey, 786 (p), 787 (e), 789 (u), 819 (m).
 Purmananddas v. Jamnabi, 642 (k).
 Purmanandas Jiwandas v. Jamnabai, 638 (k).
 Purna Chandra Pal v. Baroda Pro-sanna, 745 (f), 752 (m).
 Puranmal Chund v. Venkata Subbarayalu, 769 (w), 773 (q), 774 (z).
 Purna Shashi Bhattacharji v. Kalidhan Bai Chowdhuri, 147 (c), 153 (t).
 Purosna Soonduree v. Prohlad Chunder, 820 (n).
 Purshotam v. Dattatraya, 893 (q).
 Purshotam v. Nana, 819 (c).
 Purshottam v. Isub Mahamad, 549 (u).
 Purshottam v. Sagaji, 548 (q), 548 (r).
 Purushottama v. Municipal Council of Bellary, 28 (s), 118 (p).
 Pusa Mal v. Makdum Bakhsh, 907 (i), 907 (x).
 Pusey v. Desbouvrie, 214 (m).
 Puthia Valappil Barga v. Kunhunha Umma, 746 (n).
 Puthia Valappil Barga v. Veloth Assenar, 745 (d).
 P. V. Chetty Firm v. Motor Union Insurance Company, 286 (q), 668 (m).
 Pyare Lal v. Meen Mal Bal, 74 (h).
 Pyot v. St. John (Lady), 867 (h).
 Pyrke v. Waddingham, 405 (d), 406 (h).
 P. Z. R. Co-operative Society v. Maung Thu, 287 (b).

Qadir Parast Khan v. Mir Mohammad, 742 (x).
 Qadir Parast Khan v. Nur Muhammad, 617 (o).
 Qador Baksh v. Mangha Mal, 372 (u), 542 (j), 542 (k).
 Qamar-ud-din v. Mst. Hassan Jan, 924 (s), 924 (t), 924 (u).
 Quadratulla v. Gulgandi, 317 (r).
 Quarrell v. Beckford, 665 (x).
 Queen v. Burah, 10 (c).
 Queen v. South Western Railway Co., 146 (y).
 Queen's College Oxford v. Halbett, 876 (r).
 Queen-Empress v. Abdul Latib, 9 (i).
 Queen-Empress v. Appavu, 366 (v).
 Queen-Empress v. Bal Gangadhar Tilak, 3 (a).
 Queen-Empress v. Indrajit, 4 (q).
 Queen-Empress v. Kartick Chunder, 3 (f).
 Queen-Empress v. Kartik Chunder Das, 3 (b).
 Queen-Empress v. Shaik Ibrahim, 119 (q).
 Queensland Land & Coal Co., *In re*, 749 (e).
 Quesnel Works Gold Mining Co. v. Ward, 892 (f).

R

R. v. Casement, 5 (o).
 R. v. Cassel 5 (o).
 R. v. Champneys, 12 (i).
 R. v. Dautre, 920 (z).
 R. v. Dursley (Inhabitants) 7 (d).
 R. v. Fulham Guardians, 5 (l).
 R. v. Ipswich Union, 7 (z).
 R. v. Jarvis & Walker, 793 (l).
 R. v. Lee (Inhabitants), 27 (a).
 R. v. Local Government Board, 5 (i).
 R. v. Otley Suffolk (Inhabitants), 29 (b).
 R. v. Paulson, 897 (q).
 R. v. Pearce, 5 (r).
 R. v. Shaw, 92 (q).
 R. v. Speyer, 5 (o).
 R. v. Taunton St. James (Inhabitants), 4 (z).
 R. v. Topping, 847 (a).
 R. M. A. R. Firm v. Maung San Myun, 328 (c).
 R. M. A. R. M. Firm v. Maung San Myun, 329 (o).
 R. M. A. R. S. Chettyar Firm v. Daw Ngwe, 442 (h).
 R. M. P. M. Chettyar Firm v. Siemens, 648 (y).
 R. S. Ruikar v. Emperor, 3 (d).

- Rabeholme v. Smith, 87 (x).
 Rachappa v. Ningappa, 51 (n).
 Radcliffe, *Re.*, 565 (z).
 Radcliffe v. Abbey Road & St. John's Ward Permanent Building Society, 502 (l).
 Radha Bai v. Kamod Singh, 267 (n), 268 (v).
 Radha Charan v. Golak Chandra, 795 (h).
 Radha Churn v. Parbuttee Churn, 599 (v).
 Radha Churn Shaha v. Parbuttee Churn Dutt, 620 (w).
 Radha Kanta v. Bipro Das, 277 (q).
 Radha Kishan v. Fakharuddin, 776 (x).
 Radha Kishun Marwari v. Hem Chander Bose, 710 (o), 713 (p).
 Radha Krishna v. W. C. O'flaherty, 824 (t).
 Radhamoni Debi v. The Collector of Khulna, 542 (f).
 Radha Prasad v. Ranee Mani, 195 (w).
 Radhabai v. Anantrav, 67 (e).
 Radhabai v. Shamrav, 712 (i).
 Radhakrishna v. Subraya, 519 (h).
 Radhakrishna Iyer v. Muthuswamy Sholagan, 574 (g), 574 (i).
 Radharam v. Purna Chandra, 78 (f), 646 (p).
 Radhasyam v. Sibu Panda, 305 (w).
 Radhay Lal v. Mahesh Prasad, 358 (r), 758 (e).
 Radhika v. Radhamani, 307 (i).
 Rafiuddin v. Brijmohan, 308 (u).
 Raggett, *In re*, *Ex-parte* Williams, 569 (d), 573 (b), 576 (a).
 Raghava v. Srinivasa, 81 (o).
 Raghava Chariar v. Srinivasa, 98 (z).
 Raghavachari v. Venkatanarayana, 694 (z).
 Ragho v. Dwarka, 251 (u), 253 (x).
 Ragho v. Zaga Ekoba, 95 (f), 105 (v).
 Ragho Atmaram v. Purshotam, 336 (z).
 Ragho Govind v. Balvant Amrit, 933 (n).
 Raghoba Sakaram v. Madhoram Bapuji, 712 (m).
 Raghoo Pandey v. Kassy Parey, 21 (a).
 Raghu v. Harlal, 694 (c).
 Raghub v. Bhobni, 701 (t).
 Raghub Pruste v. Bhobui Sahoo, 702 (l).
 Raghubano Kuar v. Ramsahai, 712 (j).
 Raghubans Mani Singh v. Mahabir Singh, 760 (b).
 Raghubar v. Jai Raj, 443 (u).
 Raghubar v. Mohit Narayan, 673 (p), 677 (u).
 Raghubar Dayal v. Budhu Lal, 528 (x).
 Raghubir Datt v. Narain Datt, 60 (u).
 Raghukul Singh, 446 (t).
 Raghukul v. Pitam Singh, 442 (e), 444 (m), 445 (o), 747 (f), 747 (g).
 Raghukul Tilak v. Pitam Singh, 714 (z), 747 (h).
 Raghunandan Prasad v. Ambika Singh, 709 (i).
 Raghunandan Rai v. Ranghunandan Pandey, 497 (x), 534 (h), 584 (z).
 Raghunath v. Ashraf Husain, 586 (v).
 Raghunath v. Hansraj, 544 (x), 544 (e), 544 (y), 544 (z).
 Raghunath v. Madhav, 174 (k).
 Raghunath v. Nathu Hirji, 189 (v).
 Raghunath v. Nil Kanth, 191 (n).
 Raghunath v. Purnanand, 114 (u).
 Raghunath v. Sadhu Saran, 560 (b).
 Raghunath Prasad v. Sarju Prasad, 557 (k).
 Raghunath Singh v. Mt. Hunsraj Kunwar, 740 (k).
 Raghunatha v. Sadagopa, 442 (f).
 Raghupati v. Nrishingha, 80 (m).
 Raghuvallu v. Adinarayana, 336 (z).
 Ragunath v. Lalji Singh, 660 (n).
 Ragunath Prasad v. Deputy Commissioner Pratabgarh, 131 (r).
 Raghupathi v. Meshingha, 243 (a).
 Rahimtulla v. Official Assignee, 423 (d).
 Rahmat Ali v. Mt. Daulat Bibi, 924 (u).
 Rahmat Ali v. Muhammad Mazhar Husain, 369 (s).
 Rahmatullah Beg v. Yusuf Ali, 582 (c), 582 (j), 585 (g), 585 (h).
 Rai Bishen Chand v. Mussumat Asmaida Koer, 155 (a).
 Rai Ganga v. Ishri Pershad, 525 (q).
 Rai Krishan Chandra v. Saidan Bibi, 582 (f).
 Rai Satindra Nath v. Rai Jatindra Nath, 30 (z), 940 (c).
 Raikishori v. Debendranath, 932 (h).
 Raimoni v. Mathura, 791 (s).
 Rainbow Syndicate, *Re.*, 555 (m).
 Raison, *Re.*, *Ex-parte*, Raison, 7 (z).
 Raj Chandra v. Sheeshoo Ram, 105 (r).
 Raj Doe v. Brahmdeo Rai, 128 (k).
 Raj Kishen v. Radha Mahdub, 317 (r).
 Raj Kishore v. Durga Charan, 107 (t).
 Raj Kishore v. Jaint Singh, 296 (t).
 Raj Kumari's Case, 720 (x).
 Raj Kumar Lal v. Jai Karan, 748 (r).
 Raj Kumar Thakur v. Megh Lal, 121 (u).
 Raj Lakhee Debia v. Gocul Chandra Chowdry, 524 (x).
 Raj Mahal v. Harnam Singh, 3 (a), 4 (p), 4 (r).
 Raj Mohan De. v. Mati Lal Saha Poddar, 897 (h).
 Raj Narain v. Khobdari Rai, 911 (p), 912 (v).
 Raj Raghubar Singh v. Jai Indra, 747 (f), 752 (h).

- Raja Deo v. Brahmddeo Rai*, 117 (*h*).
Raja Durga Prosad v. Rajendra Narain, 826 (*v*).
Raja Jagadish Chandra Deo v. Rai Debendra Prasad, 87 (*a*), 87 (*d*).
Raja Jagdischandra v. Bhubaneswar, 563 (*y*).
Raja Lukhee v. Gokul Chunder, 106 (*w*).
Raja Lukshmi v. Krishna Bhupati, 488 (*j*).
Raja Mahomed Khan v. Ram Lal, 557 (*n*).
Raja Oodit Purkash v. Martindell, 623 (*r*).
Raja Raghubar v. Jai Indra, 610 (*p*).
Raja Ram v. Jagannath, 755 (*t*).
Raja Rampal Singh v. Balbahaddar Singh, 41 (*g*).
Raja Singh v. Randir Singh, 547 (*c*).
Raja Sri Sri Shiva Prasad v. Beni Madhab, 747 (*e*).
Raja Sri Sri Prasad v. Beni Madhab Chowdhary, 749 (*o*).
Raja of Bobbili v. Inugaute, 789 (*c*).
Raja of Ramnad v. Subramaniam Chettiar, 32 (*z*).
Raja of Vizianagaram v. Setrucharla, 698 (*c*).
Raja of Vizianagaram v. Raja Setucherla Somasekhararez, 759 (*w*).
Rajah v. Vizianagram v. Rajah of Setrucherla, 692 (*m*).
Rajah Bahadur Narsingerji v. Rajah Panuganti, 74 (*m*).
Rajah Baikunth v. Binodi Behari, 702 (*v*).
Rajah Bejoy Singh v. Tarini Charan, 886 (*n*).
Rajah Kishendatt Ram v. Raja Mumtaz Ali Khan, 267 (*k*), 583 (*q*), 590 (*j*), 637 (*o*), 637 (*p*), 637 (*q*), 638 (*i*), 639 (*t*), 641 (*x*), 642 (*i*), 648 (*c*), 886 (*p*).
Rajah Lakshmi v. Krishna, 516 (*o*).
Rajah Leelanund v. Thakur Munurjun, 67 (*f*).
Rajah Lelanund v. The Government of Bengal, 66 (*s*).
Rajah Mohkam Singh v. Rajah Rup Singh, 191 (*p*), 192 (*x*).
Rajah Nilmoney v. Bakranath Singh, 66 (*y*).
Rajah Parthasarathy v. Rajah Venkatadri, 3 (*h*).
Rajah Varmah v. Eavi Varmah, 58 (*t*).
Rajah Vurmah v. Ravi Vurmah, 68 (*w*), 68 (*x*).
Rajah of Cherakal v. Mootha Rajah, 69 (*m*).
Rajah of Kalahasti v. Prayag, 774 (*e*).
Rajah of Ramnad v. Subramaniam, 72 (*k*).
Rajai Tirumal v. Pandla Muthiah, 467 (*s*), 470 (*d*).
Rajagopala v. Ranganatha, 443 (*x*), 443 (*z*).
Rajagopala v. Sheik Davood, 470 (*q*).
Rajagopala Aiyar v. Sheik Davood, 470 (*u*).
Rajagopala Gramani v. Baggiammal, 176 (*t*).
Rajagopalachariar v. Thiagraya Mudali, 614 (*d*), 617 (*h*).
Rajamannar v. Venkatakrishnayya, 211 (*u*).
Rajani v. Abani, 319 (*z*).
Rajani Kanta v. Bashiram, 249 (*w*), 252 (*i*), 252 (*j*).
Rajani Kanta v. Sourendra Nath, 695 (*e*).
Rajani Kumar v. Gaur Kishore, 331 (*h*), 331 (*i*), 467 (*s*).
Rajani Kumar Das v. Gaur Kishore Shaha, 328 (*y*), 470 (*d*).
Rajanikanta Pal v. Sajanisundaree Dasee, 227 (*q*).
Rajanimohan v. Sambhunath, 277 (*n*).
Rajapakse v. Fernando, 260 (*u*).
Rajaram v. Ganesh, 68 (*e*), 930 (*l*), 930 (*n*).
Rajaram v. Khandu, 917 (*e*).
Rajaram v. Khandu Balu, 917 (*d*).
Rajaram v. Krishna, 151 (*g*).
Rajaram v. Krishnasami, 35 (*k*), 38 (*e*), 46 (*w*).
Rajaram v. Vithal Rao, 584 (*a*), 584 (*s*), 585 (*c*).
Rajenderachandra v. Bipinchandra, 610 (*p*).
Rajendra Lal v. Mrinalini, 189 (*n*).
Rajendra Lall v. Raj Coomari, 164 (*b*), 166 (*l*).
Rajendra Lall v. Raj Coomari Debi, 159 (*r*).
Rajendronath v. Bassider Ruhman, 810 (*b*).
Rajeshar v. Har Kishen, 105 (*u*).
Rajeshwar v. Gopeshwar, 70 (*y*).
Rajeshwar Prasad v. Anil Kerman Roy, 374 (*z*).
Rajeshwar Prosad v. Bhupendra Narayan, 365 (*d*).
Rajeswar v. Sheikh Yadali, 74 (*a*).
Rajeswar Prosad v. Anil Komar, 100 (*e*), 101 (*f*).
Rajeswar Prosad v. Anil Kumar Roy, 121 (*x*).
Rajib Lochand v. Jogesh Chandra, 13 (*v*).
Rajindra Bahadur v. Raghubans Kunwar, 129 (*s*).
Rajjo v. Lajja, 71 (*u*).

- Rajjo v. Lalman, 71 (n), 71 (o).
 Rajkeshwar Deo v. Bunshidhur, 67 (b).
 Rajkumar Lal v. Jai Karan, 751 (z).
 Rajmal v. Shivaji, 550 (k), 552 (o), 555 (t).
 Rajnarain v. Ekadasi, 223 (r).
 Rajoni Bibi v. Haji Son Nissa, 813 (y).
 Rajoni Bibi v. Hafisouniss Bibi, 815 (d), 815 (k).
 Rajpal v. Municipal Committee Arvi, 827 (e).
 Rajrup Kunwar v. Gopi, 291 (a), 294 (b).
 Rakestraw v. Brewer, 590 (h), 648 (p).
 Rakhal Das v. Dino Moyi, 784 (m).
 Rakhal Das Mukherjee v. Madhab Chandra Singha, 648 (d).
 Rakhoari Chatteraj v. Bipra Das Dey, 652 (v), 653 (b), 654 (y).
 Rakken v. Alagappudayan, 482 (e).
 Ralia v. Bodha Raj, 885 (d).
 Ralli Bros. v. Punjab National Bank Ltd., 10 (y), 283 (x), 503 (m).
 Ralph Bovy's Case, 340 (o), 341 (e).
 Ram v. Taruck, 70 (y).
 Ram Adhar v. Shankar, 710 (l), 710 (m), 713 (r).
 Ram Autar v. Dhanauri, 40 (z), 378 (r).
 Ram Baksh v. Mohunt Ram, 534 (j).
 Ram Baksh v. Mughlani Khanam, 353 (t), 375 (o).
 Ram Baksh Singh v. Mohan Ram Lal Doss, 705 (r).
 Ram Bali v. Ram Asre, 556 (d).
 Ram Barai v. Sheodeni, 625 (i).
 Ram Baran Chaube v. Bhagwati Pande, 740 (j).
 Ram Boisen Dutt v. Haripada Mukerji, 16 (r).
 Ram Bhaj v. Ram Das, 942 (r).
 Ram Bharose v. Rampal Singh, 308 (y).
 Ram Bilas v. Lakshminarain, 769 (t).
 Ram Brahman v. Venkatanarasu, 480 (k).
 Ram Brichh Singh v. Chakauri Singh, 584 (x).
 Ram Brich Narain Singh v. Ambika Prasad Singh, 583 (n), 586 (l).
 Ram Chand v. Mathura Chand, 328 (x).
 Ram Chand v. Raj Hans, 668 (k), 727 (r), 731 (u).
 Ram Chandar v. Kallu, 60 (j), 714 (d).
 Ram Chandar v. Tohfah Bharti, 435 (q).
 Ram Chandra v. Bhikambar, 907 (d), 907 (i).
 Ram Chandra v. Mandeshwar, 757 (s).
 Ram Chandra v. Modhu, 497 (c).
 Ram Chandra v. Mudeshwar, 73 (t).
 Ram Chandra Chatterji v. Prematha Nath Chatterjee, 829 (a), 830 (i).
 Ram Charan v. Hari, 854 (j), 855 (d).
 Ram Charan v. Hari Charan Guha, 811 (l).
 Ram Charan v. Joy Ram, 246 (i), 249 (r).
 Ram Charan v. Mt. Nazeeran, 77 (y).
 Ram Charan v. Parmeshwari Din, 311 (a), 316 (e).
 Ram Charan Lal v. Dharamsingh, 481 (v).
 Ram Chankar Prasad v. Ghulam Hussain, 690 (u).
 Ram Chunder v. Bhagwati, 448 (b).
 Ram Chunder v. Dwarkanath, 431 (l).
 Ram Chunder v. Haridas, 524 (x).
 Ram Chunder Dutt v. Dwarkinath Bysack, 433 (g).
 Ram Cundur Poddar v. Haridas, 524 (y).
 Ram Coomar v. Chunder Canto, 191 (n).
 Ram Coomar v. McQueen, 243 (z).
 Ram Das v. Dwarka Das, 30 (j), 939 (l).
 Ram Das v. The Secretary of State for India in Council, 745 (d).
 Ram Das Saw v. Ramnandan Prasad Singh, 767 (c), 767 (x).
 Ram Dat Singh v. Horakh Narain Singh, 759 (n).
 Ram Dhani v. Ram Rikh, 489 (z).
 Ram Dhun Dhur v. Mohesh Chunder, Chowdhry, 693 (t).
 Ram Din v. Kalka, 443 (q), 752 (k).
 Ram Doolaroy v. Tackoor, 518 (d).
 Ram Dulare v. Sahdeo, 667 (p).
 Ram Ganesh v. Rup Narain, 556 (d), 557 (r), 557 (u).
 Ram Gobind v. Shahshi Sekhar, 799 (y).
 Ram Gopal v. Nurumuddin, 21 (e).
 Ram Gopal v. Rulshi Ram, 911 (o).
 Ram Gopal v. Tulshi Ram, 51 (i).
 Ram Hait v. Pohkar, 470 (a), 758 (d).
 Ram Jas v. Shahabuddin, 946 (v).
 Ram Jewan v. Jagarnath, 625 (f).
 Ram Jewan Miser v. Jagannath Pershad Singh, 618 (u).
 Ram Khelawun v. Mt. Soondra, 906 (v).
 Ram Khilawan v. Ghulam Husan, 490 (k), 493 (t), 494 (e), 516 (f).
 Ram Kishen v. Sheo Sagar, 13 (n).
 Ram Kishore v. Jagarnath, 563 (j).
 Ram Kishore v. Ram Nandan, 555 (s), 555 (u).
 Ram Kishore v. Sevraj Deo, 479 (h).
 Ram Krishna v. Heramba, 557 (k), 557 (l).
 Ram Krishna v. Sm. Kousalaya, 107 (r), 109 (k).
 Ram Krishna Gir v. Suraj Deo Prasad, 615 (l).

TABLE OF CASES.

xcv

- Ram Kristo Manjhee v. Mt. Amooroonissa Bibi, 711 (y).
 Ram Kumar v. Ram Newaj, 67 (c).
 Ram Kunwar v. Ram Dai, 226 (c), 226 (f), 757 (x).
 Ram Lagan v. Mary Coffin, 583 (p), 583 (r).
 Ram Lakhan v. Bandan, 440 (b).
 Ram Lal v. Haran, 48 (i).
 Ram Lal v. Shiama Lal, 39 (i).
 Ram Lal Sen v. Sm. Suradhani, 404 (y).
 Ram Lall Mookerjee v. Jodunath Chatterjee, 591 (b).
 Ram Mohan v. Mul Chand, 275 (p).
 Ram Narain v. Bandi Pershad, 39 (h).
 Ram Narain v. Muhammad Hadi, 336 (f), 336 (g), 917 (j).
 Ram Narain v. Radha Kishen, 479 (x).
 Ram Narian Singh v. Adhindra Nath, 514 (z).
 Ram Narain Singh v. Adindra Nath Mukherjee, 479 (f), 492 (i), 748 (a).
 Ram Narain Singh v. Chota Nagpur Banking Association, 785 (g).
 Ram Narayan v. Adhindra, 524 (c).
 Ram Narayan v. Mahant Gopal Das, 114 (n).
 Ram Narayan Singh v. Adhindra Nath Mukerjee, 492 (f), 493 (l), 616 (f), 622 (u).
 Ram Naram Singh v. Adhindra Nath Mukherji, 614 (z), 619 (n), 621 (i), 621 (l).
 Ram Nath Mukhopadhyaya v. Brahma-moyi Debya, 745 (c).
 Ram Nath Singh v. Gajadhar Lal, 373 (p).
 Ram Newaz v. Nankoo, 145 (b), 156 (e).
 Ram Nirunjun v. Payag Singh, 59 (d).
 Ram Parkash v. Anand Das, 113 (d), 114 (k).
 Ram Pher v. Ajudhia Singh, 279 (a).
 Ram Piyari v. Mulchand, 281 (v).
 Ram Pragash v. Mt. Bhikna, 923 (h).
 Ram Rachhy v. Kamakhya Narain, 905 (m), 908 (o).
 Ram Rachhya v. Raghunath, 442 (g).
 Ram Rachhya Singh v. Kamakhya Narain, 819 (z).
 Ram Rachhya Singh v. Kumar Kamattya, 908 (m).
 Ram Raghubir Lal v. United Refineries (Burma) Ltd., 443 (v), 625 (f), 747 (g), 751 (y).
 Ram Rai v. Maheshwar Prasad, 586 (n).
 Ram Ranbijaya v. Harihar Prasad, 219 (x).
 Ram Ratan v. Chaudhri Ganga Baksh, 263 (v).
 Ram Ratan v. Ganga, 261 (a).
 Ram Ratan Rai v. Ramhit Singh, 477 (k).
 Ram Ratan Lal v. Aditya Prasad, 569 (c).
 Ram Reka Singh v. Ganga Prasad, 110 (d).
 Ram Sahai v. Gaya, 71 (m).
 Ram Sahai v. Kunwar Sah, 723 (j).
 Ram Sahai v. Parbhu Dayal, 111 (k), 225 (y), 261 (z).
 Ram Samujh v. Mt. Mainath, 525 (l), 525 (n).
 Ram Saran v. Yudhishtir, 17 (d).
 Ram Saran Das v. Bhagwat Prasad, 4 (d).
 Ram Saran Das v. Ram Pergash Das, 650 (o).
 Ram Saran Lal v. Amirta Kuar, 557 (m), 557 (p).
 Ram Sarup v. Bala, 190 (l), 931 (u).
 Ram Sarup v. Bela, 930 (e).
 Ram Sarup v. Gaya Prasad, 742 (y).
 Ram Sarup v. Girdhari Lal, 124 (t).
 Ram Sarup v. Hardeo, 365 (d), 374 (z).
 Ram Sarup v. Kishan Lal, 189 (y).
 Ram Sarup v. Kishen Sahai, 524 (a).
 Ram Sarup v. Mohan Lal, 472 (u).
 Ram Sarup v. Ram Dei, 124 (g).
 Ram Sarup v. Ram Lal, 762 (i), 770 (c), 772 (b), 774 (y).
 Ram Sarup v. Ram Richhpal, 737 (r), 738 (y).
 Ram Sarup Chaube v. Ram Dolar Pande, 624 (e).
 Ram Savan Rai v. Sheo Naik Rai, 352 (c).
 Ram Sewak v. Sheo Naik, 518 (v), 596 (a), 618 (v), 618 (w).
 Ram Shankar Lal v. Ganesh Prasad, 5 (i), 22 (t), 55 (j).
 Ram Singha v. Shankar Dayal, 13 (w).
 Ram Singh v. Gunga Ram, 370 (c).
 Ram Sonji v. Krishnaji, 702 (b).
 Ram Subhag v. Nar Singh, 477 (q).
 Ram Sumaran Prasad v. Gobind Das, 103 (o).
 Ram Sumran v. Shaibzada Biji Partap Narain Singh, 704 (z).
 Ram Sundar v. Kali Narain, 93 (e), 367 (i).
 Ram Sundar v. Raj Kumar, 92 (h).
 Ram Surat v. Hitanandan, 102 (f), 103 (p).
 Ram Surat Misra v. Gur Prasad, 622 (j).
 Ram Tuhul Singh v. Bisseswar Lal, 730 (h), 730 (m).
 Ram Tupal Singh v. Biseswar Lall, 729 (e).
 Rama v. Bhagchand, 544 (c).
 Rama v. Manak, 691 (a), 697 (o).
 Rama v. Ranga, 102 (x).

- Rama Aiyangar v. Anga Gurusami*, 785 (c).
Rama Aiyar v. Narayanasami, 294 (y), 294 (z), 295 (k), 296 (g), 301 (c).
Rama Aiyar v. Narayansami Aiyar, 292 (e), 302 (d).
Rama Aiyar v. Official Receiver of Tinnevely, 86 (p).
Rama Iyer v. Venkatachellam, 31 (n).
Rama Krishnayya v. Venkata, 557 (i), 734 (r).
Rama Nana v. Dhondi, 108 (h).
Rama Nand v. Sheo Das, 442 (d).
Rama Nand Singh v. Gobind Singh, 102 (p).
Rama Pattar v. Kumaran Chidayath, 58 (u).
Rama Pattar v. Raman Kutty, 77 (z).
Rama Rao v. Thimmappa, 151 (j).
Rama Rao v. Vedayya, 518 (x), 518 (y).
Rama Sahu v. Gowro Ratho, 47 (d).
Rama Shankar v. Ghulam Husain, 461 (a), 461 (c), 461 (e).
Ram Shankar v. Ganesh Prasad, 475 (o).
Rama Tulsa v. Bhagchand, 544 (a).
Rama Varma v. Raman Nayar, 69 (q).
Ramabadra Chetty v. Ramaswami Chetty, 86 (u).
Ramabai v. Dattatraya, 103 (q).
Ramabhadrachar v. Srinivasa, 690 (v), 696 (n).
Ramchandra v. Krishna, 283 (b).
Ramchandra v. Narayanaswami, 741 (p).
Ramaji v. Nagavna, 51 (m).
Ramakrishna v. Kesavalu, 510 (s).
Ramakrishna v. Subrahmania, 443 (q).
Ramakrishna v. The Official Assignee, of Madras, 307 (f).
Ramakrishna v. Tripurabai, 104 (x).
Ramakrishna Mudali v. Official Assignee, 635 (n), 639 (x), 640 (o).
Ramakrishnama Chetty v. Vuvvati Chengar Aiyar, 620 (c), 620 (d), 620 (t).
Ramalinga v. Arunchala, 556 (x).
Ramalinga v. Samiappa, 293 (p), 304 (r).
Ramalinga v. Sivachidambara, 52 (w).
Ramalinga Chetty v. Sivachidambara Chetty, 919 (f).
Ramamirtam v. Gopala, 930 (m).
Raman v. Gopal 70 (y).
Raman v. Krishna, 514 (k).
Raman Chettiar v. Tirugnanasambandam Pillai, 96 (n), 96 (o).
Raman Namboodri v. Achutha Pishurodi, 713 (o).
Raman Nair v. Mariyamma, 893 (a), 893 (t).
Ramanadan v. Ram Das, 730 (n).
Ramanadan v. Rangammal, 228 (k).
Ramanadham v. Vada Levvai, 160 (b), 164 (b), 167 (w).
Ramanajdan v. Rangammal, 226 (f).
Ramanamma v. Viranna, 191 (n).
Ramanath v. Siba Sundari, 885 (g).
Ramanathan v. Delhi Batcha, 523 (c).
Ramanathan v. Ramasawmi, 295 (p).
Ramanathan v. Ranganathan, 296 (g), 297 (l), 350 (t), 353 (d), 354 (w), 379 (x).
Ramanathan Chetti v. Murugappa Chetti, 115 (x).
Ramanna v. Venkata, 922 (b).
Ramappa v. Yellappa, 293 (s), 354 (b), 588 (x).
Ramaraja v. Arunachala, 283 (b).
Ramarayaniengar v. Maharaja of Venkatagiri, 515 (t).
Ramasami v. Alagirisami, 273 (u), 277 (i), 277 (j).
Ramasami v. Chinnan, 369 (r).
Ramasami v. Chinnan Asari, 148 (o).
Ramasami v. Chinnan Asar, 374 (d), 374 (z).
Ramasami v. Ramasami, 56 (a), 60 (q), 60 (r).
Ramasami v. Samiyappanayakan 486 (x), 488 (p), 488 (q), 489 (b), 514 (e).
Ramasami v. Sellattammal, 106 (j).
Ramasami v. Srinivasa, 495 (g).
Ramasami Aiyar v. Venkatarama Ayyar, 276 (z).
Ramasami Ayyar v. Vengidusami Ayyar, 105 (q).
Ramasami Iyengar v. Kuppusami Iyer, 760 (z).
Ramasami Mudaliar v. Annodorai Ayyar, 448 (g).
Ramasami Nadan v. Ulaganatha Goundan, 110 (z).
Ramasamia v. Adinarayana, 329 (d).
Ramasamy v. Muniandi, 540 (q).
Ramaseshiah v. Ramiah, 74 (a), 74 (b).
Ramashankar v. Gulabshanker, 768 (g).
Ramasubba v. Muthiah, 385 (q), 385 (u).
Ramasubba Iyer v. Muthiah Kone, 385 (t).
Ramaswami v. Abdul Kaddus, 77 (t), 792 (g).
Ramaswami v. Mallappa, 328 (x), 328 (u).
Ramaswami Naick v. Ramaswami Chetty, 268 (u).
Ramaswami Naidu v. Subbaraya Tovar, 751 (b).
Ramaswamy Ayyar v. Thirupathi Naik, 819 (h).
Ramaswamy Iyer v. Deivasigamani, 75 (q).

- Ramaswamy Pillai v. Vellaya Pillai*, 709 (f).
Ramavatar v. Tulsi Prosad Singh, 669 (s).
Ramayya v. Guruva, 492 (e), 497 (y), 516 (f), 516 (h).
Ramayya v. Jagannadhan, 268 (p).
Ramayya v. Kotayya, 435 (v).
Ramabhat v. Lakshman, 309 (h).
Rambishen v. Haripada, 886 (o), 887 (w).
Rambrama v. Kedar Nath, 52 (y).
Ramchandra v. Anant, 783 (g).
Ramchandra v. Hanmanta, 544 (a), 544 (b).
Ramchandra v. Jaideo, 312 (j), 312 (k).
Ramchandra v. Jairam, 35 (i), 680 (b).
Ramchandra v. Janardhan, 488 (k).
Ramchandra v. Mukund, 536 (f), 550 (j).
Ramchandra v. Narasimha, 783 (k).
Ramchandra v. Narayanaswami, 720 (a), 723 (j), 732 (e).
Ramchandra v. Paralayammal, 732 (x).
Ramchandra v. Shaikh Hussan, 882 (m).
Ramchandra v. Shripati, 586 (s), 668 (f).
Ramchandra v. Syameswari, 820 (k).
Ramchandra v. Tama, 820 (l), 820 (m).
Ramchandra v. Vishnu, 301 (x), 837 (r).
Ramchandra Marwai v. Rani Keshobate Kumari, 705 (l).
Ramcharan v. Hari Charan, 15 (j).
Ramcharan v. Mt. Abida Begum, 933 (r).
Ramcoomar Koondoo v. John and Maria McQueen, 36 (z).
Ramcoomar Mitter v. Ichamoyi Dasi, 106 (f).
Ramdas Vithaldas v. Amarchand & Co., 947 (b), 948 (g).
Ramdeni Singh v. Gumani Raut, 377 (d), 377 (g).
Ramdeo Prasad v. Sheonandan Mahaseth, 96 (n), 96 (p).
Ramdulari v. Upendra, 317 (r).
Rameshwar Narain v. Riknath Koeri, 926 (a), 926 (z).
Rameshwar Narayan Singh v. Rani Rennath Koeri, 30 (r), 30 (t).
Rameshwar Singh v. Chuni Lal, 480 (n).
Rameshwar Upadhya v. Subbkaran Upadhya, 746 (v).
Rameshwar v. Jibender, 73 (t).
Ramgopal v. Nanakran, 736 (k), 736 (l).
Ramgopal v. Shamskhaton, 337 (l).
Ramgowda v. Bhausahab, 61 (e), 104 (b), 105 (g), 105 (h), 106 (w), 106 (x), 106 (z).
Ramiah v. Rukmani, 76 (i), 77 (x).
Ramji v. Bai Parvati, 520 (x), 520 (a), 522 (u).
Ramji Chinto, 488 (k).
Ramji v. Chinto, 486 (y).
Ramji v. Mahraj Vasudev, 878 (e).
Ramji v. Municipal Board, 34 (c).
Ramji v. Parvatibai, 522 (v).
Ramji v. Rao Kishoresingh, 454 (e).
Ramji Lal v. Secretary of State, 812 (r).
Ramjit Ray v. D. A. David, 940 (u).
Ramjoo v. Haridas, 786 (c), 787 (i), 788 (u), 789 (w).
Ramkaran v. Jageshwar, 740 (n).
Ramkisan Singh v. Mahomed, 115 (a).
Ramkishore v. Jainarayan, 276 (z).
Ramkishore Kedarnath v. Jainarayan Ramarachhpal, 276 (v).
Ramkishun v. Bibi Sohaila, 824 (p).
Ramkrishna v. Anusuyabai, 259 (k), 262 (f).
Ramkrishna v. Jainandan, 343 (m).
Ramkrishnabhai v. Vittoba, 48 (o).
Ramkuwar v. Ichamoyi, 105 (m).
Ramlal v. Marwari, 287 (b).
Ramlal v. Narayandas, 669 (w).
Ramlal Mondal v. Khiroda Mohini Dasi, 735 (a).
Ramlal Sen v. Suradhanisundaree, 392 (t), 392 (u), 392 (v).
Ramlinga v. Virupakshi, 135 (v).
Ramlinga v. Viru Pakshi, 151 (h).
Ramnad Zemindar v. Ramamany, 881 (g).
Ramnandan Parbat v. Deni Sahi, 494 (y), 622 (z).
Ramprasad v. Imratbai, 244 (l).
Ramprasad v. Seth Jaskaran, 734 (x).
Ramrao v. Gopala Patil, 701 (r), 702 (w).
Ramratan v. Bishun Chand, 284 (h), 284 (j).
Ramsay v. Gilchrist, 341 (d).
Ramsbottom v. Wallis, 545 (i).
Ramsden v. Dyson, 299 (s), 363 (a).
Ramsden v. Langley, 656 (s).
Ramshankar v. Gulan Shankar, 765 (x).
Ramsing v. Bai Dhanba, 791 (u).
Ramsubhag v. Narsingh, 709 (g).
Ramsumran Prasad v. Shyam Kumari, 104 (c).
Ramu Naikan v. Subbaraya Mudali, 763 (c).
Ramunni v. Shankee, 663 (w).
Ramunni v. Shanker, 302 (e).
Ranchhod v. Manmohandas, 459 (l).
Ranchodlal v. The Secretary of State for India, 299 (p).
Ranchordas v. Parvatibai, 920 (p).
Randal v. Payne, 207 (n).
Ranee v. Amir Baksh, 732 (a).

- Rance Annapurni v. Swaminatha, 72 (h).
 Rance Bhobo Soondree v. Issur Chunder Dutt, 52 (t).
 Rang Illahi v. Mahbub Ilahi, 94 (j).
 Rang Raj Singh v. Sheonarain Lal, 469 (a), 469 (d).
 Rangampudi v. Venkateswarlu, 760 (e).
 Ranganadha v. Bhagirathi, 145 (b), 149 (t).
 Ranganaike v. Ramanuja, 228 (g).
 Ranganatha v. Mohanakrishna, 173 (u).
 Rangappa v. Kamti Naik, 108 (x), 108 (y).
 Rangasami v. Annamalai, 38 (r).
 Rangasami v. Muthukumarappa, 471 (g), 515 (o), 749 (c), 750 (u).
 Rangasami Gounden v. Nachiappa Gounden, 62 (l), 62 (p), 104 (b), 104 (w), 108 (v).
 Rangasami Nadan v. Subbaraya, 574 (o).
 Rangaswami v. Sundarapandia, 247 (z), 248 (f), 314 (r).
 Rangayya v. Basana, 578 (q).
 Rangayya v. Parthasarathi, 295 (s).
 Rangiah Chetty v. Vajravelu, 220 (j).
 Rangilbhai v. Vinayak, 318 (s), 322 (p), 330 (t).
 Rangnath v. Govind, 328 (r), 328 (v).
 Rangu v. Lakshman, 13 (n).
 Rani Chhatra v. Prince Mohan, 365 (h).
 Rani Kumari Bibi v. Srinath Roy, 748 (a), 754 (j).
 Rani Mewa Kurwar v. Rani Hulas Kunwar, 911 (o).
 Raniganj Coal Association, Ltd. v. Judoonath, 909 (e).
 Ranja Khan v. Ma Chit, 95 (e).
 Ranjit Khan v. Ramadhan Singh, 555 (u), 572 (v), 756 (l).
 Ranjit Khan v. Ramdhar Singh, 572 (x).
 Ranjit Roy Singh v. D. A. David, 944 (v), 944 (w), 944 (y).
 Ranmalsinghji v. Vadilal, 97 (u).
 Ranu v. Laxmanrao, 522 (s), 525 (k).
 Ranu Bin v. Laxmanrao, 520 (e).
 Rany Padmavati v. Baboo Doolar Singh, 67 (g).
 Rany Srimuty Dibeah v. Rany Koond Luta, 67 (g).
 Rasa Goundan v. Arunachala Goundan, 51 (g), 320 (s).
 Rash Behari v. Kasum Kumari, 660 (k).
 Rashid-un-nissa v. Muhammad Ismaili Khan, 609 (h).
 Rashik Lal v. Ram Narain, 467 (s), 470 (d).
 Rashmoni v. Surja Kanta Roy, 265 (b).
 Rasik Chandra v. Jagabhandu, 659 (f).
 Rasik Lal v. Bidhumukhi, 82 (b).
 Rasoolbibi v. Usuf Ajam, 924 (e).
 Rasoolbibi v. Yusuf, 181 (s), 175 (l).
 Rasul v. Ram Suran, 226 (m).
 Ratan Lal v. Farshi Bibi, 906 (p), 907 (e).
 Ratanlal Chunilal v. Municipal Commissioner, 444 (g), 444 (k).
 Ratansi v. Kuwarji, 76 (l).
 Ratcliffe v. Barnard, 682 (w).
 Rathna Mudali v. Perumal, 560 (a).
 Rathna Mudali v. Perumal Reddy and Others, 713 (t).
 Ratnam Pillai v. Kamalambal Ammal, 714 (a).
 Ratnasabapathy v. Devasigamony, 625 (f).
 Ratnasabhpathi v. Venkatachalam, 819 (d).
 Rattamma v. Seshachalam, 311 (y).
 Rattan Chand v. Sri Thakur Ram, 105 (v).
 Rattan Sen v. Krishna Kuar, 813 (f).
 Rattnasami v. Subramaya, 16 (u), 945 (e).
 Rau v. Chichester, 591 (t).
 Raushan Ali Khan Chowdhury v. Kali Mohan Moitra, 745 (a), 769 (w).
 Raval v. Russell, 728 (z).
 Ravenshaw v. Hollier, 746 (y).
 Ravji v. Sakuji, 67 (j).
 Ravji Moreshwar v. Sayajirao Ganpat-rao, 78 (o).
 Ravner v. Preston, 285 (m).
 Rawe v. Chichester, 590 (p).
 Rawlinson v. Ames, 356 (f), 363 (x).
 Ray Satindra v. Ray Jatindra, 608 (y).
 Rayner v. Preston, 285 (o), 447 (x), 447 (y), 669 (n).
 Rayzuddi Sheik v. Kali Nath Mookerjee, 749 (i).
 Raza Mohammad v. Ram Lal, 546 (y).
 Razina v. Abida, 321 (x).
 Read v. Eley, 641 (c).
 Read v. Goldring, 533 (y).
 Reading v. Fletcher, *In re.*, Fletcher, 886 (t).
 Rebati Mohan Das v. Ahmed Khan, 63 (u).
 Redding, *In the goods of*, 519 (m).
 Rede v. Oakes, 88 (c).
 Redmond v. Dainton, 870 (r).
 Re. Doody Fisher v. Doody Hibbert v. Lloyd, 535 (s), 535 (t).
 Reese River Silver Mining Co. v. Atwell, 324 (h), 324 (i).
 Reeve v. Berridge, 35 (u), 46 (u), 388 (f), 388 (g), 390 (w), 809 (m).
 Reeve v. Lisle, 541 (z), 553 (w), 555 (r).
 Reeve v. Whitmore, 476 (y).
 Reeves v. Grainger, 522 (y).
 Reeves v. Greenwich Tanning Co., Ltd., 802 (s).
 Reeves v. Pope, 942 (q).

- Regan, In the goods of, 522 (x).
 Regents Canal Co. v. Ware, 426 (v).
 Reid v. Bickerstaff, 236 (o), 236 (t), 236 (v), 237 (c).
 Reis, *Re. Ex-parte* Clough, 331 (r), 331 (t).
 Rajendranath v. Bassider, 815 (h).
 Renals v. Cowlishaw, 230 (x), 233 (t), 233 (u), 234 (e), 236 (n), 236 (s), 237 (d), 237 (x).
 Rendell v. Roman, 793 (r).
 Renga Srinivasa v. Gnanaprakasa, 599 (y).
 Rent and General Collecting and Estate Co. v. Troughton, *Re. Troughton*, 320 (v).
 Reuss v. Picksley, 359 (g).
 Reversionary and General Securities Co., Ltd. v. Hall, *In re* Beard, 197 (f).
 Rex v. Paulson, 898 (y).
 Rex v. Simpson, 85 (x).
 Reynard v. Arnold, 840 (v).
 Reynolds v. Ashby & Son, 27 (w), 27 (p), 29 (z), 648 (y).
 Rhodes v. Buckland, 640 (f).
 Rhondda's (Viscountess) Claim, 3 (d).
 Riasat Ali v. Iqbal Rai, 922 (z).
 Rice v. Rice, 46 (s).
 Richards, *Ex-parte*, 546 (s).
 Richards v. Borrett, 506 (q).
 Richards v. Crawshay, 854 (r).
 Richards v. Delbridge, 921 (m), 922 (r).
 Richards v. Harper, 232 (k).
 Richards v. Morgan, 667 (w).
 Richards v. Revitt, 237 (g).
 Richardson v. Jackson, 531 (o).
 Richardson v. Robertson, 170 (y).
 Richardson v. Smallwood, 324 (t).
 Riches v. Evans, 322 (i).
 Richmond v. Savill, 889 (d).
 Ricketts v. Enfield (Churchwardens), 803 (j).
 Ricketts v. Ricketts, 182 (x).
 Rider v. Ford, 805 (d).
 Ridgeway v. Wharton, 359 (o).
 Ridgway v. Roberts, 754 (l).
 Ridley Buckton v. Hay, 130 (i).
 Ridout v. Fowler, 374 (x).
 Riggs, *Re. Ex-parte*, Lovell, 894 (o), 860 (u).
 Right v. Darby, 906 (o).
 Right d Jefferys v. Bucknell, 285 (h).
 Riley v. Croydon, 713 (x).
 Riley v. Hall, 571 (p), 576 (c).
 Rimmer v. Webster, 44 (q), 46 (s), 682 (u).
 Ring v. Hardwick, 204 (e).
 Ritchie v. Smith, 190 (j).
 Robbins v. Jones, 842 (n).
 Roberts, *Re. Ex-parte* Brook, 847 (b).
 Roberts, *Ex-parte*, Evans, *Re.*, 469 (k).
 Roberts v. Croft, 503 (n), 503 (r), 503 (x), 683 (h).
 Roberts v. Davey, 892 (a).
 Roberts v. Holland, 65 (j), 881 (b).
 Roberts v. Karr, 419 (b).
 Roberts v. Roberts, 190 (y), 919 (m).
 Robertson v. Norris, 638 (m), 639 (r), 640 (h).
 Roberty v. Berry, 402 (a).
 Robins v. Whyte, 601 (p).
 Robinson, *In re*, 73 (s).
 Robinson v. Ames, 348 (g).
 Robinson v. Cook, 531 (u).
 Robinson v. Cumming, 675 (f).
 Robinson v. Harcastle, 147 (f), 157 (h).
 Robinson v. Kilvert, 828 (n), 831 (y), 836 (c).
 Robinson v. Learoyd, 878 (a).
 Robinson v. M'Donnell, 324 (o).
 Robinson v. Musgrove, 392 (o).
 Robinson v. Preston, 101 (h).
 Robson v. Palace, Chambers Westminster Co., Ltd., 835 (m).
 Roche's Estate, *Re.*, 503 (n), 506 (r).
 Rochefort v. Battersby, 711 (v).
 Rochester v. Le Fann, 218 (r).
 Rochford v. Hackman, 201 (i).
 Roe v. Wiggs, 878 (y).
 Roe d Bamford v. Hayley, 804 (q), 805 (y).
 Roe d Conolly v. Vernon, 415 (d).
 Roe d Fulham v. Wickett, 195 (q).
 Roe d Gregson v. Harrison, 897 (r).
 Roffey v. Shallcross, 404 (a), 407 (b).
 Rogers v. Challis, 470 (p).
 Rogers v. Grazebrook, 664 (q).
 Rogers v. Hosewood, 231 (h), 231 (g), 237 (z), 231 (f), 229 (m).
 Rogers v. Humphreys, 602 (v).
 Rogers v. Jones, 420 (f).
 Rogers v. Rogers, 567 (n).
 Rogers & Co., v. British and Colonial Colliery Supply Association, 615 (m).
 Rogess v. Hosegood, 46 (v).
 Roghu Nath Pershad v. Harlal Sadhu, 691 (c), 693 (r).
 Rolland v. Hart, 42 (m), 43 (g), 635 (v).
 Rolls v. Miller, 802 (m), 891 (n).
 Rolph v. Crouch, 835 (p).
 Rolt v. White, 942 (n).
 Romanath v. Rajonimoni, 226 (k).
 Rooper v. Harrison, 421 (q).
 Roper v. Castell & Brown, Ltd., 682 (u).
 Roper v. Coombes, 453 (w).
 Rorke v. Errington, 416 (o).
 Rose v. Watson, 451 (v).
 Rose Ammal v. Rajarathnam Ammal, 529 (d), 578 (r).
 Roshan Singh v. Balwant Singh, 714 (m).
 Rosher v. Rosher, *In re* Rosher, 127 (w), 126 (q).
 Rosher v. Williams, 340 (r).
 Ross v. Army & Navy Hotel Co., 749 (d).

Ross v. Ross, 125 (g), 202 (p).
 Rossdale v. Denny, 376 (t).
 Rosslyn's (Lady) Trust, *Re.*, 161 (g).
 Rottala v. Pulicat, 102 (u).
 Roundell v. Breary, 746 (w).
 Rourke v. Robinson, 533 (v), 534 (u),
 535 (l), 536 (j), 537 (m).
 Roushan Ali Khan Chowdhury v. Kali
 Mohan Moitra, 732 (b).
 Row v. Dawson, 31 (l).
 Rowbotham v. Wilson, 121 (b).
 Rowe v. May, 631 (q).
 Rowe & Co., Ltd. v. Tan Thean Taik,
 86 (s).
 Rowell v. Satchell, 46 (v).
 Roylance v. Lightfoot, 624 (v).
 Royzuddi Sheik v. Kali Nath Mukerjee,
 748 (u), 748 (z), 751 (v).
 Royzuddi Sheik v. Kali Nath, 524 (d).
 Royzuddi Sheik v. Kali Nath Moderjee,
 749 (o), 753 (a), 753 (t), 753 (v),
 757 (t).
 Rubbs v. Esser, 802 (u).
 Rudd v. Lascelles, 390 (u).
 Rudge v. Richens, 626 (q).
 Rudra Perkash v. Krishna Mohun,
 50 (a).
 Rudrappa v. Narsingrao, 907 (c).
 Rudrappa v. Sankappa, 879 (s).
 Rugad Singh v. Sat Narain, 555 (t),
 560 (w), 710 (p).
 Rugby School (Governors) v. Tannahill,
 801 (d), 811 (o).
 Rughoonath Roy v. Baraik Geereed-
 dharce Singh, 673 (o).
 Rugnathji v. Virjivandas, 542 (g).
 Ruhulla v. Hassanali, 920 (w).
 Rukeya Banu v. Najira Banu, 141 (x).
 Rukhminibai v. Venkatesh, 534 (i),
 672 (b), 672 (c), 703 (n).
 Rukmini v. Nilmani, 525 (o).
 Rukmini v. Rayaji, 783 (i), 899 (p).
 Rukminibai v. Laxmibai, 129 (v),
 136 (a), 931 (d).
 Runchordas v. Parvatibai, 168 (j),
 168 (k).
 Rup Narain v. Gopal Devi, 104 (b).
 Rup Ram v. Musammatt Rewati,
 108 (a).
 Rup Singh v. Bhabhuti Singh, 135 (w).
 Rupabai v. Audimulam, 737 (r), 764 (n),
 768 (h), 771 (p).
 Rupan v. Champa, 587 (v), 588 (x).
 Rupan Singh v. Champa Lal, 293 (m),
 652 (y).
 Rupram v. Iswar, 105 (s).
 Rushworth's Case, 590 (m), 591 (u),
 648 (n).
 Russell v. Russell, 499 (h), 502 (f).
 Russell v. Smithies, 667 (v).
 Russell v. Watts, 300 (v).
 Russicklal v. Lokonath, 848 (s).
 Rustam Ali v. Abdul Jabbar, 226 (e).

Rustam Ali v. Abdul Jaffer, 271 (l).
 Rustomji v. Keshavji, 287 (x), 287 (z),
 310 (p), 601 (c), 601 (o).
 Rustomji Ardeshir Irani v. Vinayak,
 Gangadhar Bhat, 404 (v).
 Rutledge v. Dorril, 147 (f).
 Ruttonbai v. Fraser Ice Factory, Ltd.,
 529 (f), 530 (j).
 Ruttonbai v. Ghasiram, 435 (r).
 Ryall v. Rolee, 473 (w).

S

Sabal Singh v. Salik Ram, 337 (k).
 Sabapathy v. Vanmahalinga, 531 (y),
 532 (h), 535 (r).
 Sabdi Prasad v. Sheikh Budhai, 781 (z).
 Saburannessa v. Sabdu Shaikh, 336 (n).
 Sadabart Prasad v. Foolhart Koer,
 101 (o).
 Sada Gopa v. Dorasanna, 518 (d).
 Sada Kavaur v. Tadepally, 518 (x),
 524 (b).
 Sadai Naik v. Serai Naik, 897 (o).
 Sadananda v. Emperor, 519 (g).
 Sadashiv Anant v. Vithal Anant,
 585, (i).
 Sadashiv v. Dhakoobai, 105 (i).
 Sadashiv v. Shekh Papa, 476 (b).
 Sadashiv v. Trimbak, 324 (s).
 Sadashiv v. Vyankatrao, 492 (c).
 Sadasook Ramprotap v. Hoare Miller
 & Co., 941 (f), 941 (g).
 Sadhu Saran Rai v. Burhamdeo Lall,
 622 (a).
 Sadik Husain v. Hashim Ali, 214 (n).
 Sadik Husain Khan v. Hashim Ali
 Khan, 214 (n).
 Sadiq Ali Khan v. Jai Kishori, 98 (f),
 246 (l), 918 (p).
 Sadley (Lord) and Baines & Co., *Re.*,
 88 (u).
 S. Safdar Ali v. Ambika Prasad, 791 (p).
 Safar Ali v. Abdul Rasid, 855 (e).
 Saffron Waldon Second Benefit
 Building Society v. Rayner, 43 (y).
 Sagaji v. Namdev, 367 (q), 368 (t),
 426 (a), 439 (x), 440 (b).
 Sages v. Collyer, 230 (y).
 Sage v. Eicholz, 3 (l), 4 (r).
 Sahadev Ravji v. Shekh Papa Miya,
 39 (g).
 Sahai v. Shoo Dar Shan, 550 (e).
 Sahebrao v. Jaiwantrao, 255 (j),
 337 (n).
 Sahikh Fyezoollah v. Syad Kazim
 Hoosein, 494 (b).
 Sah Lal Chand v. Indarjit, 441 (m),
 441 (u).
 Sahu Har Prasad v. Fazal Ahmad,
 118 (x).
 Sahu Ram v. Bhup Singh, 110 (d).

TABLE OF CASES.

ci

- Sahu Ram v. Bup Singh*, 261 (z).
Sahu Ram Chandra v. Bhup Singh, 110 (y), 110 (z).
Said Ahmad v. Raja Narain, 724 (t).
Saifal Bibi v. Abdul Aziz, 367 (a).
Sailaja Nath Roy v. Rishee Case Law, 368 (c).
Sailendra Nath Das v. Saroj Kumar Das, 255 (j).
Saint v. Pilley, 851 (t).
Saiyid Ismail v. Saidid Mahdi, 672 (y).
Sajjad Ahmad v. Trailakhya, 799 (d).
Sakalagena v. Chinna Munuswami, 74 (m).
Sakalaguna Naidu v. Chinna Munuswami Nayakar, 32 (g).
Sakeena Bibi v. C. Stephens, 13 (w).
Sakhadamoyi Dasi v. Atul Chandra, 262 (f).
Sakharam v. Gangadhar, 415 (c).
Sakharam v. Thama, 108 (x).
Sakharam v. Tukaram, 313 (h).
Sakharam Sarpesai v. Vithu L. Gonda, 529 (b).
Sakharamshet v. Amtha Devji, 656 (o).
Sakharam Shivram v. Dhaktojirao Shripatrao, 676 (k).
Sakhiuddin v. Sonaullah, 370 (w), 468 (z).
Sakumari v. Mugneeram Bhangar & Co., 752 (j).
Salaman v. Holford, 845 (n).
Salamat Hossein v. Luckhi Ram, 70 (e).
Salamat-uz-Zamin Begam v. Masha. Alla Khan, 352 (c), 354 (w).
Saleh Abraham v. Maneckji Cowasji, 189 (t).
Salkeld v. Johnson, 3 (i), 3 (m), 3 (n).
Salmon, Re., Ex-parte, Trustee, 571 (k).
Salmon v. Dean, 565 (v).
Salt v. Marquess of Northampton, 551 (m).
Salt v. Northampton, 547 (g).
Salter v. Salter, 309 (k).
Salu Bai v. Bajat Khan, 263 (n).
Salu Bai v. Rajat Khan, 115 (a).
S. Alwar Chetty v. K. Jagannatha Aiyar, 46 (r), 442 (g), 774 (e).
Sam v. Lallah, 502 (g).
Samar Ali v. Karim-ul-lah, 151 (f), 495 (m).
Samar Bahadur v. Jit Lal, 911 (n), 912 (f), 914 (s).
Samar Bahadur Singh v. Jit Lal, 71 (v).
Sama Rao v. Vannajee, 524 (b).
Sama Row v. Doraisami, 331 (k).
Samathal v. Her H. M. M. Kamatchi, 545 (l).
Sambasiva v. Venkatarama, 749 (o).
Sambasiva Iyer v. Venkatarama Iyer, 120 (f), 124 (s).
Sambhu v. Kamalrao, 862 (k).
Sambhu v. Nama bin Narayan Naikde, 744 (v).
Sambhu Bin Hanmata v. Nama Bin Narayan, 699 (g), 699 (h), 699 (h).
Same v. Ezra, 198 (h).
Sami Ayyangar v. Ponnammal, 111 (e).
Sammo v. Abdul Wahed, 652 (x).
Samnantha Pandara v. Sellappa Chetti, 113 (d).
Samoo Patter v. Abdul Sammad, 524 (d).
Sampson v. Easterby, 871 (c), 871 (c).
Samratmal v. Govind, 911 (r).
Samsoonessa v. Satya Sebak, 818 (p).
Samsuddin v. Abdul Husein, 268 (r).
Samuel Singh v. Ganeshi Lal, 610 (n).
Samuel v. Jarrah Timber and Wood Paving Corporation, 555 (m), 555 (o).
Samuel v. Robinson, 93 (z).
Sanagapally v. Intoory Bolla, 596 (c), 660 (l).
Sanagapally Lakshmayya v. Intoory Bolla, 597 (h).
Sander and Walford's Contract, Re., 418 (p).
Sanderson v. Berwick-upon Tweed Corporation, 831 (y), 835 (i).
Sanderson v. Mayor of Berwick-on-Tweed, 830 (s).
Sanderson & Co., v. Clark, 940 (u), 944 (w).
Sanders v. Smiles, Re. Wootton, Isaacson, 189 (g).
Sandon v. Hooper, 588 (y), 589 (e), 653 (o), 674 (w).
Sandu v. Bhikchand, 354 (w).
Sandu Valji v. Bhikchand Surajmal, 353 (g).
Saner Jigar v. Barada Kanta, 525 (q).
Sangat Baksh v. Ravajadeo, 556 (x).
Sangster v. Noy, 815 (e).
Sangu Ayyar v. Cumarasami Mudaliar, 368 (w).
Sanjib Chandra v. Santosh, 818 (l).
Sanjib Chandra v. Santosh Kumar, 786 (p), 787 (f), 789 (u).
Sankara v. Ummer, 111 (l).
Sankara Variar v. Ummer, 434 (p).
Sankari v. Mudaragaddi Sanyasi, 242 (v).
Sankaram v. Narasimhulu, 272 (r).
Sankaranarayana Pillai v. Rajamani, 86 (p).
Sannamma v. Radhabhayi, 268 (p).
Sansbury v. Read, 183 (e).
Sansom & Narbeth's Contract, Re, 419 (z), 420 (e).
Santa Fe Land Co., Ltd., v. Forestal Land, Timber and Railway Co., Ltd., 376 (r).
Santala v. Badaswari, 226 (m).
Santana Ray v. The Advocate General of Bengal, 169 (r).

- Santaya v. Narayan, 283 (d).
 Santaya v. Savitri, 415 (c).
 Santi Kumar Pal v. Mukunda Lal Mandal, 104 (a), 104 (z), 108 (v), 108 (x).
 Santley v. Wilde, 146 (o), 545 (g), 545 (m), 619, (f).
 Santana Roy v. The Advocate General of Bengal, 191 (k).
 Sanwal Singh v. Ganesh Lal, 608 (x).
 Sapenswar v. Brindiban, 556 (e).
 Sarada v. Nabin, 854 (j), 855 (d).
 Sarada Kanta v. Nabin Chandra, 15 (j), 82 (d).
 Saradakripa v. Bopinchandra Paul, 133 (j).
 Saradakripa Lala v. Bepin Chandra Pal, 138 (o).
 Sarada Nath v. Gobinda Chandra, 39 (n).
 Sarada Prasad v. Triguna Charan, 525 (j).
 Sarafali v. Subraya, 897 (n).
 Sarajubala Debi v. Jyotirmayee Debi, 132 (z).
 Saran Lal v. Amirta Kuar, 482 (j).
 Saraswatamma v. Paddayya, 13 (p).
 Sarat Chandra v. Charusilo, 103 (u).
 Sarat Chandra v. Jadab Chandra, 811 (e), 818 (p).
 Sarat Chandra v. Shyam Chand, 818 (o).
 Sarat Chunder Dey v. Gopal Chunder Dey, 243 (c).
 Sarat Chunder Dey v. Gopal Chunder Laha, 224 (x), 244 (h), 244. (l), 245 (p), 253 (t), 253 (v), 258 (r), 262 (h).
 Sarat Sukh v. Ram Prasad, 919 (i).
 Saravana v. Chinnammal, 621 (h), 621 (l), 622 (d).
 Sarba Mohan Banerjee v. Manmohan Banerjee, 919 (v), 932 (g).
 Sarban Singh v. Bhagwan, 546 (w), 547 (c).
 Sarbdawan v. Bijai Singh, 557 (r).
 Sarbdawan Singh v. Bijai Singh, 557 (t), 558 (x).
 Sardar Singh v. Kunj Bihari Lal, 102 (x), 103 (i), 103 (n).
 Sardar Singh v. Ratan Lal, 562 (u).
 Sarfarax v. Udwat Singh, 556 (j).
 Sargant J. in Vaudeville Electric Cinema, Ltd., v. Muriset.
 Sari v. Motiram, 556 (z).
 Sarjoo Prasad v. Ramsaran Lal, 115 (a).
 Sarju v. District Judge of Bonares, 96 (r).
 Sarju Kumar v. Thakur Prasad, 609 (d), 610 (j), 694 (z).
 Sarju Prasad v. Bindeshri, 266 (i).
 Sarju Prasad v. Bindeshwar, 268 (t).
 Sarkar Barnard & Co., v. Alak Manjary Kuari, 520 (h).
 Sarkun v. Rahaman, 69 (w).
 Saroj Bandhu v. Mati Lal, 796 (v).
 Saroj Basini Debi v. Mahendra Nath Bhadurji, 92 (u).
 Saroj Kumar Bose v. Surjya Kunta Sarkar, 836 (j).
 Sarojini v. Gnanendra, 164 (b).
 Sarobai v. Hussein Somji, 18 (g), 175 (l), 924 (e).
 Sarson v. Roberts, 825 (c).
 Sartag Kuari v. Deoraj Kuari, 80 (h).
 Sartaji v. Ramjas, 108 (a), 108 (x).
 Sartana Ray v. The Advocate General of Bengal, 152 (r).
 Sarunam Narain v. Mahraj Kumar Gopal, 888 (i).
 Sarupa v. Mt. Dhundan, 249 (r), 250 (d).
 Sarur Jigar v. Baroda Kanta, 520 (x).
 Sarurjigar Begam v. Baroda Kant Mitter, 521 (m).
 Sarvathada v. Kurubasubbanna, 518 (t).
 Sashi Mohan v. Meajan Haji, 796 (y).
 Sasi Bhusan v. Chandra, 519 (t), 520 (j).
 Sasi Bhusan v. Chandra Peshkar, 520 (z), 524 (v).
 Sasi Bhushun v. Tara Lal, 857 (u).
 Satchitanand v. Radhapat, 328 (t).
 Sateendranath v. Jateendranath, 927 (s).
 Satraji Dongerchand Firm v. Madhu Singh, 79 (j).
 Sat Narain Singh v. Badri Prasad, 308 (z).
 Satyabadi v. Harabati, 6 (t), 672 (c), 703 (n).
 Satyabhama v. Kesavacharya, 226 (l).
 Satya Bhupal v. Rajnandini, 219 (w).
 Satya Kripal Bandopadhyaya v. Gopi Kishon Mandul, 697 (p).
 Satya Kumar v. Satya Kripal, 124 (b), 911 (p).
 Satyanarayana v. Lakshmayya, 65 (m), 366 (m).
 Satya Niranjana v. Ram Lal, 121 (w).
 Satya Priya Choshal v. Gobindo Mohon Roy, 5 (h).
 Satya Sankar v. Monomohan, 658 (z).
 Satyendra v. Nilkantha, 17 (z), 218 (p), 219 (a).
 Saunders v. Dunman, 656 (t).
 Saunders v. Pawley, 824 (w).
 Saunders v. Vautier, 172 (m), 173 (w).
 Savage v. Dent, 879 (c).
 Savill Brothers Ltd., v. Bethell, 421 (t).
 Savitribai v. Seth Nanhelal, 735 (a).
 Savory, In the goods of, 519 (k).
 Sawaba Khandapa v. Abaji Jotiram, 618 (c).

- Sawaba Khandapa v. Abaji Jotirav*, 479 (h), 620 (x).
Sawmy Rao v. Official Assignee, 549 (v).
Sawyer & Barrings Contract, Re., 422 (z).
Sayad Abdul Hak v. Gulam Jilani, 556 (z).
Sayaji v. Umaji, 905 (l).
Sayed Abdul Hak v. Gulam Jilani, 546 (w), 556 (b).
Sayer's Trust, Re., 143 (i).
Sayers v. Whitfield, 554 (k).
Sayid Alli v. Debi Prosad, 473 (j).
Scarles v. Sedgrove, 532 (n).
Schmider v. Heath, 680 (y).
Scholefield v. Lockwood, 675 (v).
Sclater v. Cottam, 654 (z).
Scott v. Alvarez, Scott & Alvarez's Contract, 453 (z).
Scott v. Brown (Mathew) & Co., Ltd., 901 (f).
Scott v. Hanson, 396 (f).
Scott v. Jackman, 438 (k).
Scot v. Tyler, 193 (y).
Scott v. Uxbridge & Rickmansworth Co., 796 (r).
Scott v. Uxbridge Ry. Co., 532 (l).
Seagood v. Meale, 347 (o).
Seal v. Claridge, 521 (m).
Searle v. Law, 921 (f).
Sear v. House Property Investment Society, 855 (a).
Secretary of State v. Digamber, 354 (l).
Secretary of State v. Forbes, 354 (j).
Secretary of State v. Sibaprasad, 354 (m).
Secretary Board of Revenue v. Agent, S. I. Ry. Co., Ltd., 792 (y).
Secretary of State v. Chalikani, 542 (f).
Secretary of State v. Charlesworth Pilling & Co., 25 (c).
Secretary of State v. Dugappa, 294 (e), 296 (v).
Secretary of State v. Maharaja Babbi, (i) 4 (r).
Secretary of State v. Saroj Kumar, 75 (t).
Secretary of State for India v. Bhupal-chandra, 792 (a), 792 (x).
Secretary of State for India v. Bhupal-Chandra Ray, 792 (y).
Secretary of State for India v. Bombay Municipality, 4 (d).
Secretary of State for India v. Forbes, 805 (a), 806 (s).
Secretary of State for India v. Karuna, 793 (o).
Secretary of State for India v. Krishnamoni Gupta, 582 (h).
Secretary of State for India v. Madhu Sudan, 813 (g).
Secretary of State for India v. Nistarani Annie Mitter, 818 (v).
Secretary of State for India in Council v. Rishi Ram, 947 (d).
Secretary of State for India v. Sati Prasad Ganga, 792 (a).
Secretary of State for India v. Volkart Bros., 805 (m), 806 (h).
Secretary to the Commissioner of Salt, 790 (e).
Secular Society Ltd. v. Bowman, Re., Bowman, 190 (n).
Sedgwick v. Ahearn, 814 (p).
Seeni Chettiar v. Santhanathan, 23 (b), 24 (k), 792 (x).
Seers v. Hind, 860 (x).
Seetamma v. Venkataramanayya, 75 (a), 76 (h).
Seetharama v. Venkatakrishna, 766 (m), 769 (t), 771 (r), 772 (w).
Seetharamanna v. Appiah, 95 (y).
Seetharamanujacharyulu v. Venkara-subbamma, 311 (x), 317 (r).
Sefton (Earl), Re., 215 (z).
Sehonandan Lal v. Zainal Abdil, 124 (s).
Sehopati Singh v. Jagdeo Singh, 467 (p).
Selby v. Pomfret, 575 (r).
Selwyn v. Garfit, 636 (d), 635 (s), 635 (t).
Senhouse v. Earl, 567 (k).
Serafat Ali v. Issan Ali, 735 (a).
Serjeant v. Nash, Field & Company, 861 (z), 897 (j).
Servill Brothers Ltd. v. Bethell, 421 (r).
Sesha Ayyar v. Krishna, 563 (b).
Sesha Ayyar v. Sreenivasa Ayyar, 685 (q), 747 (m).
Seshagiri v. Pichu, 759 (w).
Seshaiya v. Gauramma, 69 (u).
Seshamma v. Chickaya, 907 (i).
Seshamma Shettati v. Chickaya Hegade, 727 (s), 731 (v).
Seshayya v. Lakshminarasimha, 577 (g), 578 (s), 579 (t), 677 (i).
Seth Ghunsham Dass v. Uma Pershad, 328 (z).
Seth Jaidayal v. Ramsahae, 469 (n), 470 (y).
Seth Misrilal v. Bhimrao, 320 (r).
Sethna v. Hemingway, 31 (v).
Sethumadhava v. Bacha Bibi, 254 (a), 248 (j), 249 (j), 249 (v), 249 (w).
Sethuramaswamiar v. Merswamiar, 70 (y).
Setrucharlu Ramabhadra Raju Bahadur v. Maharaja of Jeypore, 615 (t).
Seturatnam v. Venkatachela, 784 (u).
Sevaji v. Chinna, 550 (y).

- Sevenoaks Aaidstone & Tunbridge
 Rly. Co. v. London Chatham &
 Dover Rly., Co., 146 (w).
 Sewdayal v. The Official Trustee of
 Bengal, 150 (f), 170 (z), 172 (r),
 174 (d), 176 (u), 181 (w).
 Sewdayal Ramjeedas v. Official
 Trustee of Bengal, 154 (w).
 Sewdut Roy v. Sree Cantr Maity,
 753 (y).
 Sewell v. Bishopp, 565 (z).
 Shackleton v. Sutcliffe, 392 (q), 410 (g).
 Shadi Lal v. Thakur Das, 467 (r).
 Shafikul Huq v. Krishna Gobinda,
 6 (t), 356 (c).
 Shafiq-ullah v. Sami-Ullah, 244 (e),
 253 (s), 311 (i), 722 (c), 723 (f).
 Shafi-un-nissa v. Fazal Rao, 673 (p).
 Shafi-un-nissa v. Fazal Rab, 677 (p).
 Shah Mukhun Lall v. Baboo Sree
 Kishen Singh, 211 (u), 495 (h),
 669 (p).
 Shahobzada v. Hills, 595 (r), 659 (i).
 Shahjahan Begam v. Munna, 782 (z).
 Shah Lal Chand v. Indarjit, 368 (y).
 Shah Makhanlal v. Sri Krishna, 441 (q).
 Shahzada Begum v. Gokulchand,
 333 (f).
 Shahzadi Bibi v. Sheikh Jamal, 146 (p).
 Shahzad Singh v. Jiachha Kunwar,
 240 (h).
 Shahzad Singh v. Madan Gopal,
 933 (o), 933 (p).
 Shahzad Singh v. Narain Kurmi,
 617 (k).
 Shaik Hakim v. Adwaita Chandra,
 541 (u).
 Shaik Husain v. Govardhandas, 292 (g).
 Shaik Ibrahim v. Shaik Suleman,
 924 (t), 924 (u).
 Shaik Ismail v. Amirbibbi, 113 (z),
 920 (w).
 Shaik Moosa v. Shaikh Essa, 3 (b),
 84 (q).
 Shaikh Golam v. Amjad Ali, 815 (m).
 Shaikh Imam Ali v. Oograh Singh,
 562 (q).
 Shaikh Muzuhur Hoosein v. Hen
 Pershad Roy, 545 (k).
 Shailendranath v. Hade Kaza, 450 (r),
 510 (n).
 Shailendranath Palit v. Hade Kaza
 Mano, 510 (q).
 Shama Churn v. Wooma Churn,
 814 (b).
 Shama Churn Mitter v. Wooma Churn
 Haldar, 815 (l), 816 (r).
 Shama Prosad Ghoso v. Taki Mullik,
 825 (k).
 Shambati Koer v. Jago Bibi, 112 (w),
 920 (w).
 Shambor Chandra v. Kanai Lal,
 814 (v).
 Shambhu Dat v. Shiam Narain, 625 (f).
 Shambhu Nath v. Nihal Chand, 669 (v).
 Sham Das v. Battul Bibi, 595 (r),
 650 (p).
 Shamdas v. Savitribai, 30 (m), 30 (l),
 939 (q), 939 (s).
 Sham Lal v. Banna Lal, 226 (g),
 226 (h), 227 (u), 757 (x).
 Shamrao v. Pandurang, 670 (a).
 Shamsudin Tajbhai v. Dahyabhai
 Maganlal, 401 (w), 403 (p), 419 (y).
 Shamsundar v. Achhan Kunwar,
 60 (k), 60 (j), 109 (p), 110 (a).
 Shaim Sunder Lal v. Achan Kunwar,
 111 (i).
 Shami Nath v. Lalji Chanbe, 94 (u).
 Shamu Patter v. Abdul Kadir,
 525 (r).
 Shamu Patter v. Abdul Kadir Ravu-
 than, 749 (c).
 Shangara v. Krishnan, 252 (c).
 Shankarappa v. Khatumbi, 73 (v),
 75 (v).
 Shankarbhai v. Kassibhai, 488 (k),
 514 (c), 514 (c).
 Shankar v. Bhikaji, 720 (w), 560 (w),
 710 (n).
 Shankar v. Daooji, 247 (v), 252 (k),
 246 (g), 246 (j).
 Shankar v. Hukumchand, 714 (z).
 Shankar v. Latatat, 697 (u).
 Shankar v. Yeshwant, 556 (x).
 Shankar Din v. Gokal Prasad, 556 (x).
 Shankar Kondappa v. Ganpat Shankar-
 shot, 751 (a).
 Shankar Lal v. Babu Ram, 813 (d),
 814 (x).
 Shankar Sahai v. Bechu Ram, 105 (v).
 Shan Maun Mull v. Madras Building
 Co., 38 (r), 378 (n).
 Shanmuga Pallavaram v. Soosi
 Udayan, 711 (w).
 Shanmuga Pallavaram v. Soosi Udayun
 712 (f).
 Shantanand Gir v. Basudevnanand Gir,
 3 (a).
 Shantapa v. Balapa, 764 (i).
 Shanti Kumar Pal v. Mukundalal
 Mandal, 108 (v).
 Sharfudin v. Govind, 515 (m).
 Sharfudin v. Govind, 378 (r), 378 (s).
 Sharfudin v. Govind, 38 (f), 40 (u),
 40 (v), Bhikaji.
 Sharat Chunder v. Hurgobindo, 659 (i).
 Sharman v. Brandt, 359 (t).
 Sharman v. Sharman, 359 (b), 407 (y).
 Sharpe v. Birch, 521 (m).
 Sharpe v. Durant, 146 (a).
 Sharpe v. Foy, 42 (o), 43 (f).
 Sharpe v. Gibbs, 765 (c).
 Sharpe v. Richards, 576 (b).
 Shashi Bhusan v. Jyoti Prasad, 121 (s),
 121 (u).

TABLE OF CASES.

CV

- Shashi Kumar Mirbahar v. Seeta Nath Bannerjee, 862 (n).
 Shaukat Begam v. Shri Thakurji, 52 (z).
 Shaw v. Bunny, 639 (t), 723 (h).
 Shaw v. Coffin, 133 (e).
 Shaw v. Ford, 202 (p).
 Shaw v. Foster, 499 (k), 499 (w).
 Shaw v. Kay, 883 (v), 870 (t).
 Shaw v. Stenton, 830 (q), 832 (i).
 Shazadi v. Sheik Jamal, 483 (p).
 Shears v. Rogers, 324 (r).
 Sheffield v. Orrery (Lord), 88 (p).
 Sheffield Union Banking Co., *Ex-parte*, *Re. Carter*, 500 (l).
 Sheik Abdul v. Kisan, 435 (v).
 Sheik Dawood v. Moideen Bacha Saheb, 374 (r).
 Sheik Niadhor v. Rajani Khanta, 895 (b).
 Sheik Mohammad Abdullah v. Mohammad Yasin, 10 (x).
 Sheikh Akloo v. Sheikh Emaman, 811 (g), 813 (i), 818 (p), 819 (a).
 Sheikh Galim v. Sadarjan Bibi, 470 (p).
 Sheikh Gulam v. Kashinath, 797 (d).
 Sheikh Hushmat v. Sheik Jamir, 369 (r).
 Sheikh Ismail v. Wasudeo, 336 (z).
 Sheikh Jaman v. Mohammad Nobinoaz, 372 (s).
 Sheikh Nuroo v. Seth Meghraj, 812 (q), 883 (p).
 Sheikh Rajab Ali v. Sheikh, 95 (c).
 Sheikh Sona Ullah v. Troylukho, 814 (k).
 Shekaat Hosain v. Sasi Kar, 105 (s).
 Shek Abdulla v. Shek Muhammad Jafar, 550 (g).
 Shekari v. Mangalom, 486 (b).
 Shekarivarma v. Mangalom, 514 (f).
 Shekhara v. Rau, 513 (r).
 Shenstone v. Brock, 931 (z).
 Sheobarakh v. Sheobikh, 550 (c).
 Sheo Baran Singh v. Kulsum-un-nissa, 71 (a).
 Sheo Darshan v. Beni Choudhri, 654 (b).
 Sheo Dulare v. Jahannath, 456 (y).
 Sheo Goam Singh v. Roy Dinker Dyal, 618 (w).
 Sheogobind v. Anwar Ali, 250 (c), 249 (x).
 Sheo Gobind Singh v. Gouri Prasad, 30 (t), 118 (n), 945 (h).
 Sheo Gulam Singh v. Roy Dinker Dyal, 494 (c).
 Sheo Karan Singh v. Mahrajah Parbhu Narain Singh, 791 (p).
 Sheokisan v. Doma, 314 (q).
 Sheo Mangal v. Jagan Lohar, 55 (g).
 Sheonandan v. Kesho Prasad, 796 (u).
 Sheo Narain v. Chunni Lal, 314 (p), 316 (g).
 Sheo Narain Singh v. Darbari Mahton, 370 (a), 370 (g), 370 (e).
 Sheo Narayan v. Jai Gobind, 494 (x).
 Sheopati Singh v. Jagdeo Singh, 442 (e), 470 (x).
 Sheo Prasad v. Behari Lal, 610 (n), 691 (a).
 Sheo Tahal v. Sheodan Rai, 691 (a).
 Sheopujan Rai v. Bishnath Rai, 13 (s).
 Sheoram v. Babu Singh, 489 (r).
 Sheoram v. Jamnabai, 9 (q), 714 (z).
 Sheoratna v. Mahipal, 471 (g).
 Sheoratan Kuar v. Mahipal Kuar, 744 (w), 749 (o).
 Sheo Sahai v. Sidhgopal, 550 (f).
 Sheo Saran Chaudhri v. Ram Logan Das, 704 (e).
 Sheo Saran v. Ram Lagan, 780 (l), 780 (m).
 Sheo Shankar Pando v. Raj Jas Lal, 623 (t).
 Sheo Shankar v. Parwa Mahton, 555 (t).
 Sheo Shankar v. Raj Jah, 623 (m).
 Sheo Singh v. Jeoni, 124 (y).
 Sheotahal v. Lal Narain, 243 (y), 249 (y).
 Sheo Tahal v. Sheodan Rai, 608 (x), 609 (a) 610 (n).
 Shepard v. Jones, 588 (y), 589 (f).
 Shephard v. Elliot, 675 (m), 675 (o).
 Shepherd v. Beetham, 443 (o).
 Shepherd v. Croft, 384 (k), 391 (i), 395 (w), 395 (z).
 Sheppard's Trust, *Re.*, 195 (o).
 Sheppard v. Hongkong and Shanghai Banking Corporation, 855 (x).
 Shepujan Rai v. Bisnath Rai, 13 (w).
 Sherif Dadumiaji v. Emperor, 792 (y).
 Sher Singh v. Daya Ram, 756 (l).
 Sherwin v. Shakspear, 676 (a).
 Shoth Chitor Mal v. Shib Lal, 754 (o), 759 (t).
 Shiam Lal v. Jagdamba, 556 (z), 557 (o) 557 (q).
 Shiam Lal v. Radha Ballabh, 295 (o).
 Siam Lal v. Ram Piari, 98 (d).
 Shiam Lal v. Sohan Lal, 271 (k), 308 (a), 314 (n) 314 (r).
 Shiba Kali v. Chuni Lal, 13 (s).
 Shib Chandra v. Lachmi Narain, 13 (v), 307 (g), 311 (a), 666 (e), 702 (h).
 Shib Dass Banerjee v. Bomun Doss Mookerjee, 122 (f).
 Shib Dayal v. Puthe Lal, 20 (j).
 Shib Deo v. Ram Prasad, 247 (a).
 Shib Halidar v. Gapi Sundari, 22 (f).
 Shib Lal v. Bhagwandas, 367 (g), 367 (q), 368 (s), 375 (q), 379 (z), 439 (x), 440 (g).
 Shib Lal v. Bhagwan Das, 440 (b).

- Shib Lal v. Bhawani Shankar, 609 (f),
 609 (g), 694 (z).
 Shib Lal v. Ganga Prasad, 489 (r).
 Shib Lal v. Munni Lal, 733 (k).
 Shib Lal Singh v. Moorad Khan, 66 (q).
 Shib Narain v. Gajadhar, 555 (u).
 Shiba-Prasad v. Prayag Kumwari,
 220 (m).
 Shiddeshwar v. Ramchandrarav, 615 (n).
 Shikri Prasad v. Aziz Ali, 333 (f).
 Shikar Chand v. Jagmandar, 331 (o),
 329 (f).
 Shillito v. Hobson, 921 (g).
 Shintayee v. Thanakpudayen, 757 (v).
 Shirinbai Merwanji, *Re.*, 89 (p).
 Shirley v. Stratton, 386 (l).
 Shiva Devi v. Jaru Heggade, 667 (s),
 667 (z).
 Shiv Dayal v. Puthe Lal, 20 (j).
 Shiv Dayal v. Puttu Lal, 23 (a).
 Shivjiram v. Waman, 305 (v).
 Shivram v. Dhau, 472 (j).
 Shivram v. Genu, 40 (v).
 Shivrao v. Pundluk, 759 (s).
 Shivrao Narayan v. Pudlik Bhaire,
 754 (k).
 Shiwaji v. Ratiram, 71 (i).
 Shoiljanund v. Pery Charan, 58 (y).
 Shoreditch Vestry v. Hughes, 413 (h).
 Shreemath Roy v. Godadhur, 511 (f).
 Shree Shree Radhakrishna v. The
 Official Receiver, 333 (d).
 Shri Bhavaniv. Devrao, 119 (c), 436 (d).
 Shri Bhawani Devi v. Devrao, 436 (g).
 Shirdhar v. Chintaman, 374 (y).
 Shridhar v. Gangaram, 492 (c), 492 (j).
 Shridhar v. Ganu, 544 (a).
 Shri Ganesh v. Pandurang, 310 (s).
 Shrinath v. Kanhaiyalal, 30 (y), 77 (u).
 Shrinivasdas v. Meherbai, 397 (j).
 Shri Shrikishan v. Sonba Bhoer, 523
 (n).
 Shristidhar v. Rakshakaly, 525 (l).
 Shropshire Union Railways & Canal
 Co. v. The Queen, 679 (r).
 Shub Chandra v. Lachmi Narain,
 702 (y).
 Shubratn v. Dhanpat, 546 (w), 547 (a),
 578 (q).
 Shujaul v. Mohammad, 57 (f).
 Shumeshwar Dat Singh v. Kamta
 Singh, 372 (c).
 Shumsuddin v. Abdul Husein, 53 (c).
 Shumsudin v. Dahyabhai, 423 (f).
 Shyam Chand v. Land Mortgage Bank
 of India, 75 (e).
 Shyama v. Ananda, 266 (i).
 Shyama Churn v. Ananda Chandra,
 478 (t).
 Shyama Churn Buttacharjee v. Anada
 Chandra Das, 648 (z).
 Shyama Charan v. Akhoy Kumar
 Mitter, 862 (l).
 Shyampeary Dasya v. The Eastern
 Mortgage and Agency Co., Ltd.,
 745 (h).
 Shyam Narain v. Mangal Prasad,
 56 (d).
 Shyam Soonder v. Cheita, 472 (j),
 373 (z).
 Shyam Sundar v. Bajpai, 610 (p).
 Shyam Sundar v. Din Shah, 343 (o),
 363 (y).
 Shyam Sunder Wal v. Din Shah,
 781 (s).
 Sibanand v. Jagmohan, 724 (y), 733 (j),
 733 (l).
 Sibanand Misra v. Gajmohan Lal or
 Jagmohan Lal, 718 (k).
 Sibbald v. Lawrie, 416 (v).
 Sibendrapada Bannerjee v. The Secre-
 tary of State for India in Council,
 373 (o), 370 (z).
 Sibo Sundari Debi v. Hemangini Debi,
 523 (j).
 Sichel v. Mosenthal, 470 (p).
 Siddeshwar v. Ganpatrao, 563 (y).
 Siddick Haji Hoosein v. Bruel & Co.,
 837 (v), 879 (m).
 Siddiq Khan v. Nasir Ullah Khan,
 444 (f).
 Sidebotham v. Holland, 785 (m).
 Sidick Haji Hossein v. Bruel & Co.,
 838 (z).
 Sidik v. Mohamed, 890 (m).
 Sidney v. Clarkson, 235 (h).
 Sidney v. Ranger, 562 (v).
 Sidramappa v. Shidappa, 301 (y),
 301 (z).
 Sigamani Siddiq v. Muhammad Nuh,
 435 (r).
 Sigamani v. Munibadra, 432 (u).
 Siggers v. Evans, 919 (y).
 Sikandar v. Bahadur, 21 (r), 791 (p).
 Silapani v. Ashtamurti, 514 (j).
 Simmins v. Shirby, 664 (h).
 Simmons v. Heseltine, 453 (y), 455 (m).
 Simmons v. Montagure, 503 (a).
 Simmons v. Norton, 876 (p).
 Simpson v. Clayton, 805 (n), 806 (i).
 Simpson v. Gilloy, 390 (t).
 Simpson v. Hartoff, 27 (d).
 Simpson v. Hughes, 423 (k).
 Simpson v. Sadd, 416 (q).
 Sims v. Helling, 591 (a).
 Sinappa Pillai v. Ramaswami Ayyar,
 837 (s).
 Sinclair v. James, 754 (e).
 Sindha Shri Ganpatsingji v. Abraham
 Alias Vijir, 917 (c).
 Singaracharlu v. Sivabai, 945 (e).
 Singhai Kanchadilall v. Shridhar,
 477 (m).
 Singjee v. Tiruvongadum, 599 (w).
 Singjee v. Tiruvongadam, 620 (v).
 Sinnott v. Bowden, 286 (t).

TABLE OF CASES.

cvii

- Siraj-ud-din v. Siraj-ud-din*, 699 (*k*).
Sirbadh v. Ragunath, 282 (*w*).
Sirbadh Rai v. Raghunathprasad, 283 (*a*), 764 (*p*).
Sirdar Golab Singh v. Ram Buddun Singh, 673 (*k*).
Sir Jamsetji Jijibhai v. Sonabai, 921 (*m*).
Sir John Strange, 347 (*j*).
Sis Ram v. Asghar Ali, 799 (*l*).
Sitabai v. Sambhu, 25 (*a*), 848 (*v*).
Sitabai v. Sambhu Soner, 847 (*p*).
Sitab Chand v. Hyder, 752 (*g*).
Sital Chandra v. Mrs. Delanney, 4 (*s*), 51 (*j*), 65 (*m*), 366 (*m*).
Sital Prasad v. Dildar Ali Khan, 133 (*c*), 134 (*l*).
Sital Prasad v. Luchmi Prasad Singh, 485 (*f*).
Sital Singh v. Baijnath Prasad, 752 (*g*).
Sita Nath v. Thakurdas, 516 (*l*).
Sita Nath Gosh v. Thakurdas Chakravarty, 623 (*q*).
Sita Ram v. Madho Lal, 544 (*y*), 740 (*k*).
Sita Ram v. Nanak Chand, 433 (*c*).
Sita Ram v. Raj Narain, 678 (*d*).
Sitanna v. Viranna, 108 (*a*).
Sitaram v. Harkubai, 262 (*m*).
Sitaram v. Khandro, 709 (*h*).
Sitaram v. Mt. Ahearee, 191 (*h*).
Sitaram v. Petia, 21 (*l*).
Sitaram v. Ramrao, 461 (*d*), 461 (*x*), 461 (*y*).
Sitaram v. Shridhar, 540 (*j*).
Sitaramayya v. Venkatramanna, 702 (*g*).
Sitla Bux v. Mahabir Prasad, 939 (*p*), 945 (*g*), 495 (*o*).
Sitla Din v. Sheo Prasad, 698 (*d*).
Sitla Sahai v. Dhum Singh, 677 (*q*).
Situl Purshad, 482 (*h*).
Situl Purshad v. Luchmi Purshad, 481 (*u*).
Sivachidambara Mudaliar v. Kamatchi Ammal, 673 (*f*).
Sivadas v. Birendra, 799 (*b*).
Sivakami v. Gopala, 515 (*w*), 516 (*h*), 516 (*k*), 615 (*l*).
Sivarama v. Subramanya, 753 (*x*).
Sivaramayya v. Kapa Venkata, 273 (*v*), 274 (*e*).
Siva Subramaniam v. Gnanasam-manda, 442 (*f*).
Sivasubramania v. Subramania, 441 (*w*), 442 (*f*).
Sivaswami Iyer v. Thirumudi Chettiar, 114 (*l*).
Sivathi Odayan v. Ramasubbayyar, 723 (*h*).
Siveyer v. Allison, 190 (*e*).
Skinner v. Skinner, 818 (*l*).
Skipper & Tucker v. Holloway & Howard, 32 (*w*).
Slipper v. Tottenham & Hampstead Junction Railway Co., 860 (*w*).
Smallwood v. Mathews, 898 (*i*).
Sm. Annamoyi v. Umesh Chandra, 91 (*z*), 106 (*e*).
Sm. Kamala Mayee v. Nibaran Chandra, 855 (*d*).
Sm. Nurannessa Khatoon v. Shaikh Osman Gani, 407 (*u*).
S. M. A. R. A. L. Firm v. R. M. M. A. Firm, 521 (*l*).
Smethurst v. Hastings, 476 (*v*).
Smith & Hartogs, Re., Ex-parte Official Receiver, 795 (*k*).
Smith v. Burnam, 402 (*i*).
Smith v. Capron, 398 (*x*), 854 (*i*).
Smith v. Chadwick, 679 (*c*).
Smith v. Chambers, 407 (*s*).
Smith v. Colbourne, 136 (*e*), 146 (*l*), 387 (*t*), 387 (*v*).
Smith v. Day, 790 (*i*), 880 (*x*).
Smith v. Death, 411 (*m*).
Smith v. Dinonath, 845 (*k*).
Smith v. Durrant, 631 (*e*), 631 (*f*), 631 (*h*), 637 (*s*).
Smith v. Garland, 340 (*j*), 341 (*b*).
Smith v. Gronow, 894 (*n*).
Smith v. Henley, 789 (*c*).
Smith v. Hurst, 327 (*k*).
Smith v. Lambett Assessment Committee, 793 (*q*).
Smith v. Land & House Property Corporation, 392 (*l*), 394 (*m*).
Smith v. Low, 260 (*m*).
Smith v. Manable, 825 (*a*).
Smith v. Massey, 166 (*e*).
Smith v. Osborne, 261 (*y*), 264 (*y*).
Smith v. Packhurst, 64 (*a*).
Smith v. Pawson, 567 (*e*).
Smith v. Phillips, 772 (*g*).
Smith v. Pocklington, 602 (*u*), 833 (*s*).
Smith v. Raleigh, 797 (*f*), 863 (*u*).
Smith v. Sibthorpe, In re. Jackson 101 (*i*).
Smith v. Smith, 619 (*e*).
Smith v. Smith, Re. Smith, 127 (*z*).
Smith v. Wallace, 414 (*p*), 414 (*s*), 454 (*e*).
Smith v. White, 801 (*c*).
Smyth v. Nangle, 806 (*b*).
Snaith v. Parkinson, Re. Pickeworth, 174 (*b*).
Snowdown Collier, South Eastern Coal-field Extending Co. v. Snow-down Colliery Co., 7 (*z*).
Soanes v. Nicholson, 814 (*n*).
Soar v. Dalby, 663 (*g*).
Soar v. Foster, 925 (*h*).
Sober v. Kemp, 407 (*e*), 428 (*r*), 535 (*u*).

- Sobey v. Samsbury, 230 (y).
 Sobey v. Sanisbury, 46 (v).
 Sobhagechand v. Bhaichand, 40 (v),
 283 (b), 375 (m), 515 (m).
 Sohan Lal v. Mohan Lal, 47 (e), 369 (t),
 371 (k), 373 (n).
 Solaiman v. Jatindra, 907 (d).
 Solema Bibi v. Hafez Mahammad,
 94 (t), 515 (s).
 Solema Bibi v. Hafez Mahammad
 Hossein, 323 (a).
 Solomon & Davey, Re., 412 (u).
 Somasundaram v. Nachiappa, 518 (a),
 757 (u).
 Somasundaram Chettiar v. Nacheappa
 Chettiar, 749 (m).
 Somasundaram v. Unnamalai, 227 (t).
 Someshwar v. Tirbhawan, 925 (h).
 Someshwari Prasad v. Maheshwari
 Prasad, 765 (g).
 Somes v. Martin, 654 (v).
 Somu v. Rangammal, 25 (w).
 Sonai Chutia v. Sonaram Chutia,
 374 (t).
 Sonaji v. Krishna, 696 (n).
 Sonatun Bysack v. Juggut Soondree,
 159 (q).
 Sonatun Shaha v. Dino Nath,
 524 (b).
 Sonaulla v. Abu Sayad, 762 (i), 765 (e),
 766 (s), 770 (d), 777 (e).
 Sonet Koer v. Himnut Bahadoor,
 758 (f).
 Soorayya v. Sooranna, 892 (m),
 895 (y).
 Soorja Koer v. Nath Buksh, 226 (f),
 227 (r).
 Soorjeemoney Dossee v. Denobundoo
 Mullick, 132 (y), 178 (y).
 Soorjeemoney Dossie v. Denobundo
 Mullick, 158 (p).
 Soper v. Arnold, 452 (m).
 Sorabjee v. Dwarkadas, 582 (e).
 Sorabji v. Dwarkadas, 590 (i).
 Sorrell v. Carpenter, 306 (c).
 Soti Suraj v. Than Singh, 610 (k).
 Soudaminey v. Jogesh Chunder, 145 (v),
 149 (t).
 Souter v. Drake, 409 (s).
 South Eastern Rly., Co. v. Associated
 Portland Cement Manufacturer,
 145 (k).
 South Eastern Rly. Co., and Wiffin's
 Contract, Re., 230 (q), 233 (l).
 South Western Railway v. Associated
 Cement Manufacturers, 372 (d).
 Sowana v. Gadigoya, 483 (p).
 Sowbagia v. Manicka, 226 (f).
 Spackman v. Foster, 501 (p).
 Spalding & Boston Banking Co., and
 Knights Contract, Re., Stamford.
 Spencer v. Bailey, 232 (r), 397 (v),
 802 (a).
 Spencer's Case 803 (e), 803 (g), 804 (p),
 804 (x), 867 (n).
 Spencer v. Marriott, 833 (o), 834 (g).
 Spencer v. Slater, 327 (m).
 Spicer v. Martin, 234 (a), 234 (f),
 237 (y), 802 (a).
 Spindler and Mear's Contract, Re.,
 414 (v).
 Spirett v. Willows, 334 (k).
 S. P. K. R. R. M. Chettyar Firm v.
 Administrator General Bengal,
 510 (s).
 Spragg v. Binkes, 543 (r), 543 (s),
 711 (u).
 Spread v. Morgan, 213 (g), 214 (p),
 214 (r), 214 (s), 215 (x).
 Spurgeon v. Collier, 340 (p).
 Squire v. Pardoe, 574 (d).
 S. R. A. S. Sidambaram Nadar v.
 Mohan Lal Brothers, 941 (d).
 S. R. A. S. Sidambaram v. D. R.
 Maganalal Bros., 939 (j).
 Sreelal v. Madon, 430 (b).
 Sreemathi Surjeemoney v. Deenobondo
 Mullick, 206 (h).
 Sreemutty v. Kalidas, 785 (z).
 Sreemutty Rani Kumari Bibi v. Rajah
 Sri Nath Roy, 524 (g), 754 (i).
 Sreemutty Tripoora v. Juggur Nath,
 148 (k).
 Sreenivasa v. Johsua, 914 (r).
 Sre Raja Bommadevara Venkata
 Narsimha Naidu Bahdur v. Gundu
 Sastrulu, 594 (n).
 Sri Balusu v. The Collector of Godaveri
 District, 582 (i).
 Sri Chandra v. Mahima Chandra,
 277 (k).
 Sri Chidambara v. Manickam Pillai,
 113 (g).
 Sri Gopal v. Pirthi Singh, 727 (w).
 Sri Jagannada v. Sri Rajah Prasada,
 60 (q), 268 (r).
 Sri Kakarlapudi v. Sri Rajah Kanduri,
 268 (p).
 Sri Kanta v. Jag Sah, 560 (y), 710 (p).
 Sri Kishan Das v. Nathu Ram, 109 (m),
 109 (s).
 Sri Maharaja Parbhu Narain Singh
 Bahdur v. Babu Boni Singh, 699 (m).
 Sri Poll v. Gregory, 615 (l).
 Sri Raja Mohan De. v. Mati Lal Saha
 Poddar, 899 (m).
 Sri Raja Satrucherla v. Maharaja of
 Jaipur, 13 (v).
 Sri Raja Setrucherla v. Sri Raja
 Vairacherla, 529 (d).
 Sri Raja Simhadri v. Prattipati, 223 (o),
 899 (k).
 Sri Raja Simhadri v. Prattipati,
 Ramayya, 223 (s).
 Sri Raja Simhadri Appa Rao v. Pratti-
 pati Ramayya, 881 (f).

- Sri Raja Venkata v. Sri Rajah Suraneni, 140 (u).
 Sri Ram v. Kesri Mal, 737 (s).
 Sri Ram v. Kidari, 423 (e), 427 (e), 431 (m), 432 (t).
 Sri Ram v. Nand Kishore, 917 (f).
 Sribadh Rai v. Raghunath Prasad, 774 (c).
 Srimati v. Jages Chandra, 145 (b).
 Srimati v. Makan Lal, 893 (p).
 Srimati v. Makhan Lal, 895 (v), 895 (w).
 Srimati v. Sheikh Tasha, 893 (f).
 Srimati Anilabala v. Dharendra Nath Chowdhury, 92 (r).
 Srimati Bhagabati v. Kanailal, 226 (i), 227 (w).
 Srimati Bramamayi v. Jages Chandra, 149 (t).
 Srimati Mallika v. Ratnamani, 58 (t).
 Srimati Sasi Bala v. Srimati Amala, 909 (a).
 Srinohan v. Brijbehary, 105 (r), 105 (s).
 Srinath Das v. Khetter Mohun Singh, 12 (g), 15 (d).
 Srinath Roy v. Godadar Das, 502 (b).
 Srinivas v. Kesho, 87 (y).
 Srinivasa v. Radhakrishnam, 556 (d).
 Srinivasa v. Raghava, 327 (n).
 Srinivasa v. Rengasami, 435 (r).
 Srinivasa v. Thiruvengadathaiyangar, 227 (p).
 Srinivasa Chari v. Gnanaprakasa Mudaliar, 596 (e).
 Srinivasdas v. Meherbai, 430 (f).
 Srinivasadas Bavri v. Meherbai, 403 (o).
 Srinivasa Iyengar v. Thiruvengadathaiyangar, 228 (f), 228 (g).
 Srinivasa Raghava Iyengar v. K. R. Ranganatha Iyengar, 750 (s).
 Srinivasa Raghava v. Ranganatha Aiyangar, 747 (f).
 Sripat Singh v. Naresh Chandra, 315 (u).
 Sripat Singh v. Tagore, 111 (g).
 Sriram v. Hari Narain, 874 (c), 910 (i).
 Srish Chandra Roy v. Mungri Bewa, 472 (j).
 Srish Chander Singh and Others, In the matter of, 539 (y).
 Stackhouse v. Jersey, 501 (n), 502 (v), 503 (u).
 Staines v. Banks, 671 (r).
 Staines v. Morris, 859 (f).
 Stainton v. Carron Company, 86 (j).
 Re. Stamford, Spalding & Boston Banking Co. & Knights Contract, 402 (h).
 Stamp Duties Commissioner v. Stephen, 50 (z).
 Stanbury v. Plymouth Docks Waterworks, Co., 834 (w).
 Standard Manufacturing Co., *In re*, 607 (s).
 Standen v. Christmas, 864 (c).
 Standing v. Bowring, 919 (x), 919 (y).
 Stanhope v. Haworth, 902 (t).
 Staniforth v. Fox, 786 (b), 788.
 Stanlet v. Grundy, 664 (n).
 Stanley v. Hayes, 830 (m), 835 (h).
 Stanley v. Jones, 191 (m).
 Stansfield v. The Mayor of Portsmouth Corporation, 850 (l).
 Stanton v. Tattersall, 394 (s).
 Staples v. Maurice, 280 (g).
 Starkey v. Barton, 798 (l).
 Starr Bowkett Building Society and Sibun's Contract, *In re*, 414 (o).
 Startup v. Macdonald, 531 (y).
 St. Catharini's College v. Rosse, 3 (n).
 Stedman v. Moore, 29 (d).
 Steeds v. Steeds, 539 (a).
 Steed v. Whitaker, 43 (a).
 Steel Wing Co., Ltd., *Re.*, 32 (x).
 Steel v. Brown & Parry, 324 (n).
 Stephens v. Bridges, 886 (q).
 Stephens v. Gadsden, 204 (e).
 Stephens v. Junior Army and Navy Stores, Ltd., 899 (o), 871 (d).
 Stephens v. Stephens, 143 (r).
 Stephens v. Wellings, 675 (w).
 Stephenson's Trusts, *Re.*, 194 (j).
 Stephenson (Robert & Co., Ltd.) v. The Company, 854 (f).
 Stephony & Bow Educational Foundation (Governors) v. Inland Revenue Commissioners, 794 (u).
 Sterling v. Forester, 692 (p).
 Sterling v. Penlington, 280 (n).
 Sterry v. Clifton, 78 (e).
 Stevens v. Adamson, 388 (x), 389 (q).
 Stevens v. Guppy, 416 (u).
 Stevens v. Mid-Hants Railway Co., 763 (z), 772 (h).
 Stevens v. Theatres, Ltd., 640 (m).
 Stevenson v. Lambard, 841 (c), 867 (o).
 Stewart v. Massett, 806 (e).
 Stock v. MaAvoy, 336 (b).
 Stock v. Meakin, 428 (o).
 Stocker v. Dean, 148 (k).
 Stocker v. Planet Building Society, 869 (f).
 Stockley v. Parsons, *Re. Parsons*, 57 (m), 58 (r).
 Stockton Iron Furnace Co., *Re.*, 664 (l).
 Stokes v. Cooper, 797 (f).
 Stone v. Likorish, 535 (s).
 Stonewigg v. Kameshwar, 906 (q).
 Stott v. Milne, 752 (n).
 Stourcliffe Estates C. v. Bournemouth Corporation, 230 (q).
 Strange (Lord) v. Smith, 199 (u).
 Stratton, *Re.*, *Ex-parte* Salting, 722 (x).

- Streatfield *v.* Streatfield, 212 (e),
 215 (y), 216 (d).
 Streatley. In the goods of, 520 (c).
 Strickland *v.* Turner, 189 (m).
 Stringer *v.* Phillips, 280 (d).
 Strode *v.* Blackburne, 119 (c), 436 (w).
 Strode *v.* Russell, 156 (d).
 Strong *v.* Harvey, 531 (p).
 Stronge *v.* Hawkes, 438 (m), 681 (e).
 Strong *v.* Stringer, 897 (w).
 St. Thomas's Hospital *v.* Richardson,
 752 (n).
 Stuart *v.* Blakeway, 101 (j).
 Stuart *v.* Joy, 882 (i).
 Stubbs *v.* Slater, 473 (g), 643 (o).
 Stunge *v.* Stunge, 369 (k).
 Sturgeon *v.* Wingfield, 271 (i).
 Style *v.* Hearing, 828 (l).
 Suba Bibi *v.* Balgobind Das, 330 (a).
 Subadini *v.* Durga Charan, 813 (c),
 815 (d).
 Subba *v.* Nagappa, 785 (x), 895 (v).
 Subba Aiyar *v.* Pichumani, 689 (s).
 Subba Aiyar *v.* Ramaswami Aiyangar,
 86 (p).
 Subbabhat *v.* Vasudev Bhat, 494 (e).
 Subba Goundan *v.* Krishnamachari,
 111 (l).
 Subba Naiker *v.* Solaippa, 93 (f).
 Subbai Goundan *v.* Palani, 702 (u).
 Subbai Govindan *v.* Palani, 701 (t).
 Subbalakshmi *v.* Narasimiah, 39 (m).
 Subbalakshmi *v.* Narayana, 108 (w).
 Subbamma *v.* Narayya, 493 (r), 624 (c).
 Subbaraju *v.* Seetharamaraju, 219 (a),
 219 (y).
 Subba Rama *v.* Bonkatasubba, 927 (f).
 Subba Rama *v.* Venkatasubba, 313 (i).
 Subba Rao Garu *v.* Sri Balasu Buchi,
 704 (k).
 Subba Rao *v.* Ponnammal Nadathi,
 703 (v).
 Subba Rao *v.* Sarvarayudu, 560 (b),
 561 (d), 561 (k), 609 (e), 662 (u),
 672 (d), 673 (e), 677 (n), 702 (v),
 703 (l), 705 (n).
 Subba *v.* Sarvarayudu, 705 (n).
 Subbaraya *v.* Krishna, 133 (c), 133 (c).
 Subbaraya *v.* Krishna Kamti, 134 (q).
 Subbaraju *v.* Seetharamaraju, 120 (e),
 307 (i).
 Subbarayudu *v.* Kotayya, 69 (p).
 Subba Rau *v.* Deva Shetti, 470 (d).
 Subba Rao *v.* Veeranjanyaswami,
 291 (w), 292 (i).
 Subba Reddy *v.* Guruvu Reddy, 81 (n).
 Subba Row *v.* Ananthanarayana
 Aiyar, 275 (u), 276 (y).
 Subbaraya Iyon *v.* Padhmanabha
 Vadhyar, 562 (t).
 Subbaraya *v.* Muthayammal, 60 (j).
 Subbarayudu *v.* Kotayya, 945 (k).
 Subbaroya *v.* Rajagopala, 431 (l),
 434 (l), 434 (o), 434 (p), 435 (q).
 Subbiah *v.* Rami Reddi, 596 (z).
 Subhadrabai *v.* Mahomedali, 444 (c),
 444 (g).
 Subhan Ali *v.* Chittu, 97 (s).
 Subramania Aiyar *v.* Poovan, 440 (b).
 Subramania Ayyar *v.* Muthia Chettiar,
 328 (x).
 Subramania *v.* Balasubramania,
 574 (h).
 Subramaniam Chetty *v.* Mahalinga-
 sami Sivan, 759 (x).
 Subramania *v.* Narayanaswami, 702 (v).
 Subramania *v.* Ramakrishna, 311 (g),
 312 (w).
 Subramania *v.* Rungappa, 845 (k).
 Subramaniam *v.* Subramaniam, 173 (u).
 Subramanian *v.* Raja of Ramnad,
 610 (p).
 Subramania *v.* Saminatha, 914 (p).
 Subramnia *v.* Sitha Lakshmi, 932 (i).
 Subramanian *v.* Arunachalam, 30 (h).
 Subramaniya Iyer *v.* Ramasubba Iyer,
 939 (m).
 Subramanyan *v.* Mandyan, 560 (b).
 Subramanyan *v.* Mandayani, 561 (m).
 Subramniam Chettyar *v.* Raja of
 Ramnad, 751 (b).
 Subraya *v.* Ganpa, 460 (q), 678 (d),
 688 (e).
 Subraya *v.* Krishna, 72 (i), 73 (m),
 73 (u).
 Subraya *v.* Subramania, 495 (g).
 Subraya Mudali *v.* Velayuda Chetty,
 78 (m).
 Suckling *v.* Coney, 532 (e).
 Sudhamoyee *v.* Bhugendranath,
 933 (s).
 Sudisht Lal . Mt. Sheobarat Koer,
 112 (w), 920 (w).
 Sugrabai *v.* Mahomadalli, 924 (v).
 Sukalal *v.* Bapu, 49 (x).
 Sukhada Moyi Das *v.* Athul Chandra,
 259 (k).
 Sukhadamoyi Dasi *v.* Atul Chandra,
 263 (o).
 Sukhdeo Prasad *v.* Jamna, 317 (r).
 Sukhi *v.* Ghulam Safdar Khan, 777 (g).
 Sukh Lal *v.* Bishambhar, 21 (a), 55 (p),
 58 (a).
 Sukhnandan *v.* Sadaram, 378 (o).
 Sulaiman *v.* Ezzo, 673 (m).
 Suloman *v.* Patell, 343 (n), 743 (c).
 Suloman *v.* Perichevla, 296 (t).
 Suloman *v.* P. Vonkatraju, 291 (d),
 294 (d).
 Sulin Mohan Banerjee *v.* Raj Krishna
 Ghose, 82 (d).
 Sulin Mohan *v.* Raj Krishna, 15 (j),
 263 (u).
 Sultan Begam Dobi Prasad, 274 (e),
 274 (f).

TABLE OF CASES.

CXI

- Sultan Kani *v.* Mahomed Meera, 450 (*t*), 455 (*p*).
 Sultan Muhammad *v.* Ladha Singh, 555 (*s*).
 Sumner *v.* Bromilow, 850 (*l*).
 Sumner *v.* Schofield, 420 (*f*).
 Sumsuddin *v.* Abdul Hussain, 63 (*u*), 112 (*w*), 171 (*i*), 260 (*p*).
 Sunchabai *v.* Shivnarayana, 228 (*e*).
 Sunchra *v.* Shadi Ram, 705 (*m*).
 Sundarabai *v.* Jayavant, 48 (*j*), 48 (*m*), 48 (*l*).
 Sundaramayya *v.* Yanadamma, 732 (*h*).
 Sundara Nadan *v.* Annamalai, 95 (*d*).
 Sundara Reddiar *v.* Subbiah Koundan, 725 (*c*).
 Sundar *v.* Bapuji, 572 (*x*).
 Sundar Bibi *v.* Lal Rajendra, 175 (*n*), 175 (*o*), 175 (*p*).
 Sundar Koer *v.* Rai Sham, 557 (*g*).
 Sundar Lal *v.* Ghissa, 263 (*n*), 264 (*x*).
 Sundar Singh *v.* Bhalu, 611 (*r*).
 Sundar Singh *v.* Bholu, 569 (*a*), 574 (*m*), 726 (*l*).
 Sundaresan *v.* Viswanda, 114 (*p*).
 Sunder Bibi *v.* Lal Rajendra, 174 (*c*).
 Sundermull *v.* Ladhuram, 878 (*a*).
 Sunder Singh *v.* Bhogat Singh, 673 (*k*).
 Sunder Singh *v.* Ram Nath, 327 (*o*), 329 (*m*).
 Sundrabai *v.* Jayawant, 65 (*n*), 792 (*c*).
 Sundrabai *v.* Shivnarayana, 228 (*f*).
 Sunitabala Debi *v.* Dhara Sundari, 112 (*w*), 549 (*s*), 560 (*t*), 608 (*y*), 920 (*w*).
 Suppu Sokkayrga Bhattar *v.* Suppu Bhattar, 768 (*o*), 773 (*n*).
 Suraj Bansi Case, 112 (*u*).
 Suraj *v.* Attar, 226 (*m*).
 Suraj Bansi Koer *v.* Sheo Persad Singh, 101 (*e*), 109 (*n*), 109 (*t*), 109 (*u*), 109, 110 (*b*), (*v*), 242 (*u*), 275 (*i*), 276 (*c*), 276 (*u*), 757 (*n*).
 Surajmani *v.* Rabi Nath, 23 (*k*).
 Surajmull Shroff *v.* Gopeeram, 501 (*v*), 502 (*d*).
 Suraj Narain *v.* Nanda Lal, 266 (*g*), 886 (*l*).
 Suraj Prasad *v.* Makhan Lal, 102 (*t*).
 Surajubala Debi *v.* Jyotirmoyee Debi, 136 (*b*).
 Suramma *v.* Jogapathirazu, 748 (*u*).
 Surandra *v.* Kitindra, 669 (*t*).
 Surathchandra *v.* Narayanchandra, 247 (*y*), 946 (*q*), 946 (*r*).
 Surcome *v.* Pinninger, 354 (*v*).
 Surendra *v.* Bijoy Singh, 14 (*a*).
 Surendrakrishna *v.* Shree Shree Ishwar, 114 (*j*).
 Surendrakirshna Ray *v.* Shree Shree Ishwar Bhuvaneshwari Thakurani, 114 (*s*).
 Surendramohan *v.* Mahendranath, 503 (*m*), 510 (*l*), 510 (*s*).
 Surendra Narain *v.* Bhai Lal, 21 (*s*).
 Surendra Narain *v.* Bijoy Singh, 13 (*l*).
 Surendra Narain *v.* Hari Mohan, 909 (*c*).
 Surendra Nath *v.* Atul Chandra, 97 (*u*).
 Surendra Nath Dey *v.* Rajendra Chandra, 648 (*z*).
 Surendra Nath *v.* Khitindra Mohan, 677 (*r*).
 Surendranatha *v.* Kshitindra, 548 (*p*).
 Surendra Nath *v.* Rajendra Chandra, 271 (*l*).
 Surendra Nath Roy *v.* Rajendra Chandra Chandra, 267 (*l*).
 Surendra Nath Roy *v.* Krishna Sakhi Dasi, 98 (*e*).
 Surendro *v.* Doorga, 68 (*r*).
 Sures Chandra *v.* Lalit Mohun, 202 (*n*).
 Suresh Chandra *v.* Mathura Nath, 798 (*v*).
 Sureshwar Misser *v.* Maheshrani, 108 (*v*).
 Surja Narain *v.* Nanda Lal, 266 (*i*), 478 (*u*), 648 (*w*).
 Surjiram *v.* Bharamdeo, 691, (*b*) 719 (*s*), 735 (*b*), 776 (*t*).
 Surjiram Marwari *v.* Brahmadeo Persad, 735 (*h*), 745 (*c*).
 Surjya Narain *v.* Sridhany Lall, 48 (*q*).
 Surplice *v.* Farnsworth, 872 (*h*).
 Suryanarayana *v.* Ramchenbrudu, 748 (*v*).
 Suryanarayanamurthi *v.* Satyanarayanamurthi, 423 (*f*).
 Suryaprakasa *v.* Venkata, 444 (*g*).
 Susai Lazar *v.* Ramaswami, 74 (*c*).
 Susil Chander *v.* Birendrajit, 813 (*c*).
 Susil Kumar *v.* Rajani Kanta, 799 (*c*).
 Susit Chunder *v.* Birendrajit, 812 (*s*), 814 (*k*).
 Sussex Peerage's Case, 4 (*p*), 4 (*r*).
 Sutherland (Duke) *v.* Heathcote, 792 (*j*).
 Sutton *v.* Sutton, 4 (*a*), 615 (*l*).
 Sutton *v.* Tenngli, 824 (*u*).
 Suvasubramania *v.* Gnana Sambanda, 441 (*w*).
 Swain *v.* Wall, 692 (*n*).
 Swami Chetty *v.* Ethirajulu, 510 (*p*).
 Swaminath Pillai *v.* Krishna Iyer, 737 (*r*).
 Swaminatha *v.* Ramaswami, 789 (*a*).
 Swaminatha *v.* Subbarama, 442 (*k*).
 Swan *v.* North British Australasian Co., Ltd., 44 (*q*), 681 (*h*).
 Swan *v.* Swan, 754 (*e*).
 Swansea Corporation *v.* Thomas, 881 (*e*).
 Swarna Kumar Ghosh *v.* Prahlad Chandra, 151 (*l*).
 Swarnamayee *v.* Afaraddi, 898 (*e*), 899 (*q*).
 Swatman *v.* Ambler, 844 (*i*).
 Sweetland *v.* Sweetland, 519 (*f*).

Sweet *v.* Southcote, 241 (*q*).
 Sweny *v.* Smith, 796 (*q*).
 Swinburne *v.* Milburn, 806 (*w*).
 Swinfen *v.* Swinfen, 767 (*c*), 770 (*d*),
 770 (*i*), 777 (*f*).
 Syamalarayudu *v.* Subbarayudu,
 733 (*n*), 733 (*o*).
 Syam Behari Mal *v.* Maha Prasad,
 933 (*k*).
 Syamkisor *v.* Dines, 355 (*o*).
 Syed Abas *v.* Misri Lal, 541 (*v*).
 Syed Ajam *v.* Ananthanarayan, 791 (*t*),
 820 (*l*).
 Syed Aziz *v.* Mt. Arifa Begum, 32 (*m*).
 Syed Bismilla *v.* Manulal, 56 (*d*),
 268 (*z*).
 Syed Ibrahim *v.* Arungathayee, 769 (*r*).
 Syed Inam *v.* Mahomed Sikander,
 9 (*q*).
 Syed Kasam *v.* Jorawar Singh, 102 (*r*).
 Syed Mukhtar *v.* Rani Sunder, 833 (*o*).
 Symmes *v.* Symonds, 678 (*a*).
 Symes *v.* Hughes, 335 (*v*).
 Sym's Case, 280 (*j*).
 Syrian Land Co., Ltd. *v.* J. D. Rod-
 rigues, 787 (*n*).

T

Tabera *v.* Ajodhya, 924 (*s*).
 Tabor *v.* Godfrey, 836 (*h*).
 Taerkeshwar *v.* Kalka Pathak, 572 (*q*).
 Tafawddi Peada *v.* Mahar Ali Shaha,
 754 (*j*).
 Tagore *v.* Tagore, 102 (*v*), 132 (*w*),
 365 (*h*).
 Tailby *v.* Official Receiver, 61 (*y*),
 271 (*l*), 264 (*y*), 755 (*d*).
 Tajjo Bibi *v.* Bhagwan Prasad, 3 (*g*),
 569 (*a*).
 Takoor Chunder Poramanick *v.* Ram-
 dhone Bhattacharjee, 122 (*f*).
 Talbot *v.* Blindell, 904 (*g*).
 Talbot *v.* Frere, 641 (*z*).
 Talib Ali *v.* Kaniz Fatima, 71 (*t*),
 366 (*k*), 366 (*v*), 367 (*c*).
 Talik Singh *v.* Jalal Singh, 494 (*y*).
 622 (*z*), 623 (*k*).
 Tamaya *v.* Timapa, 133 (*c*), 133 (*i*),
 134 (*p*).
 Tammireddy *v.* Gangireddy, 52 (*w*),
 919 (*f*).
 Tangasami Goundan *v.* Nachiappa
 Gounden, 104 (*x*).
 Tangya Fala *v.* Trimbak Daga, 730 (*j*),
 730 (*k*).
 Tanham *v.* Nicholson, 812 (*u*).
 Tanner *v.* Smith, 414 (*l*).
 Tapassi Ram *v.* Raja Ram, 318 (*t*).
 Tarachand *v.* Narayan, 701 (*r*).
 Tarachand *v.* Ram Gobind, 827 (*x*).
 Tara Prasanna *v.* Nilmoni, 461 (*d*).
 Tara Prasanna *v.* Shandi Bibi, 924 (*a*).

Tarap Sheikh *v.* Kunja Behari, 799 (*f*),
 799 (*g*).
 Tara Sundari *v.* Saroda Charan, 73 (*n*),
 73 (*u*).
 Taraknath *v.* Sanatkumar, 242 (*t*).
 Tarasounduree *v.* The Court of Wards,
 192 (*x*).
 Tare Chand *v.* Brojo Gopal, 625 (*h*).
 Tarinicharan *v.* Debnarayan, 874 (*e*).
 Tarini Prasad *v.* Bhola Nath, 102 (*y*).
 Tarn *v.* Turner, 537 (*o*), 601 (*h*),
 710 (*j*), 714 (*z*).
 Tarte *v.* Darby, 788.
 Taruk Podo Ghosal *v.* Shyama Churn
 Napit, 784 (*m*).
 Tarvadi *v.* Bai Kashi, 22 (*w*).
 Tasker *v.* Small, 710 (*q*).
 Taster *v.* Marriott, 590 (*l*), 591 (*t*).
 Tata Iron and Steel Co., Ltd. *v.*
 Charles Joseph Smith, 610 (*p*).
 Tate *v.* Hilbert, 934 (*w*), 934 (*y*),
 934 (*z*).
 Tatem *v.* Chaplin, 804 (*v*).
 Tatia *v.* Babaji, 47 (*c*), 368 (*v*), 440 (*b*),
 467 (*s*), 470 (*d*).
 Tatyarao *v.* Puttappa, 38 (*w*).
 Tattersal *v.* Peel, *In re.* Peel, 157 (*m*),
 162 (*u*).
 Tatyya *v.* Ramakrishnamma, 102 (*h*),
 Taunton *v.* Royal Insurance Co.,
 921 (*q*).
 Tawassul Husain *v.* Abrar Husain,
 92 (*t*).
 Tayawa *v.* Gurshidappa, 826 (*t*), 830 (*i*),
 835 (*o*).
 Tay Gyi *v.* Maung Yan, 647 (*b*).
 Tayleur *v.* Wildin, 900 (*s*).
 Taylor *v.* Blakelock, 942 (*o*).
 Taylor *v.* Bowers, 335 (*u*).
 Taylor *v.* Bundle, 507 (*x*).
 Taylor *v.* Caldwell, 792 (*x*), 793.
 Taylor *v.* Gilbertson, 230 (*n*).
 Taylor *v.* Gillott, 859 (*i*).
 Taylor *v.* Horde, 808 (*w*).
 Taylor *v.* London and County Banking
 Co., 412 (*w*), 500 (*d*), 502 (*l*).
 Taylor *v.* Mostyb, 675 (*y*).
 Taylor *v.* Needham, 258 (*s*).
 Taylor *v.* Obee, 369 (*j*).
 Taylor *v.* Parry, 419 (*c*).
 Taylor *v.* Russell, 475 (*r*), 503 (*n*).
 Taylor *v.* Stibbert, 35 (*s*).
 Taylor *v.* Wheeler, 264 (*y*).
 Tebb *v.* Cave, 831 (*b*), 834 (*f*).
 Teovan *v.* Smith, 545 (*h*), 545 (*o*),
 547 (*h*), 552 (*q*).
 Tehilram *v.* Kashibai, 46 (*r*), 441 (*l*).
 Teja Singh *v.* Kalyan Das-Chot Ram,
 10 (*x*).
 Teja Singh *v.* Moti Singh, 128 (*l*).
 Tojpal *v.* Ganga, 94 (*j*).
 Tokait *v.* Darshan Deo, 783 (*h*).
 Tench *v.* Chooso, 163 (*v*).

TABLE OF CASES.

cxiii

- Tennant v. Heathfield, 195 (o), 196 (x), 196 (z).
 Tennant v. Trenchard, 562 (x), 607 (j), 638 (n).
 Terrell v. Murray, 868 (w).
 Terry and White's Contract, *In re.*, 413 (f).
 Tetley, *Re.*, *Ex-parte* Jeffrey, 321 (c), 337 (q).
 Texas Company v. Bombay Banking Company, 42 (t).
 Thackeray v. Wood, 593 (c).
 Thabhu Ram v. Girdhari Singh, 621 (j).
 Thakar Das v. Mt. Putli, 81 (n).
 Thakar Das Bhatia v. Malik Chand, 31 (q).
 Thakardwara v. Ishar Das, 115 (z).
 Thakar Singh v. Jagat Singh, 470 (x).
 Thakar Singh v. Uttam Kaur, 63 (v).
 Thakoor Chander Poramanick v. Ram Dhona Bhuttacharjee, 25 (z).
 Thakoor Chunder Paramanick, 29 (i), 847 (q), 848 (s).
 Thakoor Chunder Pormanick v. Ramdhona, 290 (r), 295 (n).
 Thakoor Deyhee v. Rai Baluk Ram, 103 (u).
 Thakro v. Ganga Pershad, 336 (c).
 Thakur Chhotey Singh v. Thucker Baldev Bux Singh, 601 (n).
 Thakurdas v. Sobhagchand, 373 (k), 374 (s).
 Thakur Dayal Singh v. Rai Promotha Nath Mitra, 904 (h).
 Thakur Prasad v. Gaya Sahu, 310 (p).
 Thakur Prasad v. Mt. Dipa Kuer, 106 (w), 108 (v).
 Thakuri v. Kundan, 244 (m), 248 (h), 251 (s).
 Thammayya v. Ramanna, 317 (r).
 Thandavaroya v. Shunmugum, 111 (h).
 Thanmul Sowcar v. Nathu Ramadoss, 689 (q).
 Thasi Muthu Kannu v. Shunmugavelu Pillai, 190 (l), 190 (h), 931 (x), 931 (v).
 Thatcher's Trust, *Re.*, 147 (e), 157 (h).
 Thavasi Ammal v. Salai Ammal, 292 (k).
 Thawerdas v. Vishnidas, 30 (x), 77 (u).
 Thayarammal v. Lakshmi Ammal, 372 (a), 535 (u).
 The Administrator-General of Bengal v. Prem Lal Mullick, 3 (a).
 The Collector of Masulipatam v. Cavalry Venkata, 758 (f).
 The Collector of Mirzapur v. Bhagwan Prasad, 524 (g), 749 (k).
 The Collector of Thana v. Hari Sitaram, 80 (k).
 The Colonial Sugar Refining Co., Ltd. v. Irving, 13 (w).
 The Corporation of Calcutta v. Kumar Arun Chandra Singha, 4 (p), 6 (t).
 The Dharwar Bank, Ltd. v. Mahomed Hayat, 227 (y).
 The Eastern Counties London and Blackwall Railway Cos. v. Marriage, 5 (i).
 The East India Distilleries and Factories, Ltd. v. Mathias, 840 (y).
 The General Finance Mortgage and Discount Co. v. Libertor Permanent Benefit Building Society, 259 (g), 259 (h).
 The Hitwardha Cotton Mills Co., Ltd. v. Sorabji Dinshaw Karaka, 566 (c).
 The Joint and United Hindu Family v. Chettiyyar, 74 (z).
 The Madras Deposit and Benefit Society v. Pasaanha, 633 (y).
 The Maharani of Burdwan v. Krishna Kamini, 5 (p).
 The Municipal Corporation of the City of Bombay v. The Secretary of State for India in Council, 301 (x).
 The Official Assignee of Bengal v. The Yokohama Specie Bank, Ltd., 332 (b).
 The Official Assignee of Madras v. Ramachandra, 278 (s).
 The Official Assignee of Madras v. Sambanda Mudaliar, 332 (b).
 The Official Assignee of Madras v. Shekih Moideen, 332 (b), 332 (w).
 The Official Assignee of Madras v. Vedavalli, 184 (g).
 The Official Receiver v. Lakshman, 366 (s).
 The Official Receiver Trichinopoly v. Lakshman Aiyar, 370 (v), 468 (y).
 The Secretary of State for India in Council v. Khemchand Jeychand, 78 (l).
 The Secretary of State v. Raja Parthasarathy, 133 (b).
 The South African Territories v. Wallington, 470 (p).
 Thekkamannergath Raman v. Kakkaseeri, 599 (b).
 Thelluson v. Liddard, 117 (e), 886 (t).
 Thelluson v. Woodford, 143 (o), 144 (w), 145 (e).
 Thethalan v. Eralpad Rajah Calicut, 859 (g).
 Thevaraya Reddy v. Venkatachalam, 703 (o), 703 (y), 704 (a), 705 (o), 707 (z).
 Thiagaraja v. Ramaswami, 666 (h), 702 (f).

- Thirtha Swamiar v. Thirtha Swamiar, 114 (l).
 Thirumalai v. Venkatachalam, 80 (j).
 Thiruvadi Ayyangar v. P. Janaki, 769 (r), 773 (k).
 Thiruvengadachariar v. Ranganath Iyengar, 6 (t), 124 (a).
 Thomas, *Re.*, *Ex-parte* Silloughby D'Eresby (Baroness), 852 (w).
 Thomas v. Owen, 841.
 Thomas v. Attorney General, 931 (b).
 Thomas v. Cook, 889 (y).
 Thomas v. Evans, 531 (z).
 Thomas v. Freeman, 58 (p).
 Thomas v. Howell, 198 (i).
 Thomas v. Jennings, 850 (k).
 Thomas v. Sorrell, 792 (b).
 Thomason v. Frere, 99 (r).
 Thomas Pillai v. Muthuraman, 324 (s).
 Thomas Souza v. Gulam Moidin, 294 (f), 304 (t).
 Thompson v. Alexander, Thompson's Settlement Trusts in *Re.*, 100 (a).
 Thompson & Holt, *Re.*, 632 (s), 633 (z).
 Thompson v. Hudson, 674 (c).
 Thompson v. Lapworth, 845 (o).
 Thompson v. Thompson, *Re.*, Thompson, 143 (m), 143 (p).
 Thompson v. Webster, 335 (p), 337 (q).
 Thorne v. Cawn, 772 (h).
 Thorne v. Cann, 763 (t), 766 (i), 766 (l), 773 (v).
 Thorn v. Madden, 802 (q).
 Thornton, *Ex-parte*, 313 (x).
 Thornton v. M'Kewan 721 (o).
 Thorpe v. Holdsworth, 503 (n).
 Three Towns Banking Co. v. Maddever, *In re*. Maddever, 337 (r).
 Thresher v. East London Water-Works Co., 28 (m), 847 (j).
 Thumbusawmy v. Hoosain, 486 (c), 488 (e), 490 (h).
 Thurlow v. Mackeson, 637 (x), 642 (m).
 Thynne (Lady) v. Glengall (Earl), 359 (z).
 Tibbatts v. Boulter, 393 (y).
 Tidey v. Mollett, 791 (j).
 Tika Ram v. The Deputy Commissioner of Bara Banki, 820 (v).
 Takam Singh v. Bhola Nath, 30 (g).
 Tilakdhari Lal v. Khedanlal, 38 (c), 39 (h), 61 (c), 260 (l), 378 (p).
 Tiloke Chand v. Beattie & Co., 40 (x), 287 (s), 287 (v), 287 (x), 312 (v).
 Timaji v. Rama, 694 (c).
 Timaji Krishna Potdar v. Rama Piraji Bhat Khande, 691 (c).
 Timangowda v. Benepgowda, 357 (h), 373 (i), 427 (g).
 Times v. Baker, 64 (d).
 Thimmanayanim v. Venkatappa, 72 (h).
 Timmappa v. Rama, 856 (k), 859 (l).
 Tin Gouri Dasseo v. Krishna Bhabini, 200¹(d).
 Tinoodan v. Trailokya, 308 (s).
 Tippayya Holla v. Venkata, 495 (j).
 Tipton Green Colliery Co. v. Tipton Moat Colliery Co., 674 (z).
 Tirath Ram v. Kahan Devi, 103 (u).
 Tirippa v. Murugappa, 680 (b).
 Tirnangowda v. Benepgowda, 364 (b).
 Tirugnana v. Nallatambi, 577 (g), 577 (k), 578 (s).
 Tiruvengadam Pillai v. Sabapathi Pillai, 732 (i), 767 (z).
 Tiruvenkatachariar v. Thanayiammal, 86 (t).
 Tiruvenkatachariar v. Venkatachariar, 239 (w), 267 (m), 458 (b).
 Tiruvenkatam Pillai v. Sabapathi Pillai, 773 (r).
 Tituram Mukerji v. Cohen, 21 (s), 117 (h).
 Todd v. Thompson, 523 (o).
 Tofaluddi v. Mahar Ali, 525 (k).
 Tofaluddi Peada v. Mohar Ali Shaah, 748 (a).
 Togendra v. Fulkumari, 305 (w).
 Tokhan v. Girwar Singh, 468 (w).
 Tolhurst v. Associated Portland Manufacturers, 854 (p).
 Tolhurst v. Associated Portland (1900) Cement Manufacturers and Imperial Portland Cement Co., 805 (e).
 Toliffe v. Baker, 399 (h).
 Tollemoche, *In re*, 89 (o).
 Tomlin v. Luce, 637 (d).
 Tomlinson v. Day, 863 (p).
 Tomlinson v. Gill, 239 (d).
 Tomlinson v. Harding, 374 (t), 444 (g).
 Tompkins v. Pincent, 794 (d).
 Tonens v. Walker, 865 (l).
 Tonkins v. Ennis, 340 x.
 Toomes v. Conset, 555 (q).
 Toomey v. Rama, 70 (h).
 Torboy Hotel, Ltd. v. Jenkins, 230 (p), 236 (m), 236 (n), 238 (q).
 Torkington v. Magee, 32 (e).
 Toronto Corporation v. Toronto Railway, 5 (f).
 Torrance v. Bolton, 394 (t), 454 (f).
 Torrens v. Walker, 867 (v), 871 (y).
 Torret v. Frampton, 279 (t).
 Tota Ram v. Ram Lal, 717 (c), 723 (o), 761 (g).
 Tottenham Local Board of Health v. Rowell, 634 (f).
 Toulmin v. Steere, 44 (p), 762 (j), 762 (m), 762 (o), 763 (d), 763 (r), 763 (u), 763 (y), 764 (t), 767 (b).
 Tourle v. Rand, 683 (j).
 Towell v. Slate & Co., 605 (h).
 Towerson v. Jackson, 602 (x).
 Townsend, *In re.*, 546 (s).

TABLE OF CASES.

CXV

Towry Law v. Burne, *Re.*, Ellenborough, 57 (k).
 Trafford v. Maconochie, *Re.*, Moore, 202 (j).
 Trapper v. Harter, 852 (z).
 Travers v. Bhundell, 416 (j).
 Treacher & Co., Ltd. v. Mahomedally, 408 (n).
 Tredway v. Machin, 869 (h).
 Tregonwell v. Sydenham, 147 (g).
 Treloar v. Bigge, 855 (x).
 Tremayne v. Rashlingh, 50 (z).
 Trent v. Hunt, 601 (g).
 Tressilian v. Canifee, 37 (p).
 Trevelyan v. Trevelyan, 149 (r).
 Trevor v. Trevor, 770 (h).
 Tribhovandas v. Krishnaram, 416 (j). 467 (r).
 Tribhovandas Mangaldas v. Yorke Smith, 211 (u).
 Trickey v. Trickey, 161 (e).
 Tricomdas v. Gopinath, 435 (s), 443 (v).
 Tricumdas Cooverji v. Gopinath, 625 (f), 747 (g).
 Triguna Sundari v. Radharani Dasi, 214 (n).
 Trilokya v. Sarat Chandra, 811 (h).
 Trimalrav v. Municipal Commissioner, 439 (w).
 Trimbak v. Lakshman, 70 (y).
 Trimbak v. Sakharam, 530 (l), 557 (m), 557 (r).
 Trimbak Gangadhar v. Bhagwandas Mulchand, 631 (b), 639 (v).
 Trimbaklal v. Hirlal, 93 (d).
 Trimmer v. Bayne, 686 (v).
 Tripurani Pal v. Jagat Tarini, 202 (n).
 Troilokya v. Sarat Chandra, 816 (x), 906 (r).
 Troilokya Nath Roy v. Sarat Chandra, 906 (s).
 Trulock v. Robey, 670 (e).
 Trumper v. Trumper, 649 (l).
 Truscott v. Diamond Rock Boring Co., 865 (v).
 Tubbs v. Wyne, 428 (p).
 Tucker v. Linga, 857 (v).
 Tucker v. Wintle, *Re.*, Wintle, 173 (y).
 Tuckley v. Thompson, 656 (r).
 Tufail Fatma v. Bitola, 723 (e), 724 (t), 725 (j), 731 (q), 735 (e).
 Tukaram v. Ramchand, 483 (p), 493 (n), 493 (o), 496 (p), 515 (e).
 Tuke v. Gilbert, *Re.*, Martin, 173 (y).
 Tula Ram v. Tulshi Ram, 105 (v).
 Tulk v. Moxhay, 136 (c), 229 (l), 230 (x), 232 (j), 232 (m), 232 (o), 232 (q), 238 (p), 387 (u), 859 (j).
 Tullockchand v. Gokulbhoy, 517 (s).
 Tulshi Prasad v. Jahmohan Lal, 102 (y).
 Tulshi Ram v. Bishnath Prasad, 110 (c).

Tulshi Ram v. Sat Narain, 617 (i).
 Tulsidas v. Raisinghji, 96 (i).
 Tulsiram v. Anusuya, 744 (m), 744 (s), 744 (t), 744 (u), 760 (e).
 Tulsiram v. Murlidhar, 434 (p).
 Tulsi Ram v. Radha Kishen, 735 (h).
 Tuppan v. Chinna Pari, 666 (f).
 Turgnand v. Rhodes, 392 (x).
 Turner v. Cameron's Coalbrook Steam Coal Co., 827 (c).
 Turner v. Green, 445 (p).
 Turner v. Hardy, 790 (d).
 Turner v. Harley, 445 (p).
 Turner v. Moon, 395 (v), 459 (p).
 Turner v. Smith, 510 (v), 565 (t).
 Turner v. West Bromwich Union Guardians, 394 (i).
 Turner v. Wright, 875 (l).
 Turpin v. Chambers, 414 (n).
 Turquand v. Rhodes, 417 (x).
 Tweedale v. Tweedale, 575 (q), 575 (s).
 Tweddell v. Tweddell, 448 (e), 625 (j).
 Tweedie & Miles, *Re.*, 88 (s).
 Twopenny v. Young, 765 (a).
 Twyne's Case, 319 (f), 321 (a), 329 (m).
 Tyler v. Lake, 770 (f), 773 (u).
 Tyler v. Tyler, *In re.* Tyler, 168 (o).
 Tyne Boiler Works Co. v. Overseers of Longbenton, 27 (s).
 Tyrie, *Re.*, *Ex-parte* Morris, 507 (y).
 Tyrwhitt v. Tyrwhitt, 762 (k), 765 (v), 767 (e), 770 (d), 776 (c).
 Tysoe v. The Co., *Re.*, Turkesbury Gas Co., 616 (c).

U

Udai Chunder v. Ashutosh Das, 102 (y).
 Udai Dat v. Ambika Prasad, 105 (o).
 Udairaj Singh v. Ram Udit Tewari, 621 (t).
 Udaram v. Ramu, 274 (g), 275 (n).
 Udaya Chandra Rana v. Bhajahari, 739 (d).
 Udayana v. Senthivelu, 516 (k).
 Uday v. Katyani, 835 (o).
 Udho Das v. Mehr Baksh, 372 (b).
 Udiipi Seshagiri v. Seshamma, 133 (c), 891 (r).
 Udit Narain v. Asharfi Lal, 736 (n), 737 (q).
 Udoy Kumari v. Hari Ram, 66 (a).
 U. Dun Htaw v. Maung Aw, 377 (f).
 U. Kyaw v. Ah Doe, 219 (a).
 Ulfat Hossain v. Gayani Dass, 12 (e), 886 (l).
 Ulfat Rai v. Gauri Shankar, 81 (n), 98 (y).
 Ulfatunnissa v. Hosain Khan, 518 (x).
 Umar Ali v. Asmat Ali, 717 (b), 720 (w), 740 (o).
 Umar Din v. Abdul Haq, 94 (k).
 Umar Hussain v. Sakharam, 659 (i).

- Umaram v. Puruk, 243 (d), 243 (w), 243 (x), 245 (p), 245 (r).
 Umartara Gupta v. Uma Charan, 658 (w), 660 (r), 658 (y), 745 (z).
 Uma Sundari v. Benod Lal, 277 (o).
 Umda v. Umrao Begum, 16 (p), 497 (y).
 Umedmal v. Davu bin Dhondiba 440 (b).
 U. Meda v. U. Sandima, 925 (k).
 Umedmal v. Baijnath, 368 (b), 369 (f).
 Umedmal Motiram v. Davu Bin Dhondiba, 367 (q), 368 (t), 439 (w).
 Umed Singh v. Babu Ram, 733 (p).
 Umes Chunder Sircar v. Zahur Fatima, 175 (o), 777 (g).
 Umesh Chandra v. Khulna Loan Company, 653 (e).
 Umesh Chandra Pramanick v. Mothura Kohan Haldar, 619 (j).
 Umesh Chandra v. Zahur Fatima, 57 (f).
 Umesh Chunder v. Chunchun Ojha 14 (b).
 Umrai Lal v. Rukmin Kuar, 730 (h).
 Underhay v. Read, 288 (n).
 Underwood v. Wing, 195 (o), 196 (x), 196 (z).
 Ungley v. Ungley, 354 (v), 359 (b).
 Unhamma v. Vaikunta 785 (w), 893 (r), 893 (u).
 Uni v. Nagammal, 739 (d).
 Unichaman v. Ahmed Kutti Kayi, 621 (m).
 Unichamar v. Ahmad, 625 (f).
 Union Bank of England v. Ingram, 671 (h), 673 (q), 674 (c), 674 (r).
 Union Bank of London v. Ingram, 671 (r).
 United Club & Hotel Co., *Re.*, 220 (e).
 United London & Scottish Insurance Co. v. Omnium Insurance Corporation, 409 (v).
 United Provinces Electric Supply Co., Ltd., *In re.*, 800 (m).
 Unity Joint Stock Mutual Banking Association v. King, 754 (n).
 Unnamalai v. Gopalaswami, 688 (e), 688 (k).
 Unnian v. Rama, 550 (k).
 U. Pandarvun v. U. Sandima, 925 (j), 928 (v).
 Upendra v. Bindesri, 60 (t).
 Upendra Chandra v. Hukum Chand, 520 (w), 525 (l), 525 (m).
 Upendra Chandra Mitter v. Tara Prosanna Mukerjee, 653 (a), 654 (y), 730 (m).
 Upendra Chandra v. Mohri Lal, 660 (r).
 Upendra Krishna v. Ismail Khan, 784 (p).
 Upendra Lal v. Jogesh Chandra, 785 (e).
 Upendra Nath v. Kali Charan, 461 (b).
 Upendra Nath v. Saroda Prasad, 759 (r).
 U. Pe. v. U. Maung Maung Kha, 925 (p).
 Upfill v. Wright, 190 (j).
 Upjohn v. Ford, 838 (d).
 Upjohn v. Hitchens, 838 (d).
 Upjohn v. Macfarlane, 857 (q).
 U. Po O. v. Ma Tok Gyi, 925 (n).
 U. Pyinnya v. Maung Law, 81 (r).
 U. Shwe Bwa v. Maung Thauk Kya, 759 (u).
 U. Tezawunta v. Maung Saw Pe, 925 (o).
 U. Tha Nyo v. Maung Kyaw Tha, 791 (r).
 U. Zoe v. Ma Mya May, 174 (j), 175 (o), 175 (p).
 Upton v. Townend, 863 (t).
 Urjooni Kembhi v. Harbaji Jagannath, 528 (z).
 Usborne v. Usborne, 603 (z).
 Usman Khan v. Dasanna, 541 (c), 556 (x).
 Uthandi v. Ragavachari, 70 (b), 485 (g).
 Uttam Chandra v. Raikrishna Dalal, 496 (v).
 Uttam Chandra v. Rajkrishna, 563 (e).
 Uttermone v. Stevens, 675 (o).
 Utterson v. Mair, 85 (h).
 Uzhur Ali v. Bebee Ultaf Fatima 227 (y).

V

- Vaccum Oil Co., Ltd. v. Ellis, 664 (o).
 Vacker & Sons v. London Society of Compositors, 3 (k).
 Vadamalai v. Subramania, 510 (s).
 Vadapalli v. Dronamrajee, 905 (l), 907 (i), 907 (j), 907 (x), 908 (m).
 Vaddiparthi v. Appalanarasimhulu, 556 (d).
 Vadivelam v. Natesam, 101 (n), 275 (m).
 Vadji v. Vadju, 497 (b), 497 (l).
 Vadju v. Vadju, 528 (w).
 Vagha Jesing v. Manilal, 794 (z), 816 (r).
 Vaguran v. Rangayyengar, 64 (y).
 Vaidynatha v. Eggia, 72 (l).
 Vaikuntam v. Kallipiram, 228 (h).
 Vaikuntarama v. Authimoolam, 98 (i).
 Vale & Sons v. Moorgate Street & Broad Street Building, Ltd., 802 (z).
 Valia Thamhuratt v. Anujant Kunhuni, 79 (z).
 Vallabh Das v. Murat Narain, 908 (r).
 Valluru Appalasuri v. Saspu Kannamma, 107 (n).
 Valu v. Ganga, 226 (k).
 Vamana Pai v. Venkatu Naiku, 881 (h), 892 (h), 901 (d), 902 (n).
 Vaman v. Tikaram, 252 (o), 254 (z).
 Vaman v. Vasudev, 274 (f), 274 (g).
 Vani v. Bani, 518 (x), 745 (y), 760 (e).

TABLE OF CASES.

CXVII

- Vanmikalinga Mudali *v.* Chidambara Chetty, 766 (n), 766 (o), 771 (m), 771 (s), 771 (t).
 Varada Pillai *v.* Jeevarathnammal, 13 (p), 518 (z), 541 (c), 921 (i).
 Varadarajulu Chetty *v.* Dhana Lakshmi Ammal, 654 (x).
 Varahaswami *v.* Ramchandra Raju, 75 (g), 76 (h), 76 (o), 76 (p).
 Varden *v.* Luckpathy, 267, (m), 502 (e).
 Varden Seth Sam *v.* Luckpatty Royjee, 506 (o).
 Vardon's Trusts, *Re.*, 212 (e), 215 (y).
 Varjivan *v.* Ghelji, 106 (d).
 Varley *v.* Coppard, 860 (r).
 Varlo *v.* Faden, 162 (k).
 Vasantrao *v.* Nanabhai, 676 (m).
 Vasava Menon *v.* Kelu Achan, 703 (x).
 Vasteva *v.* Mahabala, 666 (g).
 Vasudeo *v.* Bhau, 488 (m).
 Vasudeo *v.* Janardhan, 339 (e), 340 (q).
 Vasudeo Bhikaji *v.* Balaki Krishna, 752 (m).
 Vasudeva Samiar, *In re.*, 13 (v).
 Vasudeva *v.* Krishna, 902 (n).
 Vasudeva *v.* Narasamma, 441 (o).
 Vasudeva *v.* Srinivasa, 480 (o), 498 (g).
 Vasudeva Mudaliar *v.* Srinivasa Pillai, 489 (u).
 Vasudevan *v.* Valia Chathu, 668 (f).
 Vasudev *v.* Bahaji, 542 (e).
 Vasudev *v.* Krishaji, 110 (c).
 Vatsavaya *v.* Poosapati, 192 (r).
 Vaudeville Electric Cinema Ltd. *v.* Muriset, 26 (j), 28 (p).
 Vaughan *v.* Vanderstegen, *Re.*, Annesley, 506 (h).
 Vayalil *v.* Udaya, 621 (h), 621 (l), 827 (x).
 V. B. S. Chettiar Firm *v.* Ya Ya, 611 (t).
 V. E. A. R. M. Chettyar Firm *v.* A. K. R. M. K. Chettyar Firm, 504 (o).
 Vedachari *v.* Narasimha, 313 (a), 313 (r).
 Veerabhadrayya *v.* Zamindars of North Vallur, 13 (s).
 Veeraraghava Reddi *v.* Subba Reddi, 316 (c).
 Veera Pillai *v.* Poonnambala, 913 (m).
 Veerappa *v.* Ma Tin, 28 (y), 119 (b).
 Verrappa *v.* Subramania, 521 (l), 525 (j).
 Veraswamy Naicker *v.* Ibramsa Rowther, 510 (q).
 Veerbhadra *v.* Chiranjivi, 194 (d).
 Velayuda Mudali *v.* Co-operative Rural Credit Society, 310 (m).
 Velayudhan *v.* Nallathambi, 734 (w).
 Velayudhan Pandaram *v.* Nallathambi Nadan, 730 (h).
 Velayudu *v.* Hyder Hussan, 672 (z).
 Velayutha Chetti *v.* Govindaswami Naiken, 368 (r), 426 (w), 428 (k), 436 (a), 440 (a), 440 (d), 440 (h).
 Vellachami *v.* Alagarsami, 114 (v).
 Vellachami *v.* Samusuvava, 23 (j).
 Vellore Taluk Board *v.* Gopalasamy Naidu, 452 (o).
 Velusami *v.* Bommachi Naicker, 302 (m).
 Vencatachella *v.* Panjanadion, 764 (n).
 Vengubai *v.* Ramaswami, 663 (d).
 Venkaji Narayan *v.* Gopal Ramchandra, 51 (m).
 Venkata *v.* Gatham, 252 (h).
 Venkata *v.* Krishna, 659 (g).
 Venkata *v.* Menda, 751 (z).
 Venkata *v.* Parvati, 488 (i).
 Venkata *v.* Peda Venkata, 518 (w).
 Venkata *v.* Seetayya, 748 (v).
 Venkata Gurunadha *v.* Kesava Ramiah, 30 (h).
 Venkata Jagannath Rao *v.* Maharaja Rava, 743 (k).
 Venkata Kumara *v.* Gokuldoss, 511 (g).
 Venkata Lakshmi Narayana Rao *v.* Allameni Venkayya, 737 (p).
 Venkata Surya *v.* Court of Wards, 80 (i).
 Venkatachalam *v.* Sethuram Rao, 99 (o).
 Venkatachariar *v.* Narasimha, 785 (b), 785 (i).
 Venkatachariar *v.* Rangasawmy, 895 (x).
 Venkatachariar *v.* Rangaswami, 893 (y).
 Venkatachayulu *v.* Venkatasubba Rao, 6 (w), 443 (p).
 Venkatachella *v.* Srinivasa, 609 (z).
 Venkatachella Chetty *v.* Srinivasa Varada, 609 (a).
 Venkatachellam *v.* Tirumala, 488 (j).
 Venkatachellam Chett *v.* Audian, 819 (w).
 Venkatadri *v.* Lakshminarasimha, 946 (q).
 Venkatanarayaiah *v.* Subramania, 430 (c).
 Venkatanarasimha Rao *v.* Subba Rao, 169 (s), 920 (s).
 Venkatanarayana *v.* Subbammal, 60 (n).
 Venkatarama *v.* Aiyasami, 206 (h).
 Venkatarama *v.* Meera Labai, 273 (x), 276 (v).
 Venkatarama *v.* Ramasami, 75 (b), 76 (i).
 Venkatarama Aiyar *v.* Aiyasami Aiyar, 930 (c), 930 (q).
 Venkatarama Ayyar *v.* Krishnaswami Chettiar, 946 (q).
 Venkataraman *v.* Sivagurunatha, 114 (h), 114 (i).
 Venkataramana Reddi *v.* Rangiah Chetti, 738 (w).

- Venkataramanaya v. Venkataramana Doss, 111 (e).
 Venkataramayya v. Nagamma, 918 (q).
 Venkataramayya v. Nagamura, 523 (c).
 Venkataramayya v. Narsinga Row, 503 (o), 504 (c).
 Venkatarami Chetty v. Suppa Pillai, 818 (i).
 Venkateshwara v. Kesava, 430 (e), 496 (s), 837 (q).
 Venkataranga Aiyar v. Ramaswami Ayyar, 429 (t).
 Venkatarao v. Mahableswhar, 624 (a).
 Venkatarayadu v. Venkataramayya, 67 (m).
 Venkatarayar v. Srinivasa, 69 (l).
 Venkatasami v. Subramanya, 490 (f), 497 (y).
 Venkatasami v. Viranni, 96 (n).
 Venkatasubba v. Subba Rama, 918 (r), 927 (g).
 Venkatasubba Rao v. Ananda Rao, 105 (j).
 Venkatasubhayya v. Subramaniam, 60 (q).
 Venkatavaragappa v. Tirumalai, 292 (g), 851 (o).
 Venkatesh v. Babasubraya, 520 (f).
 Venkatesh v. Mallappa, 354 (c), 356 (a).
 Venkatesh v. Maruti, 305 (v).
 Venkatesh v. Narayan, 471 (q), 486 (y).
 Venkatesh Damodar v. Mallappa Bhimappa, 379 (v).
 Venkateshwar v. Kesavashetti, 837 (q).
 Venkateshwara v. Kesava Shetti, 618 (s), 618 (t), 667 (b).
 Venkateshwara v. Keshava Shetti, 618 (t).
 Venkateswara v. Raman, 111 (o).
 Venkateswara Iyer v. Soinasundaram, 327 (p).
 Venkati Rama v. Pillati Rama, 927 (d).
 Venkatrama v. Ellumalal, 316 (u).
 Venkatrama Iyer v. Esumza Rowthen, 595 (r), 659 (i), 659 (q).
 Venkatramana v. Krishna, 891 (p), 894 (t).
 Venkatram v. Chokkier, 278 (r).
 Venkatvarahacharya v. Kotrapa, 548 (l).
 Venkat Subba v. Subba Rama, 923 (n), 927 (n).
 Venkaya v. Ramsami, 874 (e).
 Venkayamma Rao v. Appa Rao, 353 (i).
 Venkayya v. Venkataramayya, 688 (f).
 Venkayamma v. Appa Rao, 379 (w).
 Venkayamma Rao v. Appa Rao, 353 (i).
 Venkitaswami Naicker v. Muthuswamy Pillai, 655 (g).
 Venkureddi v. Venku Reddi, 274 (y).
 Venn & Furze's Contract, *In re.*, 117 (i).
 Venning v. Bray, 863 (x).
 Vernon v. Smith, 803 (l), 839 (e).
 Veyathan v. Lakshmiammal, 666 (f).
 Vibhudapriya v. Lakshmindra, 114 (o).
 Vickers v. Vickers, 367 (h).
 Vidyapurna v. Rengappaya, 902 (l).
 Vidyapurna Tirtha Swami v. Vindyanidhi Tirtha Swami, 113 (d).
 Vidya Varuthi v. Balusami Ayyar, 113 (d), 114 (k).
 Vijayabhushanammal v. Evalappa, 609 (d).
 Vilayat Husain v. Misran, 80 (m), 243 (a).
 Villa v. Petley, 503 (q), 511 (z), 512 (j), 650 (r).
 Villffar v. Gilbey, 145 (q).
 Villers v. Beaumont, 930 (p).
 Vinayak v. Gobind, 106 (d).
 Vinayak v. Govind, 104 (x), 104 (y).
 Vinayak v. Lakshman, 753 (w).
 Vine v. Raleigh, 162 (s), 163 (x).
 Vint v. Padget, 569 (e), 575 (v), 575 (q).
 Virammal v. Kasturi, 818 (h).
 Virayya v. Hanumanta, 263 (t).
 Virchand v. Kumaji, 439 (w), 443 (q), 443 (s).
 Virjivandas v. Mahomed, Ali 879 (q), 879 (t).
 Visalakshi Ammal v. Veeraswami, 429 (t).
 Visavalinga v. Palaniappa, 493 (n), 515 (d).
 Viscount Exmouth v. Praed, *In re. Viscount Exmouth*, 199 (o).
 Visheshwar v. Mahableswhar, 64 (y), 881 (d), 892 (e).
 Vishindas v. Thawerdas, 75 (n).
 Vishnoo Trimbuck v. Tatia, 591 (x), 591 (z).
 Vishnu v. Anant, 905 (j).
 Vishnu v. Balaji, 893 (d).
 Vishnu v. Manjamma, 226 (k).
 Vishnu v. Rango, 730 (h).
 Vishnu Shambog v. Manjamma, 757 (v).
 Vishwanath v. Bala Kaku, 393 (c), 434 (j).
 Vishwanath v. Ramkrishna, 798 (p).
 Visvaling v. Palanippa, 515 (d).
 Visvalinga Pillai v. Palaniappa Chetty, 513 (v).
 Visvananda v. Raja Venkata, 323 (x), 331 (k), 331 (l).
 Visvanathan v. Ethirajulu, 558 (v), 557 (m).
 Viswananda v. Raja Venkata 329 (m).
 Viswanatha v. Chimmukutti, 475 (p), 476 (b), 476 (c), 476 (z), 477 (k).
 Vithal v. Sakharan, 316 (j).
 Vithal v. Shriram, 508 (u), 508 (s), 666 (m), 857 (t), 859 (g).

TABLE OF CASES.

cxix

Vithal Nilkanth Pinjale *v.* Vishvasrav, 720 (a).
 Vithu *v.* Dandi, 815 (h).
 Vithu *v.* Dhondi, 893 (u), 893 (q), 895 (v).
 Vitoba *v.* Chhottalal, 618 (s), 618 (t).
 Vittu *v.* Govind, 226 (m).
 Vivian *v.* Moat, 893 (v).
 Vivian, Vivian *v.* Swansea, 201 (f).
 Vizagapatam Sugar Development Co., Ltd. *v.* Muthuramareddi, 293 (w), 296 (g), 350 (g), 353 (f), 357 (h), 379 (w).
 V. M. R. V. Chettyar Firm *v.* Asha Bibi, 506 (p).
 Volkart Bros. *v.* Vettivelu Nadan, 366 (v).
 Von Hatzfeldt Wildenburg *v.* Alexander, 376 (t).
 Vorley *v.* Richardson, 183 (b).
 Vowles *v.* British Etc., Building Society, 413 (j).
 Vrajlal *v.* Venkataswami, 780 (g).
 Vrandavandas *v.* Yamunabai, 102 (u).
 Vrijbhukandas *v.* Dayaram, 292 (l).
 V. S. Shrinivas Hedge *v.* S. Rama Hedge, 930 (f).
 Vuppuluri Tatayya *v.* Garimilla Ramakrishnamma, 102 (x).
 Vyankapacharya *v.* Yamanasami, 250 (f).
 Vyankatraya *v.* Shivrambhat, 134 (p).
 Vyraperumal *v.* Alagappa, 748 (w).
 Vythilinga *v.* Ponnuswami, 86 (q).

W

Wade & Thomas, *Re.*, 536 (d).
 Wade *v.* Coope, 721 (p).
 Wadho Rao *v.* Gulam Mohiuddin, 722 (b).
 Waghela *v.* Shekh Masludin, 97 (u).
 Wahid Ali *v.* Ashruff Hossain, 69 (v).
 Wahid-un-nissa *v.* Gobardhan, 479 (b), 479 (g), 479 (h), 479 (i), 737 (s).
 Wainwright *v.* Miller, 147 (c).
 Wainwright *v.* Ramsden, 797 (g).
 Wajhat Husain *v.* Ratan Lal, 693 (w).
 Wajid-Ali Khan *v.* Shafakat Husain, 484 (w), 485 (u).
 Wajid Khan *v.* Ewaj Ali Khan, 920 (v).
 Wake *v.* Hall, 27 (t), 28 (g), 846 (w).
 Wakefield *v.* Sayeeda Khatoon, 343 (m).
 Walcot *v.* Botfield, 200 (y).
 Waldron *v.* Sloper, 679 (r).
 Waldy *v.* Gray, 500 (g), 683 (f).
 Wale *v.* Inland Revenue Commissioners, 566 (a).
 Wales *v.* Carr, 469 (j), 654 (p).
 Walhingford *v.* Mutual Society, 615 (s).
 Wali Bandi Bibi *v.* Tabeya Bibi, 316 (p), 317 (q).

Waliul Hassan *v.* Maharaj Kumar Gopal, 912 (w).
 Walker's Case, 880 (a).
 Walker, *Re.*, 93 (f).
 Walker, In the Goods of, 519 (e).
 Walker *v.* Jones, 534 (l), 536 (j).
 Walker *v.* Lincom, 678 (c), 679 (q), 679 (t).
 Walker *v.* Reeve, 856 (k).
 Walker *v.* Walker, 189 (o).
 Wallace *v.* Kelsall, 539 (z).
 Wallace *v.* Patton, 889 (a).
 Wall *v.* Bright, 374 (u).
 Wall *v.* City of London Reak Property Co., 457 (a).
 Wall *v.* Cockerall, 501 (o).
 Walls *v.* Atcheson, 797 (h).
 Wallis, *Re.*, *Ex-parte*, Lickorish, 535 (s), 671 (p).
 Wallis & Barnard's Contract, 397 (k).
 Wallis *v.* Hands, 827 (c), 831 (x).
 Wallis *v.* Woodyear, 416 (w), 688 (h).
 Wallwyn *v.* Lee, 500 (k).
 Walsall Railway Co. *v.* L. & N. W. Railway Co., 912 (c).
 Walsh *v.* Lonsdale, 61 (z), 348 (h), 349 (j), 349 (l), 350 (n), 350 (p), 350 (r), 354 (i), 355 (s), 355 (y), 362 (t), 563 (w).
 Walters *v.* French Brewesters, *Re.*, French Brewester's, 766 (q).
 Walters *v.* James, 533 (a).
 Walter *v.* Morgan, 445 (p).
 Waman *v.* Balaji, 68 (b).
 Waman *v.* Dhondiba, 40 (v), 377 (y).
 Wandsborough *v.* Maton, 29 (c).
 Want *v.* Stallibrass, 403 (n).
 Ward *v.* Baugh, 217 (l).
 Ward *v.* Carttar, 664 (j).
 Ward *v.* Grey, 57 (j).
 Ward *v.* Grimes, 402 (d).
 Ward *v.* Hobbs, 680 (y).
 Wardle *v.* Oakley, 499 (v), 504 (d).
 Ward *v.* Moss, 386 (g).
 Ward *v.* Sharp, 554 (j).
 Ward *v.* Shew, 87 (g).
 Ward *v.* Taylor, *Re.*, De Falbe, 27 (o).
 Ward *v.* Van Der Loeff, 143 (i).
 Ware *v.* Booth, 64 (g).
 Ware *v.* Cann, 125 (q).
 Ware *v.* Lord Egmont, 33 (x), 44 (u), 45 (d).
 Ware *v.* Polhill, 766 (r).
 Waring (Lord) *v.* London & Manchester Assurance Co., Ltd., 640 (j).
 Waring *v.* Scotland, 410 (f).
 Waring *v.* Ward, 448 (e).
 Warman *v.* Faithful, 786 (w).
 Warner *v.* Jacob, 590 (r), 637 (f), 637 (n), 639 (a), 640 (h), 641 (w), 642 (h).
 Warner *v.* Moir, *In re.* Moir, 193 (c), 200 (a).

- Warr v. Jones, 629 (x).
 Warren v. Lambeth Waterworks, 921 (q).
 Warrick v. Warrick, 33 (w).
 Warrington v. Miller, 203 (q).
 Waryam Singh v. Thakar Das Dhamali, 331 (k).
 Watcham v. A. G. of East Africa Protectorate, 415 (h).
 Watkins v. Birch, 321 (b).
 Watkins v. Milton Nest Gravesend Overseers, 793 (p).
 Watkins v. The Administrator General of Bengal, 159 (x).
 Watling v. Lewis, 616 (b).
 Watson v. Lloyd, 78 (j).
 Watson v. Wellington (Duke), 31 (r).
 Watson v. Young, 157 (j).
 Watts v. Kelson, 841 (f).
 Watts v. Symes, 775 (s).
 Waugh v. Land, 711 (u).
 Wauton v. Coppard, 390 (z).
 Weale v. Rice, 216 (e).
 Weatherall v. Geering, 134 (n).
 Weatherall v. Thornburgh, 172 (o).
 Webb & Austin, 258 (u).
 Webb v. Austin, 260 (t), 271 (h).
 Webb v. Crosse, 531 (y), 534 (f), 534 (g), 534 (k), 535 (n), 537 (g), 537 (n), 546 (q), 546 (r).
 Webb v. Grace, 201 (i).
 Webb v. Hughes, 423 (i).
 Webb v. Macpherson, 365 (d), 365 (h), 439 (v), 440 (e), 441 (v), 442 (a), 442 (b), 442 (y), 443 (b), 503 (q).
 Webb v. Russell, 602 (t), 803 (i).
 Webb v. Smith, 687 (c), 687 (w), 687 (z), 688 (e).
 Webber v. Hunt, 675 (j), 675 (w).
 Webber v. Smith, 895 (z), 903 (x).
 Webster v. Power, 472 (i).
 Wedd v. Porter, 864 (h).
 Weddall v. Capes, 889 (z).
 Weekes v. Weekes, 190 (b).
 Weeton v. Woodcock, 847 (h), 847 (n).
 Weigall v. Waters, 843 (t).
 Welby v. Parker, 7 (b).
 Welby v. Welby, 213 (f).
 Welby v. Still, 469 (l).
 Welchman v. Spinks, 409 (t).
 Welker v. Hatton, 865 (i).
 Wollesley v. Mornington (Lord), 696 (k).
 Wells v. Kingston Upon Hull Corporation, 792 (s).
 Wells v. Smith, 43 (h), 43 (z).
 Wells v. Wells, 920 (z).
 Welman v. Wanen, 711 (x).
 Welman v. Welman, 256 (k).
 Welman v. Warren, 714 (c).
 Wenlock (Baroness) v. River Dee Co., 921 (o).
 West v. Dobb, 64 (c), 892 (d).
 West v. Lawday, 416 (j).
 West v. Reid, 44 (r), 46 (a), 506 (j).
 West v. Shuttleworth, 168 (h).
 West Derby Union v. Metropolitan Life Assurance Society, 552 (r).
 West Ham Central Charity Board v. East London Works Co., 875 (h).
 West Hopetown Tea Co., Ltd., In the matter of, 134 (q).
 West London Commercial Bank v. Reliance Permanent Building Society, 641 (y).
 Western v. Macdermott, 233 (y), 237 (h).
 Western v. Savage, 455 (o).
 Weston & Thomas's Contract, Re., 407 (z), 414 (w).
 Weston v. Collins, 423 (j).
 Weston v. Metropolitan Asylum District Managers, 891 (v).
 Weston v. Richardson, Re., Richardson, 336 (a).
 Weston v. Savage, 393 (b).
 Westzinthus, Re., 687 (a).
 Wetherell, Ex-parte, 503 (n).
 Wetherell v. Collins, 546 (r).
 Whaley v. Bagenal, 384 (y).
 Wheeler, In re, 546 (s).
 Wheeldon v. Burrows, 841 (e).
 Wheelton v. Hardisty, 679 (g).
 Whistler v. Webster, 211 (w), 214 (k), 214 (o), 217 (k).
 Whistler v. Whistler, 215 (y).
 Whitbread & Co., Ltd., v. Watt, 450 (p), 454 (j).
 Whitbread v. Brockhurst, 360 (m).
 Whitby v. Mitchell, 142 (b), 142 (c).
 Whitby v. Von Luedecke, 181 (q).
 Whitebread, Ex-parte, 500 (g).
 White & Smith's Contract, Re., 35 (u), 35 (v), 46 (u), 388 (f), 388 (h).
 White v. Baker, 185 (s), 186 (u).
 White v. Bayley, 793 (k).
 White v. Bradshaw, 386 (h).
 White v. City of London Brewery Co., 673 (j), 676 (e).
 White v. Hay, 574 (d), 575 (u), 575 (v), 855 (c).
 White v. Southend Hotel Co., 795 (m).
 Whitehead v. Bennett, 28 (g).
 Whitehouse v. Hugh, 235 (i).
 Whitehouse v. Frost 948 (f).
 Whiteley v. Delaney, 763 (b), 763 (x), 773 (v).
 Whitham v. Kershaw, 874 (d), 877 (h).
 Whiting to Loomes, 403 (t).
 Whiting v. De Rutzen, In re. Whiting's Settlement, 203 (u).
 Whitley v. Delaney, 571 (i), 772 (i).
 Whitmore v. Humphries, 836 (j).
 Whitmore v. Mason, 137 (i).
 Whitney v. Smith, 474 (m).
 Whittemore v. Whittemore, 388 (z).

TABLE OF CASES.

CXXI

- Whittingham v. Chesters, 775 (m), 775 (n).
 Whittington v. Turton, *Re.*, Turton, 189 (p).
 Whitworth v. Rhodes, 639 (a).
 Wickenden v. Webster, 802 (k).
 Wickens v. Shuckburgh, 530 (i).
 Wicks v. Scivens, 713 (x).
 Wigan v. English & Scottish Law Life Assurance Association, 330 (w).
 Wigram v. Buckley, 307 (k), 308 (e).
 Wigsell v. School for Indigent Blind, 457 (a).
 Wilbraham v. Livesey, 35 (u), 808 (c).
 Wilde v. Gibson, 398 (d), 398 (f).
 Wilden v. Andrews, 417 (y).
 Wilder v. Pigott, 216 (a).
 Wildgoose v. Wayland, 32 (j).
 Wildy v. Mid-Hants Railway Company, 607 (o).
 Wilkes v. Collier, 770 (d).
 Wilkes v. Collin, 776 (c).
 Wilkes v. Goodwin, 4 (a).
 Wilkes v. Saunion, 674 (x).
 Wilkes v. Spooner, 240 (o), 241 (q), 397 (p), 751 (w), 889 (c).
 Wilkins v. Fry, 808 (r).
 Wilkinson v. Rogers, 801 (f).
 Wilkinson v. South, 157 (l).
 Willan, *Re.*, 538 (c).
 Wille v. St. John, 235 (i).
 Williams, *In re.*, 181 (u).
 Williams v. Bosanquet, 856 (k).
 Williams v. Burrell, 593 (d), 835 (q).
 Williams v. Earle, 133 (d), 891 (r).
 Williams v. Earl, 804 (m).
 Williams v. Gabriels, 830 (t), 830 (u), 831 (y), 882 (j).
 Williams v. Hathaway, 616 (b).
 Williams v. Hensman, 280 (i).
 Williams v. Lucas, 746 (x).
 Williams v. Medlicott, 500 (j).
 Williams v. Owen, 468 (v).
 Williams v. Pinckney, 258 (a), 259 (h).
 Williams v. Sorrell, 476 (b).
 Williams v. Williams, 336 (a).
 Williams v. Williams, *Re.*, William's Settlement, 182 (y).
 William Arratoon Lucas v. Bank of Bengal, 565 (s).
 William Brandts Son & Co. v. Dunlop Rubber Co., 941 (e).
 Williams & Duchess of Newcastle's Contract, *Re.*, 436 (c).
 William Joseph Mayson v. A. G. Clovet, 452 (q).
 Willie v. Lugg, 575 (q).
 Willis v. Barron, 921 (d).
 Willis v. Watney, 420 (i).
 Willmott v. Barber, 300 (u).
 Willmott v. London Road Car Co., Ltd., 855 (y).
 Wills v. Stradling, 348 (z).
 Wilson, *Re.*, *Ex-parte* Hastings, 218 (r).
 Wilson, *In the goods of*, 520 (c).
 Wilson v. Allen, 401 (z).
 Wilson v. Beddard, 519 (i), 519 (u).
 Wilson v. Brett, 44 (t).
 Wilson v. Chisolm, 786 (b), 788.
 Wilson v. Clark, *Re.*, Wilson, 766 (q).
 Wilson v. Cluer, 675 (m).
 Wilson v. Finch Hatton 825 (a).
 Wilson v. Hart, 682 (y).
 Wilson v. Keating, 443 (n).
 Wilson v. Metcalfe, 675 (t), 676 (s).
 Wilson v. Queens Club, 601 (q).
 Wilson v. Tavener, 792 (z).
 Wilson v. Thornbury, 215 (w).
 Wilson v. Townshend, 211 (t).
 Wilson v. Tumman, 615 (n).
 Wilson v. Whateley, 849 (g).
 Wilson v. Wilson, 161 (h), 409 (w), 839 (i).
 Wilton v. Hill, 88 (w).
 Wiltshier v. Cottrell, 25 (y), 26 (l), 29 (c), 420 (m).
 Wiltshire v. Smith, 531 (y), 535 (o), 537 (k).
 Wim v. White, 867 (i).
 Winch v. Winchester, 420 (d).
 Windsor (Dean & Chapter) v. Gover, 804 (u).
 Winterbottam v. Ingham, 439 (t).
 Witchcot Linesey v. Nine, 835 (n).
 Withrington v. Banks, 667 (a), 668 (g).
 Witt v. O'Flanagan, 394 (t).
 Wolff v. Vanderzee, 640 (q).
 Wollaston v. Hakewill, 856 (h), 861 (f).
 Wollaston v. King, 212 (z), 217 (k), 217 (o).
 Wolveridge v. Steward, 858 (c).
 Womesh Chunder v. Raj Narain Roy, 798 (s).
 Wood, *In re.*, 332 (x).
 Wood v. Cooper, 802 (p).
 Wood v. Dixie, 330 (u).
 Wood v. Riley, 4 (x).
 Woods v. Huntingford, 625 (h).
 Woodall v. Clifton, 149 (r).
 Woodhouse v. Balfour, 523 (k).
 Woodman v. Blake, 187 (c).
 Woodward v. Hermpage, *Re.*, Holmes Estate, 921 (b).
 Woolston v. Ross, 646 (t).
 Woonwalla & Co. v. N. C. Macleod, 86 (l).
 Wordsley Brewery Co. v. Halford, 880 (w).
 Workman Clark v. Lloyd, 452 (h).
 Worthing Corporation v. Heather, 131 (n), 149 (r).
 Worthington & Co. v. Abbott, 626 (s).
 Worthington v. Evans, 194 (h), 194 (k).
 Worthington v. Morgan, 42 (p).
 Worthington v. Wiginton, 215 (u).

Wragg v. Denham, 667 (x), 673 (h).
 Wright, *Ex-parte*, 505 (r).
 Wright v. Lawson, 866 (b), 867 (v).
 Wright v. Newton, 454 (d).
 Wright v. Robotham, 437 (h).
 Wright v. Sanderson, 523 (j).
 Wright v. Trevezant, 786 (t).
 Wright v. Tugwell, *In re*. Robinson, 187 (a).
 Wrigley v. Gill, 674 (c).
 Wrigley v. Sykes, 411 (n).
 Wrixon v. Vize, 605 (g).
 Wrout v. Dawes, 443 (n).
 Wutzler v. Sharpe, 118 (l).
 Wyatt v. Berry, 523 (l).
 Wylde v. Radford, 499 (k), 499 (o), 504 (k), 507 (u).
 Wyld v. Pickford, 45 (v).
 Wyllie v. Pollen, 33 (x), 41 (i).
 Wynn v. Convoy Corporation, 806 (y).
 Wynee v. Styan, 711 (x).
 Wynne, *In the goods of*, 523 (n).
 Wythes v. Lee, 450 (p), 454 (j).

X

Xenos v. Wickham, 919 (w).

Y

Yacub Khan v. Guljar Khan, 521 (l), 525 (n).
 Yadalle Beg v. Tukaram, 560 (s).
 Yadalli Beg v. Tukaram, 560 (z).
 Yadavendra v. Srinivasa, 75 (o), 470 (q), 470 (v), 471 (e).
 Yakub Ali v. Kishan Lal, 733 (k).
 Yalla Krishnamma v. Katipalli Mali, 369 (e).
 Yamnabai v. Nanabhai Sadanand, 226 (d), 226 (g), 226 (h), 227 (r), 228 (k).
 Yandle & Sons v. Sutton, 385 (s).
 Yashvant Narayan v. Vithal Divakar, 615 (l).
 Yashwant v. Vithal, 516 (g).
 Yasin Khan v. Muhammad, 310 (n).
 Yates v. Plumb, 536 (z).
 Yates v. University College, London, 931 (r).
 Yeilding & Westbrook, *Re.*, 451 (u).
 Yella Krishnamma v. Kotipulli, 426 (x).
 Yellappa v. Parasharamappa, 473 (j).

Yeshwada Bibi v. Ramchandra, 301 (x).
 Yeshwadabai v. Ramchandra, 292 (i).
 Yeshwanta v. Antu, 922 (c).
 Yonge v. Reynell, 721 (e).
 Yorkshire Banking Co. v. Mullan, 536 (i).
 Yorkshire Insurance Co. v. Clayton, 119 (y).
 York Union Banking Co. v. Artley, 511 (b), 511 (d).
 Young v. Adams, 7 (d), 343 (q).
 Young v. Ashley Gardens Properties, Ltd., 857 (s).
 Young v. Raincook, 830 (n).
 Young v. Same, 385 (s).
 Young v. Spencer, 876 (s).
 Yusuf Ali Khan v. Hira, 876 (b).

Z

Zafar Ahsan v. Zubaide Khatun, 81 (o).
 Zafar v. Zubaida, 561 (g).
 Zahir Ahmad v. Debi Dayal, 32 (g), 323 (q).
 Zaib-un-Nissa v. Parbhu Narain, 560 (a).
 Zaki Hasan v. Deo Nath Sahai, 477 (s).
 Zamin Ali Khan v. Genda, 13 (w).
 Zamindar of Polavaram v. Pittapuram, 367 (z), 524 (b), 525 (r).
 Zamindar of Polavaram v. Maharaja Pittapuram, 523 (c), 912 (x).
 Zamindar of Ramnad v. Ramamany Ammal, 754 (q).
 Zamindar of Vizianagram v. Behara, 827 (y), 827 (z).
 Zamir Husain v. Daulat Ram, 71 (p).
 Zangabai v. Bhawani, 249 (r).
 Zarif-un-Nissa v. Shafiq-us-Zaman Khan, 243 (w), 245 (w).
 Zaverchand v. Jesang, 47 (a).
 Zick v. London United Tramways, Ltd., 889 (v).
 Zollikofer & Co. v. Official Assignee, 265 (c).
 Zonch d Abbot Hallet v. Parsons, 888 (u).
 Zooleka Bibi v. Syed Zynul, 167 (a), 167 (b).
 Zubeda Bibi v. Sheo Charan, 584 (t), 584 (w).
 Zulfar Khan v. Sant Baksh Singh, 71 (y).

THE TRANSFER OF PROPERTY ACT.

ACT No. IV OF 1882

An Act to amend the Law Relating to the Transfer of
Property by Act of Parties.

(As modified upto the 1st April 1930.)

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; it is hereby enacted as follows :—

Preamble. Pream.

STATEMENT OF REPEALS AND AMENDMENTS.

| | | | | | |
|-------------------------------|----|----|----|----|--|
| S. 1 amended | .. | .. | .. | .. | 3 of 1885, s. 1. 6 of 1904, s. 2. 38 of 1920, s. 2 and Sch. I. 20 of 1929, s. 2. |
| S. 2 amended | .. | .. | .. | .. | 20 of 1929, s. 3. |
| S. 3 amended | .. | .. | .. | .. | 2 of 1900, s. 2. 27 of 1926, s. 2. 10 of 1927, s. 2 and Sch. I. 20 of 1929, s. 4. 5 of 1930, s. 2. |
| S. 4 amended | .. | .. | .. | .. | 3 of 1885, s. 3. 20 of 1929, s. 5. |
| S. 5 amended | .. | .. | .. | .. | 20 of 1929, s. 6. |
| S. 6 amended | .. | .. | .. | .. | 3 of 1885, s. 4. 2 of 1900, s. 3. 20 of 1929, s. 7. |
| S. 11 amended | .. | .. | .. | .. | 20 of 1929, s. 8. |
| S. 15 amended | .. | .. | .. | .. | 20 of 1929, s. 9. |
| Ss. 16, 17 and 18 substituted | .. | .. | .. | .. | 20 of 1929, s. 10. |
| Ss. 39 and 40 amended | .. | .. | .. | .. | 20 of 1929, ss. 11 and 12. |
| S. 43 amended | .. | .. | .. | .. | 20 of 1929, s. 13. |
| S. 52 amended | .. | .. | .. | .. | 20 of 1929, s. 14. |
| S. 53 substituted | .. | .. | .. | .. | 20 of 1929, s. 15. |
| S. 53A substituted | .. | .. | .. | .. | 20 of 1929, s. 16. |
| S. 55 amended | .. | .. | .. | .. | 20 of 1929, s. 17. |
| S. 56 substituted | .. | .. | .. | .. | 20 of 1929, s. 18. |

| | | |
|--------|--------------------------------------|--------------------------------|
| Pream. | S. 58 amended | 20 of 1929, s. 19. |
| | S. 59 amended | 6 of 1904, s. 3. |
| | | 20 of 1929, s. 20. |
| | S. 59A inserted | 20 of 1929, s. 21. |
| | S. 60 amended | 20 of 1929, s. 22. |
| | Ss. 60A and 60B inserted | 20 of 1929, s. 23. |
| | S. 61 substituted | 20 of 1929, s. 24. |
| | S. 62 amended | 20 of 1929, s. 25. |
| | S. 63 amended | 20 of 1929, s. 26. |
| | S. 63A inserted | 20 of 1929, s. 27. |
| | Ss. 64 and 65 amended | 20 of 1929, ss. 28 and 29. |
| | S. 65A inserted | 20 of 1929, s. 30. |
| | S. 67 inserted | 20 of 1929, s. 31. |
| | S. 67A inserted | 20 of 1929, s. 32. |
| | S. 68 substituted | 20 of 1929, s. 33. |
| | S. 69 amended | 3 of 1885, s. 5. |
| | | 6 of 1904, s. 4. |
| | | 11 of 1915, s. 2 and Sch. I. |
| | | 20 of 1929, s. 34. |
| | S. 69A inserted | 20 of 1929, s. 34. |
| | Ss. 71 and 72 amended | 20 of 1929, ss. 36 and 37. |
| | S. 73 substituted | 20 of 1929, s. 38. |
| | Ss. 74 and 75 omitted | 20 of 1929, s. 39. |
| | S. 76 amended | 20 of 1929, s. 40. |
| | S. 80 omitted | 20 of 1929, s. 41. |
| | S. 81 substituted | 20 of 1929, s. 42. |
| | Ss. 82, 83 and 84 amended | 20 of 1929, ss. 43, 44 and 45. |
| | Ss. 85 to 90 repealed | 5 of 1908, s. 156 and Sch. V. |
| | S. 91 substituted | 20 of 1929, s. 46. |
| | Ss. 92-94 inserted | 20 of 1929, s. 47. |
| | Ss. 95 and 96 substituted | 20 of 1929, s. 48. |
| | S. 97 repealed | 5 of 1908, s. 156 and Sch. V. |
| | S. 98 amended | 20 of 1929, s. 49. |
| | S. 99 repealed | 5 of 1908, s. 156 and Sch. V. |
| | S. 100 repealed in part | 5 of 1908. |
| | amended | 20 of 1929, s. 50. |
| | S. 101 substituted | 20 of 1929, s. 51. |
| | Ss. 102 and 103 amended | 20 of 1929, ss. 52 and 53. |
| | S. 106 amended | 20 of 1929, s. 54. |
| | S. 107 amended | 6 of 1904, s. 5. |
| | | 20 of 1929, s. 55. |
| | S. 108 amended | 20 of 1929, s. 56. |
| | S. 111 amended | 20 of 1929, s. 57. |
| | S. 114A inserted | 20 of 1929, s. 58. |
| | S. 117 amended | 6 of 1904, s. 6. |
| | | 38 of 1920, s. 2 and Sch. I. |
| | S. 119 substituted | 20 of 1929, s. 59. |
| | Ss. 128, 129 and 130 amended | 20 of 1929, ss. 60, 61 and 62. |
| | Chapter VIII substituted | 2 of 1900, s. 4. |
| | Repealed as to Crown Grants | 15 of 1895, s. 2. |

Various stages of the Act.—It is not within the province of a Court to look to the Statement of Objects and Reasons or to the proceedings of the Legislative Council with a view to discover whether the words used mean something above and beyond what they say (a). It is not permissible to refer, for this purpose, to the various forms in which the Bill was brought before the Legislature (b) or the Report of the Select Committee (c). The sense is not to be collected from history of changes or debate on the Bill (d).

Report of the Commissioners.—The Report of the Commissioners on which a statute is founded is no aid in its construction (e). The Indian decisions to the contrary are doubtful (f).

Reasons for enactment.—The Transfer of Property Act was brought upon the Indian Statute-book because it was expedient to define and amend certain parts of the law relating to the transfer of property by act of parties (g). It does not consolidate the pre-existing law but only lays down certain portions of it in derogation of the rest. Hence it is not a complete code in itself as regards the subject it deals with.

Transfers within the Act.—The Act applies to alienations *inter vivos* and has no application to transfers by operation of law or disposal of property by will (h).

Title of the Act.—This is no part of the law and in strictness ought not to be taken into consideration (i) but it may tend to shew the object of the Legislature (j) nor should any weight be attached as to its scope (k) or to alter its construction (l).

The preamble.—The preamble is merely a key to the construction of a statute and the mischief it was intended to remedy (m). It is undoubtedly a part of the Act and may be used to explain it. It cannot control the enacting part which may and often does go beyond it (n).

It may well point out what is the subject-matter in respect of which the Act is intended to operate and does operate (o) and where the enacting part of a statute

- (a) *Raj Mahal v. Harnam Singh* (1928) 9 Lah. 260; *The Administrator-General of Bengal v. Prem Lal Mullick* (1895) 22 Cal. 788, 22 I. A. 107; *Kandakuri Balasurya v. The Secretary of State* (1917) 40 Mad. 886; *Krishna Ayyangar v. Nallaperumal Pillai* (1919) 43 Mad. 550, 47 I. A. 33; *Zamindar of Ethiyapuram v. Chidambaram* (1920) 43 Mad. 675, (687); *Shantanand Gir v. Basudevanand Gir* (1930) 52 All. 619; *Queen-Empress v. Bal Gangadhar Tilak* (1898) 22 Bom. 112; *Gopal Pandey v. Parsotam Das* (1882) 5 All. 121, (135); *Kadri Bakhsh v. Bhawani Prasad* (1892) 14 All. 145; *Gurdial Singh v. The Central Board Local Committee* (1928) 9 Lah. 689.
- (b) *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241 (247); *Fadu Jhala v. Gour Mohun* (1892) 19 Cal. 544 (567); *Mooltara Kant v. The India General Steam Navigation Co.* (1883) 10 Cal. 166; *Queen-Empress v. Kartik Chunder Das* (1887) 14 Cal. 721.
- (c) *Gurdial Singh v. The Central Board Local Committee* (1928) 9 Lah. 689.
- (d) *Millar v. Taylor* (1769) 4 Burr. 2303; 98 E. R. 201; *Hollinshead v. Hazleton* (1916) 1 A. C. 428; *Rhonda's (Viscountess) Claim* (1922) 2 A. C. 339; *R. S. Ruikar v. Emperor* (1935) 31 Nag. L. R. 318.
- (e) *Arding v. Bonner* (1856) 2 Jur. N. S. 763; *Ewart v. Williams* (1854) 3 Drew. 21, 61 E. R. 808.
- (f) *Romesh Chunder Sanyal v. Hiru Mondal*

- (1890) 17 Cal. 852; *Queen-Empress v. Kartick Chunder* (1887) 14 Cal. 721.
- (g) *Kishorilal v. Krishna-Kamini* (1910) 37 Cal. 377 (382); *Deo Narain Rai v. Kukur Bind* (1902) 24 All. 319 (332); *Tajjo Bibi v. Bhagwan Prasad* (1894) 16 All. 295, (298).
- (h) *Rajah Parthasarathy v. Rajah Venkatadri* (1923) 46 Mad. 190 (222); *Kishorilal v. Krishna-Kamini* (1910) 37 Cal. 377 (382); *Promotho Nath Mitter v. Kali Prasanna* (1901) 28 Cal. 744 (748).
- (i) *Salkeld v. Johnson* (1848) 2 Exch. 256, 154 E. R. 487.
- (j) *Fenton v. Thorley & Co., Ltd.* (1903) A. C. 443; *Re. Boaler* (1915) 1 K. B. 21; *Johnson v. Upham* (1859) 28 L. J. Q. B. 252, 121 E. R. 95.
- (k) *Vacker & Sons. v. London Society of Compositors* (1913) A. C. 107; *National Telephone Co., Ltd. v. Postmaster-General* (1913) A. C. 546.
- (l) *Sage v. Eicholtz* (1919) 2 K. B. 171.
- (m) *Salkeld v. Johnson* (1848) 2 Exch. 256, 154 E. R. 487; *Giria Nandan Kalwar v. Hanuman Das* (1927) 49 All. 25.
- (n) *Salkeld v. Johnson* (1848) 2 Exch. 256, 154 E. R. 487; *St. Catharini's College v. Rosse* (1916) 1 Ch. 73; *Chinna Aiyar v. Mahomed Fakr-u-din Saib* (1865) 2 Mad. H. C. 322.
- (o) *Chilton v. Progressing Printing and Publishing Co.* (1895) 2 Ch. 29.

Pream. is ambiguous, the preamble can be referred to, to explain and elucidate it (p). In *Powell v. Kempton Park Racecourse Co.* (q), Lord Halsbury said: "Two propositions are quite clear: one, that a preamble may afford useful light as to what a statute intends to reach, and another that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment." If the words of the Act are clear and unambiguous you cannot alter its construction by reason of the preamble (r).

Though the preamble does not control any plain enactment which follows it, it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved (s). A preamble does not govern clear expressions in the enacting part (t).

Section.—Where an Act is divided into sections and rules the proper canon of interpretation is that the sections lay down general principles and the rules provide the means by which they are to be applied, and they cannot be otherwise applied (u). There is no magic in the word section or in the different parts of an Act being numbered (v). If there be two inconsistent enactments it must be seen if one cannot be read as a qualification of the other (w).

If two sections are repugnant, the last must prevail (x).

Proviso.—A proviso appended to a section is either an explanation or a qualification of the section. It does not add to or enlarge the scope of the section (y). It is engrafted on a preceding enactment (z).

Marginal notes.—Marginal notes to sections of an Act do not form part of the Act (a) nor do they control the enactment (b).

No reliance can be placed on them for the purpose of interpreting the section (c). They can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to by the Legislature or can be looked at to see the general trend of the section (d).

Illustrations.—These are no part of the section but they are helpful in the working and application of the statute and their usefulness in that respect should

- (p) *The Corporation of Calcutta v. Kumar Arun Chandra Singha* (1934) 60 C. L. J. 312; *Raj Mal v. Harnam Singh* (1927) 9 Lah. 260; *Doe v. Brandling* (1828) 7 B. & C. 643; *Fellows v. Clay* (1843) 4 Q. B. 313; *Sussex Peerage Case* (1844) 11 Cl. & F. 85.
 (q) (1899) A. C. 143 (157); *Queen-Empress v. Indrajit* (1889) 11 All. 262.
 (r) *Sage v. Eicholz* (1919) 2 K. B. 171; *Raj Mal v. Harnam Singh* (1928) 9 Lah. 260; *Sussex Peerage Case* (1844) 11 Cl. & F. 85, 143; *Powell v. Kempton Park Racecourse Co.* (1899) A. C. 143, 157; *Secretary of State v. Maharaja of Bobbili* (1919) 43 Mad. 529, 46 I. A. 302; *Mani Lal Singh v. Trustees for the Improvement of Calcutta* (1917) 45 Cal. 343, (F. B.)
 (s) *Sital Chandra v. (Mrs.) Delaney* (1916) 20 C. W. N. 1158.
 (t) *Keshab Panda v. Bhobani Panda* (1913) 18 C. L. J. 187.
 (u) *Nabin Chandra v. Prankrishna De* (1914) 41 Cal. 108.
 (v) *Edward v. Shenen* (1843) 11 M & W. 595, 162 E. R. 943.
 (w) *Ebbs v. Beninots* (1875) as reported in 10 Ch. App. 479; *Cholomeley School, Highgate*

- v. Sewell* (1894) 2 Q. B. 906.
 (x) *Wood v. Riley* (1867) as reported in L. R. 3 C. P. 26; *Amar Chand Roy v. Prasanna Dasi* (1921) 25 C. W. N. 9.
 (y) *In re Mrs. Besant* (1916) 39 Mad. 1164.
 (z) *R. v. Taunton St. James (Inhabitants)* (1829) 2 B. & C. 831, 109 E. R. 309.
 (a) *Punardeo Narain Singh v. Ram Sarup Roy* (1898) 25 Cal. 858; *Dukhi Mollah v. Halway* (1895) 23 Cal. 55; *Sutton v. Sutton* (1882) 22 Ch. D. 511; *Wilkes v. Goodwin* (1923) 2 K. B. 86; *De Beauvis v. Green* (1906) 22 T. L. R. 816.
 (b) *A.-G. v. Great Eastern Ry. Co.* (1879) 11 Ch. 449; *Re Penrhyn's (Lord) Settlement Trusts, Penrhyn v. Roberts* (1923) 1 Ch. 143; *Balaji Singh v. Gangamma, A. I. R.* (1927) Mad. 85.
 (c) *Corporation of Calcutta v. Arunchandra* (1933) 60 Cal. 1470; *Balaji Singh v. Gangamma* (1927) 51 M. L. J. 641; *Balraj Kunwar v. Jagatpal Singh* (1904) 26 All. 393; 31, I. A. 132.
 (d) *Ram Saran Das v. Bhagwat Prasad* (1929) 51 All. 411; *Secretary of State for India v. Bombay Municipality* (1935) 59 Bom. 681.

not be impaired. They should only be rejected as repugnant to the section as the last resort of construction (e).

Pream.

It is the duty of the Court to accept, if that can be done, illustrations given under the section as being of value in the construction of the text. It would require a special case to warrant their rejection on the ground of repugnancy with the section (f). The Act is not affected by it inasmuch as an illustration has not the same operation as the section which really forms the enactment (g). They do not control the plain meaning of the words (h).

Heading of parts.—Headings are not to be treated as marginal notes. They constitute an important part of the Act itself. They may be read as affording a better key to the construction of the sections which follow (i) or to determine the sense of any doubtful expression in a section ranged under any particular heading (j). They cannot be allowed to control the enactment (k) or cut down the effect of plain words in the sections (l).

The Schedules.—The Schedule is as much a part of the Act as the enactment (m). If the enacting part and the Schedule do not correspond the latter must give way (n).

Punctuation and brackets.—This is not a part of the Act. There are no such things as brackets any more than there are such things as stops (o).

Their Lordships of the Privy Council regard it an error to rely on punctuation in construing Acts of the Legislature (p).

Interpretation clause.—The interpretation clause is of modern origin and frequently does a great deal of harm (q). It is not of a descriptive but of an enlarging character and should be used for the purpose of interpreting the words which are ambiguous or equivocal and not so as to disturb the meaning of such as are plain (r).

Act, if exhaustive.—The essence of a code is to be exhaustive in the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment, according to its true construction (s).

- (e) *Hemchandra v. Narendranath* (1934) 61 Cal. 148; *Mahomed Syedol Ariffin v. Yeoh Woi Gark* (1916) 2 A. C. 575, 43 I. A. 256, 19 Bom. L. R. 157. But see *Krishnadas v. Dwarkadas* (1937) Bom. 679.
- (f) *Durga Priya Chowdhury v. Durga Pada Roy* (1928) 55 Cal. 154.
- (g) *Kamalamal v. Peru Meera* (1897) 20 Mad. 481 (483); *Koylash Chunder v. Sonatun Chung* (1881) 7 Cal. 132; *Nanak Ram v. Mehin Lal* (1877) 1 All. 487.
- (h) *Satya Priya Ghoshal v. Gobindo Mohon Roy* (1909) 14 C. W. N. 414.
- (i) *The Eastern Counties London and Blackwall Railway Cos. v. Marriage* (1860) 9 H. L. C. 32; *R. v. Local Government Board* (1882) 10 Q. B. D. 309; *Inglis v. Robertson* (1898) A. C. 618; *Dwarkanath v. Tafazar* (1917) 44 Cal. 287; *Janki Singh v. Mahanath Jagannath Das* (1919) 3 Pat. L. J. 1; *Ram Shankar Lal v. Ganesh Prasad* (1907) 29 All. 385, (414).
- (j) *Hammersmith & City Ry. Co. v. Brand* (1869)

- 4 H. L. 171; *Toronto Corporation v. Toronto Railway* (1907) A. C. 315.
- (k) *Re. Penrhyn's (Lord) Settlement Trusts, Penrhyn v. Roberts* (1929) 1 Ch. 143.
- (l) *R. v. Fulham Guardians* (1909) 2 K. B. 504.
- (m) *A-G. v. Lamplough* (1878) 3 Ex. D. 214.
- (n) *Re. Baines* (1840) Cr. & Ph. 31, 41 E. R. 401; *Allen v. Flicker* (1839) 10 Ad. & El. 639, 113 E. R. 243; *Panagotis v. S. S. Pontiac* (1912) 1 K. B. 74.
- (o) *Claydon v. Green* (1868) 37 L. J. C. P. 226; *Devonshire (Duke) v. O'Connor* (1890) 24 Q. B. D. 468; *R. v. Speyer, R. v. Cassel* (1916) 1 K. B. 595; *R. v. Casement* (1917) 1 K. B. 98; *Mansa Ram v. Ancho* (1933) 55 All. 700.
- (p) *The Maharani of Burdwan v. Krishna Kamini* (1887) 14 Cal. 365 (372), 14 I. A. 30.
- (q) *Lindsey v. Cundy* (1876) 45 L. J. Q. B. 781.
- (r) *R. v. Pearce* (1880) 5 Q. B. D. 386.
- (s) *Kari Singh v. Emperor* (1919) 40 Cal. 433; *Gokul Mandar v. Pudmanund Singh* (1902) 29 Cal. 707.

Pream.

The Transfer of Property Act was not intended to be exhaustive and does not profess to be a complete code (t). It does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the Legislature (u).

It was said by Lord Hobhouse in *Waghela v. Shekh Masludin* (v) that the expression "equity and good conscience" was generally interpreted as meaning English Law, if found applicable to Indian society and circumstances. But in matters regulated thereby the Act is to be regarded as exhaustive (w).

Amending Act, retrospective effect of.—Since the passing of the Transfer of Property Act in 1882 its provisions have been amended on twelve occasions. But there was no general revision of the Act nor was there any importation of a new principle until the Amending Act 20 of 1929 was passed whereby substantial changes have been made in the Act which have been noticed in their proper places. Of the Amending Act section 63 is in these terms:—

"Nothing in any of the following provisions of this Act, namely, sections 3, 4, 9, 10, 15, 18, 19, 27, 30 clause (c) of section 31, sections 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect—

- (a) the terms or incidents of any transfer of property made or effected before the first day of April 1930,
- (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,
- (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or
- (d) any remedy or proceeding in respect of such right, title, obligation or liability;

and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in a Court on that day; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

To ascertain how far the Amending Act is retrospective, the following rules are deducible from the authorities:—

1. The initial presumption is that an Act is not retrospective. The Court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the Legislature (x). Provisions which if applied retrospectively would deprive of their

(t) *The Corporation of Calcutta v. Kumar Arun* (1935) 60 C. L. J. 312; *Satyabadi v. Harabadi* (1907) 34 Cal. 223; *Jatindra Chandra v. The Ranpur Tobacco Co., Ltd.*, A. I. R. (1924) Cal. 990; *Mayashankar v. Burjorji* (1925) 27 Bom. L. R. 1449; *Kishorilal v. Krishna-Kamini* (1910) 37 Cal. 377 (382); *Chotesha v. Mt. Maktum Bi*, A. I. R. (1928) Nag. 223; *Hotchand v. Kishinchand* A. I. R. (1924) Sind 23; *Shafikul Huq v. Krishna Gobinda* (1918) 23 C. W. N. 284; *Bhupendra Nath v. Mt. Wajihunnissa* (1918) 2 P. L. J. 293; *Amir Bibi v. Arokiam* (1918) 34 M. L. J. 184 (187); *Thiruvengadachariar v. Ranganath Iyengar* (1903) 13 M. L. J. 500; *Alamelu Ammal v. Balu Ammal* (1914) 28 M. L. J. 685; *Latchmiammal v. Gangammal* (1910) 34 Mad. 72; *Gyannessa v. Mabarakannessa* (1897) 25 Cal. 210; *Pallayya v. Ramavadhhamulu* (1903) 13 M. L. J. 364; *H. V. Low & Co., Ltd. v.*

Pulinbiharilal (1932) 59 Cal. 1372 (1384).
 (u) *Kalyan Das v. Jan Bibi* (1929) 51 All. 454; *Maharaja of Jeypore v. Rukmini* (1919) 42 Mad. 589 (598); *Mayashankar v. Burjorji* (1925) 27 Bom. L. R. 1449; 59 I. A. 236, (246); *Muhammad Raza v. Abbas Bandi Bibi*, 59, I.A. 236 (246).
 (v) (1887) 11 Bom. 551, 14 I. A. 89 (96).
 (w) *Venkatacharyulu v. Venkatasubba Rao* (1925) 48 Mad. 821 (824).
 (x) *Modern Railway Co. v. Page* (1861) 30 L. J. C. P. 314 (318); *Phillips v. Eyre* (1870) 6 Q. B. 1; *Pardo v. Bingham* (1869) 4 Ch. App. 735; *Gloucester Union v. Woolwich Union* (1917) 2 K. B. 374; *Muhammad Abdus Samad v. Qurban Husain* (1903) 26 All. 119 (129), 31 I. A. 30; *Leeds and County Bank v. Walker* (1883) 11 Q. B. D. 84 (91); *Colonial Sugar Refining Co. v. Irving* (1905) A. C. 369.

existing finality orders which when the statute came into force were final are provisions which touch existing rights (y). Pream.

2. A statute altering the law so as to affect an existing status, should not be construed as retrospective (z) unless that effect cannot be avoided without doing violence to the language of the enactment (a).

3. Statute regulating procedure can be retrospective unless that construction be textually inadmissible (b).

4. Statutes made to correct an error by omission in a former statute (c) and which are declaratory or explanatory are retrospective in effect (d).

5. Amending statutes which touch vested rights are not to be construed as retrospective in the absence of express enactment or necessary intendment (e).

- (y) *Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi* (1928) 30 Bom. L. R. 60, 54 I. A. 421 (425).
- (z) *R. v. Ipswich Union* (1877) 2 Q. B. D. 269; *Main v. Stark* (1890) 15 A. C. 384; *Re Snowden Colliery, South Eastern Coalfield Extension Co. v. Snowden Colliery Co.* (1925) 94 L. J. Ch. 305; *Re Raison, Ex-parte Raison* (1891) 60, L. J. Q. B. 206; *Girja Nandan v. Hanuman Das* (1927) 49 All. 25.
- (a) *In re Joseph Sonche & Co., Ltd.* (1875) 1 Ch. D. 48; *In re Athlumney* (1898) 2 Q. B. 547 (551).
- (b) *Welby v. Parker* (1916) 2 Ch. 1; *Re A Debtor* (1928) 97 L. J. Ch. 250; *Colonial Sugar Refining Co. v. Irving* (1905) A. C. 369; *Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi* (1928) 30

- Bom. L. R. 60, 54 I. A. 421 (425).
- (c) *A.-G. v. Pougett* (1816) 2 Price 381, 146 E. R. 130.
- (d) *Vicol v. Verelst* (1779) 2 Wm. Bl. 1277, 96 E. R. 751; *Young v. Adams* (1898) A.C. 469; *R. v. Dursley (Inhabitants)* (1832) 3 B. & Ad. 465, 110 E. R. 168; *Balaji Singh v. Chakka Gangamma, A. I. R.* (1927) Mad. 85; *Mt. Mohammadi Bibi v. Kashi Upadhyaya A. I. R.* (1926) All. 725; *Girja Nandan v. Hanuman Das* (1927) 49 All. 25; *A.-G. v. Theobald* (1894) 24 Q. B. D. 557.
- (e) *Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi* (1928) 30 Bom. L. R. 60, 54 I. A. 421 (425); *Kidar Nath v. Durgamal and Sons, A. I. R.* (1931) Lah. 501; *Girja Nandan v. Hanuman Das* (1927) 49 All. 25; *Balaji Singh v. Chakka Gangamma, A. I. R.* (1927) Mad. 85.

CHAPTER I.

PRELIMINARY.

S. 1

Short title.

1. This Act may be called the Transfer of Property Act, 1882.

Commencement.

It shall come into force on the First day of July 1882.

Extent.

It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab and the Chief Commissioner of British Burma.

But any of the said Local Governments may from time to time by notification in the local official *Gazette*, extend this Act or any part thereof to the whole or any specified part of the territories under its administration.

And any Local Government may, from time to time, by notification in the local official *Gazette*, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 50, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

Changes in the section.—The only change made by the Transfer of Property (Amendment) Act, 20 of 1929, is to substitute for the year " 1877 " the year of the Registration Act now in force, namely, " 1908."

Short title.—The Act deals with transfers *inter vivos* only.

Commencement.—The Act came into force on the 1st day of July 1882 on which date it was made to extend to the whole of British India except the territories administered by the Governors of Bombay, the Punjab and British Burma.

Extent.—The Act itself purports to apply to the whole of British India except the territories specified therein. It includes the Scheduled Districts as the Scheduled Districts Act, 1874, does not apply to Acts of the Indian Legislature passed after

that Act (f). British India is defined by section 3 (7) of the General Clauses Act, X of 1897, a later statute which in section 3 enacts that the definitions therein are for Acts and Regulations made after the commencement of that Act. British India includes the agency tract of Vizagapatam District (g). The application of this Act was barred in the Naga Hills District, including the Mokokechang Sub-division, the Dibrugarh Frontier Tract, the North Cachar Hills, the Garo Hills, the Khasia and Jaintia Hills, and the Mikir Hills Tract, by notification under s. 2 of the Assam Frontier Tracts Regulation, 1880 (2 of 1880) (h). It does not extend to Native States save in certain States where it has been enacted as a Regulation, the word "Act" being substituted by the word "Regulation."

S. 1

Rajkot (i), Wadhwan (j), Kathiawar (k), Secunderabad (l) are not British Indian territory nor are lands occupied by an Indian Independent State Railway (m).

Other references.—The Lieutenant-Governor of the Punjab is now Governor of the Punjab. British Burma is now Lower Burma (n). The Chief Commissioner of British Burma is now Governor of Burma.

Bombay.—Act IV of 1882 has been extended with effect from 1st January 1893, to the whole of the territories other than the Scheduled Districts, under the administration of the Government of Bombay (o).

Sind.—The whole Act has been extended with effect from 1st January 1915, to the province of Sind (p).

Berars.—The Act was extended to Berars in 1907 (q). Prior to 1907 the principles embodied in the Act were applied as principles of equity and good conscience. It is foreign territory (q¹).

Burma.—The whole Act has been extended with effect from 22nd December 1924 to the whole of Burma except certain specified areas (r).

Bangalore.—The Civil and Military Station of Bangalore is an area in the Mysore State. A notification made under the Indian Foreign Jurisdiction Order, 1902, has declared that the Act shall apply in the station so far as applicable thereto (s).

Mysore.—Enacted as Regulation IV of 1918 it has been extended to the whole of Mysore. It received the assent of His Highness the Maharaja on the 14th day of March 1918 (t).

Secunderabad and Aurangabad.—Only section 108 (f) is made applicable (u). The whole of it is now extended by notification No. 418 of the Foreign Department dated 2nd August 1932. The Hyderabad State Transfer of Property Act is on the same lines as the Act with slight modification to suit local conditions. It came into force on 5th April 1928.

(f) *Krishnachandra v. President, Agency District Board* (1929) 52 Mad. 1.

(g) *Krishnachandra v. President, Agency District Board* (1929) 52 Mad. 1; *Chakrapani v. Varahamma* (1895) 18 Mad. 227.

(h) *Assam Local Rules and Orders*, Vol. 1, pp. 816-18.

(i) *Queen-Empress v. Abdul Latib* (1885) 10 Bom. 183.

(j) *Emperor v. Chimantal* (1912) 14 Bom. L. R. 878.

(k) *Henchand Deuchand v. Chhotamlal* (1906) 33 Cal. 219, 33 I. A. 1.

(l) *Hoosain Ali v. Abid Ali* (1894) 21 Cal. 177; *Anantapadmanabhaswami v. The Official Receiver of Secunderabad* (1933) 35 Bom. L. R. 747.

(m) *Muhammad v. Queen-Empress* (1897) 25 Cal.

20, 24 I. A. 137.

(n) *Burma Laws Act*, 1898 (13 of 1898).

(o) *Bombay Rules and Orders*, Vol. 11, pp. 19-95.

(p) *Bombay Rules and Orders* Vol. 11, p. 195.

(q) *Sheoram v. Jamnabai* (1923) 19 Nag. L. R. 18; *Kisanlal v. Abdulla*, A. I. R. (1923) Nag. 88.

(q¹) *Gangaram Tekchand v. Dharamsi Jetha & Co.* (1936) 31 Nag. 43, 2nd Supp.; *Syed Imam v. Mahomed Sikander* (1908) 4 Nag. L. R. 357; *Bartirao v. Sardarmal* (1934) 31 Nag. L. R. 357.

(r) *Burma Gazette*, 1924, Pt. 1, p. 1082.

(s) *Papiah Naidu v. Naganatha* (1931) 58 I. A. 333.

(t) *Mysore Code*, Volume VI.

(u) See *British Enactments in force in Indian States*, Vol. 5, p. 1.

S. 1 Other Cantonments.—The Act has been applied to Mhow, Neemuch and Nowgong and the Indore Residency Bazars, being administered areas in Central India (v).

The Punjab.—In the Punjab the principles of the Act apply but it is necessary to shew that a principle has been transgressed as opposed to the non-observance of prescribed formalities (w).

Although the equitable principles underlying the Act are followed, the Act itself with its technicalities does not apply (x).

Delhi.—In the absence of any notification under section 1 of the Transfer of Property Act extending that Act to Delhi the mere fact that Delhi ceased to be a part of the Punjab did not automatically bring the Act into operation in Delhi (y).

Madras.—The Act has been repealed or modified to the extent necessary to give effect to the provisions of Madras Act 3 of 1922, in the City of Madras (z).

Crown grants.—The Act has been repealed as to Crown grants by the Crown Grants Act, 1895 (15 of 1895).

Power to extend.—Powers are reserved by the Act to the Governors of Bombay, the Punjab and British Burma to extend the whole or any part of the Act to the whole or any specified part of the territories under their respective administration from time to time by notification in the local official *Gazette*.

Extend this Act or any part thereof (a).—The power to extend any part of the Act did not authorize a Local Government to extend particular sections of the Act so as to give those sections a different operation from that which they had in the Act itself read as a whole. The Local Government of Lower Burma by notification extended in 1904 various sections including section 123 but not in terms section 129 to the Pegu District. The rule of Mahomedan Law that a gift is not valid unless possession has been delivered is preserved by section 129 of the Act. In 1914 a Mahomedan conveyed immoveable property in the Pegu District to his wife by a registered deed. He effected mutation into her name but continued to manage the property himself. It was held that the Local Government was not authorized by section 1 to extend section 123 apart from section 129 and consequently that the above rule of Mahomedan Law applied and the gift was valid (b). Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is not uncommon and, in many circumstances, it may be highly convenient (c).

Exempt either retrospectively or prospectively.—No such exemption has yet been made.

Exemption for certain provisions.—Powers are given to the Local Governments from time to time by notification in the official *Gazette* to exempt any part of the territories administered by them either retrospectively or prospectively from all or

(v) See British Enactments in force in Indian States, Vol. 3, p. 3.

(w) *Jhunam v. Dulia* (1923) 4 Lah. 439 (destruction of the equity of redemption).

(x) *Tefa Singh v. Kalyan Das-Chel Ram* (1925) 6 Lah. 487 (oral assignment of debt); *Mool Chand v. Ganga Jal* (1930) 11 Lah. 258 (*Uspendens*) *Dula Singh v. Bela Singh* A.L.R.; (1925) Lah. 92 (covenant for title); *Kanwar Ram v. Ghugi*, A. I. R. (1928) Lah. 148; *Sheik Mohammad Abdullah v.*

Mohammad Yasin, A. I. R. (1933) Lah. 151.

(y) *Ralli Brothers v. Punjab National Bank, Ltd.* (1930) 11 Lah. 564.

(z) Sec. 13 of Madras Act 3, of 1922.

(a) Inserted by sec. 2 of the Transfer of Property (Amendment) Act, 1904 (6 of 1904).

(b) *Ma Mi v. Kallander Ammal* (1927) 5 Rang. 7, 54 I. A. 23; *Emnabai v. Hajirabai* (1888) 13 Bom. 352; *Amina Bibi v. Katja Bibi* (1884) 1 Bom. H. C., 157, approved.

(c) *Queen v. Burah* (1879) 4 Cal. 172, 5 I. A. 178.

any of the following provisions, namely, section 54, paragraph 2 (transfer of tangible immoveable property of the value of one hundred rupees or upwards or in the case of a reversioner or other intangible things) and paragraph 3 (transfer of tangible immoveable property of a value less than one hundred rupees), section 59 (mortgage where to be by assurance), section 107 (leases of immoveable property how made), and section 123 (gift of moveable and immoveable property how effected).

Ss. 1-2

Limit of Local Governments on powers of extension.—The powers of the Local Governments mentioned in the section to extend the whole or part of the Act are limited so as not to extend to any district or tract of country excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

The excepted sections.—Sections 54 (paragraphs 2 and 3), 59, 107 and 123 of the Act have been extended with effect from 1st January 1908 to the Settlement of Aden and to Sheikh Othman (d) and to every cantonment in British India (e).

Last clause of the section.—This was added by section 2 of Act 3 of 1885 and it is deemed to have been added from the date on which the Act came into force.

1908.—This is the year of the Registration Act now in force. These figures were substituted for 1877 by section 2 of the Transfer of Property (Amendment) Act, 20 of 1929, but prior to the Amending Act, 1908 was used for 1877 under section 8 of the General Clauses Act, 1897.

2. In the territories to which this Act extends for the time being, the enactments specified in the Schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Repeal of Acts.

Saving of certain enactments, incidents, rights, liabilities, &c.

- (a) the provisions of any enactment not hereby expressly repealed :
- (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :
- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or
- (d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law, or by, or in execution of, a decree or order of a Court of competent jurisdiction :

And nothing in the second chapter of this Act shall be deemed to affect any rule of . . . Muhammadan . . . law.

(d) Bombay Rules and Orders, Vol. 11, p. 194. | (e) Sec. 287, Cantonments Act, 1924 (2 of 1924).

S. 2

Herein.—This word means “in this Act” and not “in this section” (f) but in *Srinath Das v. Khetter Mohun Sing* (g) Lord Hobhouse, delivering judgment, stated as follows:—

“The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for s. 2, cl. (c) of the Transfer of Property Act says that nothing therein shall affect any right or liability arising out of legal relation constituted before this Act comes into force, or any relief in respect of such right or liability.”

Here the word “therein” governs section 2, clause (c). As for the case of *Jibanti Nath Khan v. Gokool Chunder Chowdry* (h), it is enough to say that that case was decided without reference to the Act: the *patni* lease in that case was granted and the *patni* created before the Act came into operation.

“Affect.”—This is a term which means either validate or invalidate. The phrase “be deemed to affect” has frequently been interpreted to mean “shall apply to”—a construction which it is submitted is erroneous.

Clause (a).—Clause (a) saves enactments not expressly repealed.

Repeal of Acts.—This Act repeals Statutes, Acts and Regulations specified in the Schedule but saves enactments, incidents, rights, liabilities and transfers mentioned in the clauses that follow:—

As observed by Bovill, C.J., in *R. v. Champneys* (i): “It is a fundamental rule in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication.” The reason for the presumption against a repeal by implication in these cases, as stated by Wood, V.C., is “in passing a special Act, the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having done so, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated” (j).

C., a registered khatedar of certain unalienated lands, executed a *rajinama* on August 11, 1904 of the *khata* in favour of D. who undertook to pay the land revenue thereafter. In 1911 C. by a registered sale deed sold the lands to the plaintiff who filed a suit for possession from D. It was held that the method of relinquishment adopted in 1904 was that provided by section 74 of the Land Revenue Code made more easy by section 90 of the Registration Act (XVI of 1908) which exempted such *rajinama* from registration. The contention that in the absence of a registered sale deed as required by section 54 of the present Act the deed of relinquishment could not operate to transfer ownership to D. was rejected, inasmuch as by reason of clause (a) of section (2) nothing in the present Act could affect a relinquishment made by law then existing (k). A *patnidar* is entitled to manufacture bricks in the absence of a clause in the *patni* lease forbidding it. *Patni*

(f) *Ulfat Hoosain v. Gayani Dass* (1909) 36 Cal. 802 (806); *Promotho Nath v. Kali Prasanna* (1901) 28 Cal. 744 (748).

(g) (1889) 16 Cal. 693, 16 I. A. 65.

(h) (1891) 19 Cal. 760.

(i) (1871) 40 L. J. C. P. 95.

(j) *Fitzgerald v. Champneys* (1861) 30 L. J. C. P. 777, 70 E. R. 958; *Gunepally v. Sri Rajah Tyadappusapati* (1930) M. W. N. 475; *Phool Chand v. Ram Nath* (1928) 50 All. 430; *Kundamul v. Dyer* (1925) 52 Cal. 551.

(k) *Motibhai v. Desai* (1917) 41 Bom. 170.

taluks are really grants of the zemindar's interest without restrictions unless specially mentioned in the *pattah*. It is not possible to apply all the provisions of the Transfer of Property Act by analogy to *patni* taluks. The Transfer of Property Act contains a saving clause for the *patnis* governed by Regulation VIII of 1819 (l).

S. 2

Clause (b).—This clause relates to saving of terms or incidents of any contract or property. As an illustration of clause (b) in this country a partition between co-owners does not require to be effectuated or evidenced by a written document, and there is nothing in the Act to warrant the suggestion that the Legislature intended to make any alteration in the recognized law on the subject (m). Nor is there any provision of law requiring that partitions or family settlements must be reduced to writing and the writing registered, though when reduced to writing the point of registration may arise (n). There is no prohibition in the Transfer of Property Act prohibiting an oral partition (o). A document affecting a division of status is not a transaction affecting immoveable property, such an interest is created not by virtue of the instrument but by operation of the rules of Hindu Law (p). The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration (q). The date of giving and taking of possession by the several sharers of their several lots would be held to be the date on which the joint holding ceased to be joint and became severalty (r).

Clause (c).—The general rule is that Acts are prospective and not retrospective in their operation (s). To this rule there are two exceptions. First, when Acts are expressly declared to be retrospective or placed in a statutory form the rules of law which had already been adopted by the Courts in India (t) which are directed by the several charters to proceed when the law is silent with justice, equity and good conscience and thus adopt the English Law (u), and secondly when they only affect the procedure of the Court (v). A right of appeal is not a matter of procedure (w).

(l) *Surendra Narain v. Bijoy Singh* (1925) 52 Cal. 655.

(m) *Gyannessa v. Mobarakanassa* (1898) 25 Cal. 210.

(n) *Rangu v. Lakshman* (1930) 32 Bom. L. R. 948; *Ram Kishen v. Sheo Sagar*, A. I. R. (1924) All. 304.

(o) *Maung Po Kin v. Maung Shwe Bye*, A. I. R. (1924) Rang. 155.

(p) *Saraswatamma v. Paddayya* (1923) 46 Mad. 349; *Girja Bai v. Sadashi* (1916) 43 Cal. 1031, P. C.; *Varada Pillai v. Jeevarathnammal* (1920) 43 Mad. 244, 46 I. A. 285.

(q) *Maung Tun Sein v. Ko Tu*, A. I. R. (1928) Rang. 196; *Chhotulal v. Bai Mahakore* (1917) 41 Bom. 466.

(r) *Hadayat Khan v. Shah Amand*, A. I. R. (1924) Lah. 155.

(s) *Mt. Ramjhari Kuer v. Gokhul Singh*, A. I. R. (1930) Pat. 61; *Sheopujan Rai v. Bishnath Rai*, A. I. R. (1930) All. 706; *Shiba Kali v. Chuni Lal*, A. I. R. (1927) Cal. 748; *Veerabhadrayya v. Zamindars of North Vallur* (1927) 50 Mad. 201; *Hindu Singh v. Mangal* (1923) 19 Nag. L. R. 110; *Mt. Lahani v. Bala* (1922) 18 Nag. L. R. 85; *Paras Ram v. Mewa Kunwar* (1930) A. L. J. 890; *Bhai (Kirpa) Singh v. Rassall-dar* (1928) 10 Lah. 165; *Javanmal v. Muktabhai* (1890) 14 Bom. 516; *Gopi Lal v. Abdul Hamid*, A. I. R. (1928) All. 381.

(t) *Maharaja of Jeypore v. Rukmini* (1919) 42 Mad. 589, 46 I. A. 109; *Kally Dass v.*

Monmohinee (1897) 24 Cal. 440.

(u) *Nizamuddin v. Mamtoruddin* (1900) 28 Cal. 135.

(v) *Jankinath v. Nirodbaran* (1930) 57 Cal. 148; *Shib Narain v. Lachmi Narain*, A. I. R. (1929) Lah. 761; *Gokal Prasad v. Govind-rao*, A. I. R. (1929) Nag. 282; *Sri Raja Satrucherla v. Maharaja of Jaipur*, A. I. R. (1928) Mad. 1194; *Nisar Husain v. Sundar Lal*, A. I. R. (1927) All. 657; *Rajib Loch-and v. Jogesh Chandra*, A. I. R. (1924) Cal. 983; *Nataraja v. Rangaswamy* (1924) 47 Mad. 384; *Mt. Janak Dulari v. Bishamber Nath*, A. I. R. (1929) All. 745; *Bai Ganga v. Rajaram* (1911) 35 Bom. 248; *Official Assignee of Madras v. Mary Dagarins* (1903) 26 Mad. 440.

(w) *Ram Singha v. Shankar Dayal* (1928) 50 All. 965; *Sakeena Bibi v. C. Stephens*, A. I. R. (1926) Rang. 205; *Kirpa Singh v. Rasall-dar*, A. I. R. (1928) Lah. 627; *Shepujan Rai v. Bishnath Rai*, A. I. R. (1930) All. 706; *Vasudeva Samiar, In re* (1929) 52 Mad. 361; *The Colonial Sugar Refining Co., Ltd., v. Irving* (1905) A. C. 360; *Delhi Cloth and General Mills Co., Ltd. v. Income Tax Commissioner* (1927) 9 Lah. 284; *Dairanayaka v. Rennukambal* (1927) 50 Mad. 857; *Bala Prasad v. Shyam Behari* (1928) 26 A. L. J. 406; *Zamin Ali Khan v. Genda* (1904) 26 All. 375, over-ruled.

- S. 2 Where a section mixes procedure and rights so much of it as regulates procedure is given a retrospective effect, which is denied to the residue (x), a proposition distinguished in a later case (y) both being under the Deccan Agriculturist Relief Act XVII of 1879. Retrospective effect was given in the case of a mortgage of 1859 in the absence of a rule of law that prevailed at the time or on failure to establish that whatever was the law that prevailed at the date of the mortgage it was not in conflict with the provisions of the Act and thus the specific rule in section 63 as to compensation between a mortgagor and mortgagee was applied and not the general rule laid down in section 51 (z). But it has been held that it was not possible to apply all the provisions in the Transfer of Property Act by analogy to *pattni taluks* (a). The sections of the Transfer of Property Act, 1882, which related to procedure were consigned to the Code of Civil Procedure, 1908. Both clause (c) of section 2 and section 6 of the General Clauses Act (X of 1897) came up for consideration in a suit for foreclosure under a deed of conditional sale under Regulation XVII of 1806. Under the law in force by virtue of that Regulation a mortgagee had the right of foreclosing the mortgage by notice served through the Court. This was a substantive right vested in the mortgagee, for on the expiration of a year of grace he became absolute owner. It was held that this right was not affected by the Act for it arose out of a relationship between the mortgagor and mortgagee constituted before the Act came into operation. Consequently the right accruing to the mortgagee under the Regulation was saved by clause (c). Then again, on the service of the notice for foreclosure a certain liability on the part of the mortgagor arose out of that relation, viz., losing the right of redemption. That liability also remained unaffected by this clause. A similar effect follows from the provisions of clause 6 of the General Clauses Act (b). The same principle was applied where the mortgagee had acquired the right of an absolute owner while the Regulation was in force, and sued for possession after the passing of the present Act, the Court holding that the mortgagee was entitled to a decree such as he would have had if the Regulation had been still in force (c).

Yet another case arose under the same Regulation which went up to the Privy Council which refused to revive an extinguished right under the following circumstances:—The mortgagor's right of possession under the Regulation was brought to an end without a foreclosure suit and a right of entry accrued to the mortgagee whose suit for possession became barred on the lapse of 12 years from the date the mortgagor's right to possession determined. The mortgagor sold parcels of the mortgaged land to purchasers without notice of the proceedings under the Regulation. In a suit after the passing of the Transfer of Property Act against the purchasers and the mortgagor for foreclosure and possession by a transferee of the mortgagee's interest, it was held that the mortgagor's right of possession having been determined in 1866, the mortgagor's right of suing for possession became extinguished in 1878, such right was not revived by the subsequent creation of suits for foreclosure on the coming into operation of the Transfer of Property Act, 1882, and that the title of the mortgagee's transferee was barred by time, and the suit against the purchasers was dismissed; as against the mortgagor who made no defence the right of possession in the mortgagee consequent on the proceedings

(x) *Fatma Bibi v. Ganesh* (1907) 31 Bom. 630.

(y) *Narasangji v. Ranchhodbhai* (1911) 13 Bom. L. R. 109.

(z) *Gopi Lal v. Abdul Hamid*, A. I. R. (1928) All. 381.

(a) *Surendra v. Bijoy Singh* (1925) 52 Cal. 655.

(b) *Umesh Chunder v. Chunchun Ojha* (1888) 15 Cal. 357; *Mohabir Pershad v. Gunghadar Pershad* (1887) 14 Cal. 599.

(c) *Baij Nath v. Moheswari* (1887) 14 Cal. 451.

under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed (*d*). The Act deals with substantive rights only and this saving clause has reference to rights acquired and liabilities incurred before the first day of July 1882, the date on which the Act came into force. As distinguished from the first part of the clause the latter part refers to the enforcement of that right or imposition of that liability. Hence the word "relief" has no reference to the mode of that enforcement or imposition which is a matter of procedure prescribed by adjective law. Thus the clause reproduces one of the canons for the interpretation of statutes, that a legal relation created before the Act cannot be disturbed by any of its provisions. The provisions of section 108, clause (c) prohibiting a lessee from working mines or quarries not open when the lease was granted do not apply to a lease granted in 1865 (*e*). A usufructuary mortgage was executed in 1846 under which the mortgagee had obtained possession and the profits from the property had discharged the mortgage money with interest at 12 per cent. per annum. Regulation XXXIV of 1803 was in force at the date of the mortgage. The mortgagor contended that he was entitled to redeem. The mortgagee resisted redemption on the ground that the transaction was regulated by Act IV of 1882 and that he was entitled to interest at the contract rate which was more than 12 per cent. per annum. It was held by virtue of clause (c) of section 2, the rights and liabilities were saved and the provisions of the Regulation had not been disturbed by operation of any subsequent legislation (*f*). Again, the sections of the Act relating to notice do not apply to suits in ejectment before the Act came into operation (*g*). In a mortgage-deed executed before the Act its provisions do not affect the rights and liabilities of the parties to the mortgage or the relief in respect of such rights or liabilities (*h*). A had a money decree on 20-11-1881 against B and a mortgage-deed dated 6-10-1875. In execution of the money decree A had the mortgage lands attached on 9-3-1882 and sold subject to the mortgage. He purchased them with the permission of the Court and transferred to C and D. The order for sale was in April 1882. The Act came into force on 1st of July 1882. It was held that the Act had no retrospective effect so as to disturb the legal relations created before the Act came into force (*i*). And so the incident of non-transferability attached to ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands are not affected by section 108 (i) of this Act (*j*). Nor does the Act affect a non-permanent tenure created before the Act (*k*).

Section 11 of the Bengal Tenancy Act imports that non-permanent tenures are not to be regarded as transferable.

Instances of sales of holdings recognized on payment of *nazarana* by the landlord do not prove usage of transferability. The usage to be proved is a usage of

- (*d*) *Srinath Das v. Khetter Mohun Singh* (1889) 16 Cal. 693, 16 I. A. 65.
- (*e*) *Megh Lal v. Rajkumar* (1907) 34 Cal. 358.
- (*f*) *Samar Ali v. Karim-ul-Lah* (1888) 8 All. 402.
- (*g*) *Ambabai v. Bhau* (1896) 20 Bom. 759.
- (*h*) *Nanu v. Raman* (1893) 16 Mad. 335.
- (*i*) *Naranappa v. Samacharu* (1896) 19 Mad. 382; *Dinendra Nath v. Chandra Kishore* (1886) 12 Cal. 436.
- (*j*) *Madhu Sudan v. Kamini Kanta* (1905) 32 Cal. 1023; *Hari Nath v. Raj Chandra* (1897) 2 C. W. N. 122; *Sarada Kanta v.*

- Nabin Chandra* (1927) 54 Cal. 333; *Mudhab Chandra Pal v. Bejoy Chand Mahtab* (1900) 4 C. W. N. 574; *Ramcharan v. Hari Charan* (1908) 7 C. L. J. 107; *Sulin Mohan v. Raj Krishna* (1920) 25 C. W. N. 420; *Ananda Mohan Saha v. Gobinda Chandra Ray* (1915) 20 C. W. N. 322.
- (*k*) *Chota Nagpur Banking Association, Ltd. v. Kumar Kamakhya* (1928) 7 Pat. 341; *Hira Moti v. Annoda Prasad* (1908) 7 C. L. J. 553.

- S. 2 sale (l). A *mokurari* was created before the Act and *patni* was granted of the zemindary within which the *mokurari* was created. In 1886 both the *mokurari* and *patni* were acquired by the same individual. It was held that section 111 (d) did not cause a merger of the two interests (m). In cases unaffected by the provisions of the Act the union of a superior and subordinate interest do not necessarily merge yet the conduct of the party may shew that he did not intend to keep the two interests alive as mutually distinct rights (n). The Privy Council, dealing with a case of denial of landlord's title, refused to apply section 111 (g) of the Act as the provision was not retrospective and did not govern the case (o). Hence the Act is not retrospective but a different rule prevails in matters of procedure.

The right to relief arising from a certain jural relation existing between parties is a matter of adjective law and consequently the parties are entitled, where a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of Law. And so where a mortgage by conditional sale before the Act did not purport to sell but only contained a covenant by the mortgagor to relinquish all rights in the property as if it had been sold in case of default in payment on stipulated date, the document was construed as a mortgage by conditional sale and the remedies given by section 67 was made available and that there was nothing in section 2 (c) to disentitle them from so doing (p). In a suit for ejectment to avail of clause (c) defendant must establish that her right as it exists at present arose of a legal relation constituted before the Act came into force (q).

Although the legal relation of mortgagor and mortgagee was constituted in 1879 the right to attach the property and bring it to sale and the relief in respect of such right arose only out of the decree of 1884 which was subsequent to the Transfer of Property Act. The right to enforce the decree is a substantive right but the mode of enforcing it is a matter of procedure (r). On a single mortgage bond dated 5th April 1879 the mortgagee filed a suit on 21st January 1881 and obtained a decree on 31st July 1882. It was held that the pending suit was not governed by the Act. It was not the intention of that section to render ineffectual suits instituted and decrees made under the procedure in force before the Act was passed for every decree-holder would be obliged to file a suit under section 67 (s). Before the Act there was no distinction between agricultural and non-agricultural tenancies. And there was no law before the Transfer of Property Act under which agricultural holdings could be transferred against the will of the landlord or subdivided without his consent (t).

The provisions of the Transfer of Property Act apply to the assignment of a mortgage made after that Act came into force although the mortgage may have been made before the commencement of the Act (u).

- (l) *Kailash Chandra v. Hari Mohan* (1909) 13 C. W. N. 541.
 (m) *Harendra Nath v. Hari Mohan* (1914) 18 C. W. N. 860.
 (n) *Ram Beisen Dutt v. Haripada Mukerji* (1919) 23 C. W. N. 830.
 (o) *Maharaja of Jeypore v. Rukmini* (1919) 42 Mad. 589.
 (p) *Bikkina Ramayya v. Adabala Seshayya* (1916) 30 M. L. J. 338; *Pergash Koer v. Mahabir Pershad* (1885) 11 Cal. 582; *Bhobo Sundari v. Rakhai Chunder* (1886) 12 Cal. 583; *Kaveri v. Ananthayya* (1886) 10 Mad. 129; *Mata Din v. Karim Hussain*

- (1891) 13 All. 432; *Umda v. Umrao Begum* (1889) 11 All. 367; *Ganga Sahai v. Kishen Sahai* (1884) 8 All. 262; *Ammanna v. Gurumurthi* (1892) 16 Mad. 64.
 (q) *Durgi Nikarini v. Gobordhan Bose* (1914) 19 C. W. N. 525.
 (r) *Kaveri v. Ananthayya* (1887) 10 Mad. 129.
 (s) *Makund Ram v. Ram Sarup* (1884) A. W. N. 274.
 (t) *Madhab Chandra Pal v. Bejoy Chand Mahtab* (1900) 4 C. W. N. 574.
 (u) *Lala Jugdeo v. Brij Behari Lal* (1886) 12 Cal. 505; *Rattinasami v. Subramaya* (1888) 11 Mad. 56.

Changes in the section.—Hindus and Buddhists were formerly excluded from the operation of the second chapter relating to Transfer of Property whether moveable or immoveable. By the Amending Act, 20 of 1929, it has been made applicable to them.

Clause (d).—This clause does not exclude transfers mentioned from the operation of this Act. It only enacts that the provisions of the Act shall not "affect" them. Even before the passing of the Act it was held that under an execution sale the purchaser acquired title by operation of law (v). A sale by the Official Receiver under the Provincial Insolvency Act is not a transfer by operation of law or by or in execution of a decree or order (w) nor is a charge created by a liquidator on the assets of a company in course of being wound up by authority of the Court (x). By reason of this clause the implied covenant for title in section 55 (2) is not annexed to the interest of a transferee at a Court-sale (y).

Nor do the provisions of section 36 as to apportionment of rent (z) or those of section 51 relating to improvements made by *bona fide* holders under defective titles (a) apply to execution sales. Prior to its repeal by Act 2 of 1900 the original section 135 of the Act was held not to affect transfers in execution (b). And a purchase by a legal practitioner of a claim under a life insurance policy in execution is enforceable notwithstanding section 136 (c). A security bond obtained by the Court hypothecating immoveable property to secure moneys due to minors is not affected by the Act and an assignment thereof to the minors on attaining majority to enable them to realize the money from the security need not be stamped or registered but may be made by an order of the Court nor is such an assignment to a third person a transfer of an interest in immoveable property being an authorization by the Court to sue upon it (d).

Holding that the purchase of a *patni* lease by the purchaser who was at that time zemindar of the property, affected a merger under section 111 (d) of the Transfer of Property Act, it was pointed out that there was no distinction *qua* the law of merger between the result of a transfer by act of parties and one by operation of law and that what clause (d) of section 2 meant was that the various provisions in the Act regulating and codifying the law as to actual transfers by act of parties should not affect transfers by operation of law (e).

The Punjab.—The Act has not been extended to the Punjab though the Courts there apply its provisions as embodying the principles of the Common Law based on equity, justice and good conscience. It has, however, been held there that clause (d) contains a highly technical provision which could not be invoked to defeat a creditor's suit for a declaration that the debtor has transferred property to defeat or delay creditors (f). A contrary view is, however, held by the Allahabad High Court which applied the principles embodied in section 53 to a transfer by virtue of a decree on an award though the provisions of section 53 of the Act did not in terms apply thereto (g).

(v) *Dinendronath v. Ramkumar* (1891) 7 Cal. 107, 8 I. A. 65.

(w) *Narasappah v. Hussain* (1934) 67 M. L. J. 746; *Basava v. Anjaneyulu* (1927) 50 Mad. 135.

(x) *Motilal v. Poona Cotton and Silk Mfg. Co.* (1917) 19 Bom. L. R. 602.

(y) *Natesa v. Gopalaswami* (1928) 51 Mad. 688.

(z) *Mathewson v. Shyam Sunder* (1906) 33 Cal. 786; *Satyendra v. Nilkantha* (1894) 21 Cal. 383.

(a) *Nannu Lal v. Ram Chandra* (1931) 53 All.

334.

(b) *Krishnan v. Perachan* (1892) 15 Mad. 382.
(c) *National Insurance Co., Ltd. v. Haridas*, A. I. R. (1927) Cal. 691.

(d) *Ram Saran v. Yudhishtir* (1931) 53 All. 786.

(e) *Promotho Nath v. Kali Prasanna* (1901) 28 Cal. 744.

(f) *Chattur Mal v. Mt. Majidan*, A. I. R. (1934) Lahore 460.

(g) *Akram-un-nissa v. Mustafa-un-nissa* (1929) 51 All. 595.

Ss. 2-3

Hindu Law.—Prior to the Amending Act, 20 of 1929, it was enacted that rules in the second chapter shall not affect any rule of Hindu Law. Subsequent legislation such as the Hindu Disposition of Property Act, XV of 1916, the Madras Act 1 of 1914 and the Madras Act VIII of 1921 has rendered retention of the word “Hindu” in the section unnecessary, for the inconsistencies that subsisted have now been removed by the above legislation and by sections 11, 12 and 13 of the Transfer of Property (Amendment) Supplementary Act, 21 of 1929, amending the aforesaid Acts.

Mahomedan Law.—The section declares that the provisions of the second chapter relating to transfers of property whether moveable or immoveable shall not be deemed to affect any rule of Mahomedan Law. The reason for this express enactment is to save the rules of Mahomedan Law in various branches of transfer which are inconsistent with the law as laid down in the Act. Thus the creation of life-interests amongst Sunnis whether or not followed by vested remainders are not recognized by Mahomedan Law (*g*¹). The formalities necessary for a valid gift in Mahomedan Law differ from those laid down in Chapter VIII of the Act and remain unaffected by them. Again, a Mahomedan may make an oral gift of immoveable property a privilege unknown to the law as laid down in the Act. The rule of equity in section 52 of the Act is not opposed to the principles of Mahomedan Law as to preclude its application to Mahomedans (*h*). The Courts in India permit Mahomedans through the instrumentality of a *wakf* to trench on the law of perpetuity as laid down in section 14 of the Transfer of Property Act. The peculiar rules of the law of pre-emption are preserved to them and the creation of joint tenancies unknown to English Law are favoured. But the Act does not state that Chapter II shall not apply to Mahomedans. The word “affect” occurring in the first part of the section is repeated in the concluding portion thereof and so where a question arose whether a partial restraint on alienation was valid, the Privy Council applied the rule in section 10 of the Transfer of Property Act, 1882, recognizing the validity of a partial restraint on alienation in the absence of any authority suggesting that prior to the Act a different principle was applied by the Courts in India (*i*).

Buddhist Law.—The rules relating to transfers, whether moveable or immoveable property, in Chapter II were declared prior to the Amending Act, 20 of 1920, not to affect rules of Buddhist Law but the inconsistencies anterior to the amendment having disappeared, no occasion remains for the retention of the word “or Buddhist” in the section.

Interpretation clause.

3. In this Act, unless there is something repugnant in the subject or context—

“Immoveable property”

“immoveable property” does not include standing timber, growing crops or grass

“Instrument”

“instrument” means a non-testamentary instrument

(*g*¹) See *Saroobai v. Hussein Somji* (1937) Bom. 18.

(*h*) *Durgosi Row v. Fakar Sahib* (1907) 30 Mad.

197.

(*i*) *Muhammad Reza v. Abbas Bandi Bibi* (1932) 59 I. A. 236.

“attested” in relation to an instrument means, and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary ;

S. 3

“registered” means registered in British India under the law for the time being in force regulating the registration of documents :

“attached to the earth” means :—

- (a) rooted in the earth, as in the case of trees and shrubs ;
- (b) imbedded in the earth, as in the case of walls or buildings ;
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debts or beneficial interest be existent, accruing, conditional or contingent ;

A person is said to have “notice” of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

EXPLANATION I.—Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument

S. 3 as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired, is situated :

Provided that—

- (1) *the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,*
- (2) *the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and*
- (3) *the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.*

EXPLANATION II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

EXPLANATION III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

Interpretation clause.—See the same caption in the commentaries to the preamble.

Immoveable property.—Immoveable property is not defined in the Act which enumerates certain items by way of exclusion. This enumeration is neither comprehensive nor exhaustive as is indicated by the word "include" (j). The exclusion is intended to avoid conflict with the law of attachment. Under section 2 (9)

(j) *Balantray v. Purshotam* (1872) 9. Bom. H. C. 99; *Empress v. Ramanjiyya* (1878) 2 Mad. 5; *Mangaldas v. Jawanram* (1899) 23 Bom. 673; *Nasiben v. Prasunhar* (1882) 8 Cal.

534; *Empress v. Ashoolosh* (1879) 4 Cal. 483, 493; *Shiv Dayal v. Puthi Lal* (1932) 54 All. 437.

of the Indian Registration Act these items are moveables. It has also received interpretation in the Indian Trustees Act (*k*) and the Trustees and Mortgagees Powers Act (*l*) and defined in the Indian Registration Act (*m*) and the General Clauses Act (*n*). The term has come up for Judicial determination under various enactments. Apart from the Registration Act the Courts have held that a right of ferry is (*o*) but a right of way is not (*p*) immoveable property for the purpose of section 9 of the Specific Relief Act. Nor is a *hat* the possession of which is held by collecting tolls or rents (*q*). For the purpose of the Registration Act a right to collect market dues is a benefit to arise out of land (*r*). Again, a lease of a *hat* or the right to collect market dues (*s*) and a *hat* can be the subject of a valid mortgage (*t*). But a *pala* or turn of worship is not immoveable property (*u*) nor is a *karch-i-pandan* a personal allowance by a Mahomedan husband to his wife even though secured by a charge on immoveable property (*v*).

The right to *parsipan* in Nimar is similar to *pala* and is not immoveable property (*w*). A right to rents and income bequeathed by will to the widow during the term of her natural life subject to the maintenance and education of the children is immoveable property (*x*). Within the meaning of the Limitation Act a claim to possession and management of jaghir villages known as Saranjams is an interest in immoveable property (*y*) but the right of a purchaser to have lands registered in his name in the revenue records is not an interest in immoveable property (*z*). A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property. The right ranks amongst immoveable property in Hindu Law (*a*). The texts on the subject are collected in two Bombay cases (*b*). After referring to the rule of construction in these two cases, the Privy Council observed : " To the application of this rule within proper limits, their Lordships see no objection. The question must in every case, be whether the subject of the suit is in the nature of immoveable property or of an interest in immoveable property ; and if its nature and quality can be only determined by Hindu Law and usage, the Hindu Law may properly be invoked for that purpose " (*c*). The " nature and quality " of the property in such a case can only be determined by Hindu Law, because it is not recognized as property in any other system of law.

A *Yajman Vritti*, an obligation imposed upon the *purohit* or family priest to perform certain religious rites carrying with it certain emoluments is not immoveable property (*d*). A *jalkar* or right of fishery is immoveable property within the General Clauses Act (*e*). A suit for rent of a fishery is immoveable property within

- (*k*) XXVII of 1866, sec. 2.
 (*l*) XXVIII of 1866, sec. 1.
 (*m*) XVI of 1908, sec. 2 (6).
 (*n*) X of 1897, sec. 3 (25).
 (*o*) *Krishna v. Akilanda* (1890) 13 Mad. 54.
 (*p*) *Mangaldas v. Jewanram* (1899) 23 Bom. 673 ;
Bejoy Chandra v. Bunker Behari (1908) 13
 C. W. N. 451.
 (*q*) *Fuzlur Rahman v. Krishna Prasad* (1902) 29
 Cal. 614 ; *Jagannatha v. Ram Rayar* (1905)
 28 Mad. 238 *contra*.
 (*r*) *Sikandar v. Bahadur* (1905) 27 All. 462.
 (*s*) *Surendra Narain v. Bhai Lal* (1895) 22 Cal.
 752.
 (*t*) *Golam Mohiuddin v. Parbati* (1909) 36 Cal.
 665.
 (*u*) *Jagdeo Singh v. Ram Saran* (1927) 6 Pat. 245
Nitya Gopal v. Nani Lal (1920) 47 Cal. 990 ;
Narasingha v. Prokhadman (1919) 46 Cal.
 455 ; *Jati Kuar v. Mukunda Deb* (1912) 39
 Cal. 227 ; *Eshan Chunder v. Monmohini*

- (1879) 4 Cal. 683.
 (*v*) *Ataf Begam v. Brij Narain* (1929) 51 All.
 612.
 (*w*) *Kaluram v. Nagulal*, A. I. R. (1929) Nag. 81.
 (*x*) *Natha v. Dhunbaiji* (1899) 23 Bom. 1.
 (*y*) *Narayan v. Vasudeo* (1891) 15 Bom. 247.
 (*z*) *Bhikaji v. Pandu* (1895) 19 Bom. 43.
 (*a*) *Sukh Lal v. Bishambhar* (1917) 39 All. 196 ;
Raghoo Pandey v. Kassy Parey (1884) 10
 Cal. 73.
 (*b*) *Krishnabhat v. Kapabhat* (1869) 6 Bom. H. C.
 137 ; *Balvantrav v. Pirshotam* (1872) 9 Bom.
 H. C. 99.
 (*c*) *Futtehsangji v. Desai Kallian* (1874) 13 Beng.
 L. R. 254 ; 1 I. A. 34.
 (*d*) *Kodulal v. Beharilal*, A. I. R. (1932) Sind 60.
 (*e*) *Bhundal Panda v. Pandol Pos* (1888) 12 Bom.
 221 ; *Ram Gopal v. Nurumuddin* (1893) 2
 Cal. 446 ; *Parbutley v. Mudho* (1878) 3 Cal.
 276 ; *Sitaram v. Petia* (1918) 14 Nag. 85.

S. 3 section 18 of the Code of Civil Procedure, 1908 (*f*). When a grant is merely of a fishery the lessee acquires no interest in the sub-soil and is not entitled to retain possession when the water dries up (*g*). A lease granted for fishing creates an interest in immoveable property but not for Singhara cultivation (*h*). A right to extra-territorial fishery is not immoveable property for all purposes; but it is an interest in immoveable property (*i*). A right to collect rents of shops or houses from persons actually occupying them is immoveable property (*j*). *Nibandha* such as a right to assessment (*k*) or a right to levy toll on exports of paddy from foreign territory is immoveable property (*l*). So also a grant by a Hindu sovereign to a Hindu temple (*m*). Both before and after the Act was passed it was held that *malikana* which is an annual recurring charge on immoveable property, constitutes an interest in land (*n*), so also *varhasans* or annual allowance charged on the revenue of villages in the Nizam's territory (*o*). A mortgage of immoveable property is itself immoveable property whatever may be the form of the mortgage (*p*). The interest of a mortgagee is immoveable property (*q*) but not according to the Madras High Court (*r*). The Bombay and Allahabad High Courts have taken the same view as the Calcutta High Court (*s*). A second mortgage like the first is also immoveable property (*t*). A mortgage debt is immoveable property (*u*). The right of a mortgagor, known as the equity of redemption, is also immoveable property (*v*) though not for the purpose of determining the procedure appropriate to attachment (*w*). And so is air space above land (*x*).

Standing timber.—According to the interpretation clause this item is excluded from the category of immoveable property. Here we have a negative definition but it is apparent that standing timber was intended to be *cjusdem generis* with "growing crops" or "grass" and the latter articles not only do not connote the idea of permanence but their use and enjoyment can be secured by the use of the sickle. The subject whether a tree is moveable or standing timber or an interest in immoveable property is one about which there has been considerable difference of opinion in this country and the decisions somewhat conflicting. The trend of authorities is to divide trees into two groups, one in which the timber is to be used for building purposes and the other where the purpose is to enjoy the fruits from it. The latter is regarded as immoveable property while the former as moveable. The conflict, however, arises when the same kind of tree is regarded by one Court as moveable and by another as immoveable property. For general law reference may be made to *Marshall v. Green* (*y*), a case under the statute of frauds which does not apply to this country in which is to be found the following statement of law :

- (*f*) *Shib Haldar v. Gapi Sundari* (1897) 24 Cal. 449.
 (*g*) *Nahananda v. Mongala* (1904) 31 Cal. 937.
 (*h*) *Manya v. Sitaram* (1927) 23 Nag. 16.
 (*i*) *Lokenath v. Jahanía* (1911) 14 C. L. J. 572.
 (*j*) *Babu Lal v. Bhawani Das* (1912) 9 A. L. J. 776.
 (*k*) *Madhavrao v. Kashibai* (1910) 34 Bom. 287.
 (*l*) *Krishnaji Pandurang v. Gajanan Balvant* (1909) 33 Bom. 373.
 (*m*) *Collector of Thana v. Krishnanath* (1881) 5 Bom. 322.
 (*n*) *Churaman v. Balli* (1887) 9 All. 591; *Heranund v. Ozeerun* (1868) 9 W. R. 102; *Bhoalee Singh v. Nemoo Behoo* (1869) 12 W. R. 498; *Hurmuzi Begum v. Harday Narain* (1880) 5 Cal. 921; *Gobind Chunder v. Ram Chunder* (1873) 19 W. R. 94.
 (*o*) *Keshav v. Vinayak* (1899) 23 Bom. 22; *Collector of Thana v. Hari Sitaram* (1882) 6 Bom. 546; *Maharana Fatesangji v. Desai Kallianrayaji* (1873) 10 Bom. H. C. 281; *Balvantrav v. Purshotam* (1872) 9 Bom.

- H. C. 99.
 (*p*) *Elumalai v. Balakrishna* (1921) 44 Mad. 965.
 (*q*) *Paresh Nath v. Nabogopal* (1902) 29 Cal. 1.
 (*r*) *Chullile v. Othenam* (1914) 27 M. L. J. 339.
 (*s*) *Jang Bahadur v. Bhagatram* (1930) 52 All. 232.
 (*t*) *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 33; *Ram Shankar Lal v. Ganesh Prasad* (1907) 29 All. 385.
 (*u*) *Elumalai v. Balakrishna* (1921) 44 Mad. 965.
 (*v*) *Parashram v. Govind* (1897) 21 Bom. 226; *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 33; *Mahalavu v. Kusaji* (1894) 18 Bom. 739.
 (*w*) *Lai Umrao v. Lal Singh* (1924) 46 All. 917; *Karim-un-nissa v. Phul Chand* (1893) 15 All. 134; *Tarvadi v. Bai Kashi* (1901) 26 Bom. 305; *Nataraja v. The South Indian Bank of Tinnevely* (1911) 37 Mad. 51; *Debendra v. Rup Lal* (1886) 12 Cal. 546.
 (*x*) *Indore State v. Visheshwar* (1935) 57 All. 553.
 (*y*) (1875) 1 C. P. D. 95.

"The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land: but where the process of vegetation is over or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods."

S. 3

The aforesaid principle has the high authority of Sir Edward Vaughan Williams and has a classic flavour about it. This principle would be applicable to India though the statute is not. The test is to look to what the parties intended to contract for. If the intention is to enjoy the fruit only it is immovable (z). A mortgage of fruit-bearing trees has been held to be of immovable property (a). So also a lease which gave a right to the enjoyment of forest produce, grass, etc. (b) but a *theka* of a certain portion of a forest "for all kinds of trees" is not of an interest in immovable property (c). Where the intention is to cut and remove, the tree is moveable, and so a contract for cutting all kinds of trees to be converted into charcoal upon the ground, was held to be standing timber within the meaning of this definition (d). Where during the currency of the contract to take toddy and fruit during a specified period the trees were to remain available for the use specified in it and there was no limitation on the transferor's enjoyment of the land as such, it was held that the contract did not affect the nutriment the land afforded to the trees, their juice or fruit and that no interest in immovable property was transferred (e). As regards trees which produce fruit or other forest produce they have been regarded as immovable, such as a mahua grove (f), a mango tree (g). A fruit tree may not always come within the term "standing timber" unless by custom of the locality its wood is used in building houses (h).

The Bombay and Allahabad High Courts, as seen, have held that a mango tree is immovable property, a view doubted by the Patna High Court (i) and accepted with limitation by the Madras High Court. The Bombay High Court has qualified the term "timber" as meaning property in such trees only as are fit to be used in building and repairing houses. The Madras High Court while holding that *karuvela* and *velvela* trees were timber within the meaning of the section, took exception to the limitation by saying that the term timber cannot be limited to the class of trees the timber of which is used for building purposes and that whatever may be the purpose to which a mango tree is put in the Bombay Presidency, in Southern India mango-planks were used for doors, windows and other articles of wooden furniture (j). When there is no actual removal of the thing sold the governing principle would be whether there is actual possession of the thing sold and something actually done to the thing sold by the buyer which could only be properly done by an absolute owner. Under the Indian Forest Act (XVI of

- (z) *Ashloke Singh v. Bodha Ganderi*, A. I. R. (1926) Pat. 125 (mango tree) confirmed on appeal (1926) 5 Pat. 765 on another point.
 (a) *Shiv Dayal v. Puttu Lal* (1932) 54 All. 437 (mango and jamban) trees; *Chandi v. Sat Narain*, A. I. R. (1925) Oudh 108 (mahua grove); *Katwaru Chamar v. Ram Adhin* (1912) 10 A. L. J. 516 (mango, mahua and plum trees).
 (b) *Seeni Chettiar v. Santhanathan* (1896) 20 Mad. 58.
 (c) *Mathura Das v. Jadubir Thapa* (1906) 28 All. 277.
 (d) *Alisakeb v. Mohidin* (1911) 13 Bom. L. R. 874.

- (e) *Natesa v. Tangavelu* (1915) 38 Mad. 883 (887).
 (f) *Chandi v. Sat Narain*, A. I. R. (1925) Oudh 108; *Katwaree Chamar v. Ram Adhin* (1912) 10 A. L. J. 516.
 (g) *Krishnarao v. Babuji* (1900) 24 Bom. 31; *Katwaree Chamar v. Ram Adhin* (1912) 10 A. L. J. 516.
 (h) *Krishnarao v. Babuji* (1900) 24 Bom. 31; *Nahanchand v. Modi* (1907) 31 Bom. 183 (197).
 (i) *Bodha Ganderi v. Ashloke Singh* (1926) 5 Pat. 765.
 (j) *Vellachami v. Samusuvava*, A. I. R. (1928) Mad. 392.

- S. 3 1927), section 2, clause 4 (a), forest produce includes "timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds and myrabolams."

Crops.—These are moveable property according to the interpretation clause. The word is used in section 51 and crops to grow in future are immoveable property (k). A mortgage of indigo crops that may be grown was held to be a transaction not governed by the Act (l). By section 2 (7) of the Indian Sale of Goods Act (III of 1930), "goods" include, *inter alia*, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale, and "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract for sale. The contract for the sale of goods will be found in sections 6, 7 and 8 of the same Act. Growing crops are not immoveable property. A mortgage of such crops amounts to an agreement to hypothecate future crops. When the crops grow the hypothecation attaches to the crops, creating an equitable interest in the lender (m). Under the Code of Civil Procedure, 1908, section 2 (13), "moveable property" includes growing crops. The Calcutta High Court in dealing with a suit for damages for wrongful seizure of standing crops under distress, held that they were immoveable property (n) and so are they also under section 3 (25) of the General Clauses Act, 1897, which is a wider definition. Recently, bamboo clumps as standing crops were held immoveable (o) though a crop of sugarcane was held moveable (p). A mortgage of property which is to come into existence in the future is a valid transaction enforceable by Courts of Equity (q). Under the Indian Forest Act (XVI of 1927), section 2, clause 6, "timber" includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not, and under clause 7 "tree" includes bamboos, stumps, brushwood and canes.

Pan creepers which have no existence apart from their produce as they are uprooted when the *pan* has been gathered are moveables (r). A transfer of possession of *parsa* or *palas* tree with a right to take the crops of lac each year is a transaction relating to immoveable property (s).

Grass.—The Madras High Court, in *Seeni Chettiar v. Santhanathan* (t), observed it has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land. It is included in the term "goods" under the Sale of Goods Act (III of 1930).

Instrument.—The word is not defined. By way of interpretation it includes a non-testamentary instrument as opposed to a will or testamentary instrument. Under section 2 (14) of the Indian Stamp Act, 1899, it includes "every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded." A definition which has been held to cover an account written on a sheet of paper (u) as also an entry in a book purporting to

(k) *Seeni Chettiar v. Santhanathan* (1897) 20 Mad. 58.

(l) *Misri Lal v. Mozhar Hossain* (1888) 13 Cal. 262.

(m) *Babu Ram v. Ram Sarup*, A. I. R. (1926) All. 164; *Bansidhar v. Sant Lal* (1888) 10 All. 133; *Misri Lal v. Mozhar Hossain* (1888) 13 Cal. 262.

(n) *Hari Charan v. Hari Kar* (1905) 32 Cal. 459.

(o) *Jagmohan Singh v. Emperor*, A. I. R. (1932) Pat. 344.

(p) *Kalka Prasad v. Chandan Singh* (1888) 10 All. 20.

(q) *Baldeo Pershad v. Miller* (1904) 31 Cal. 667.

(r) *Atmaram v. Doma* (1896) 11 C. P. L. R. 87.

(s) *Parmanand v. Birku* (1909) 5 Nag. 21.

(t) (1897) 20 Mad. 58.

(u) *Mulchand v. Kashibullav* (1908) 35 Cal. 111.

be a register of sums payable with respect to the letting out of wooden machines and rollers (*v*). All fiscal enactments are, however, construed strictly. In construing section 49 of the Indian Registration Act, XX of 1866, it was held that the word was used on the understanding that the writing was not merely evidence of the transaction but was the transaction itself (*w*).

S. 3

Attested.—This subject is treated in section 59, *q.v.*

Registered.—This subject is treated in section 59, *q.v.*

Attached to the earth.—This phrase is defined to mean as rooted in the earth or imbedded in the earth. Clause (c) is an enlargement of clause (b). It implies a union with the hereditaments as to form an integral part thereof. Clause (a) refers to what is attached by nature, clause (b) to annexations of a personal nature or physical annexation. The phrase is used in sections 8 and 108 (h) of this Act and in section 3 (25) of the General Clauses Act. The presumption which arises from the definition may be rebutted by the subject or context wherever there is a contrary intention in determining whether or not a chattel has become a fixture: the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of annexation (*x*). In English Law this subject is dealt with under the law of fixtures. The principles on which they rested were relaxed in favour of agriculture as also trade and between landlord and tenant when affixed for ornament and convenience. There the law was originally founded on the maxims, “*quid quid inædificatur solo solo cedit*” and “*quid quid plantatur solo solo cedit*” which have not received so wide an application here as there.

The word ‘fixture,’ though of common use in English Law, has no precise legal meaning (*y*). In England it does not necessarily mean annexed to the freehold though in India for anything to be a fixture it must be “attached to the earth” as that expression is defined in section 3 of this Act. Following the observations in *Thakoor Chander Poramanick v. Ram Dhone Bhattacharjee* (*z*), the Privy Council held that in India there is no absolute rule of law that whatever is affixed or built on the soil becomes part of it, and is subject to the same rights or property as the soil itself (*a*). It must further be remembered that the tendency under English Law has been to restrict rather than to enlarge the scope and operation of the law of fixtures and various exceptions have been allowed. Under such circumstances it would obviously be inappropriate to extend the English doctrine of fixtures to this country as based on equitable grounds, and this position is fortified for neither the Hindu Law, as pointed out by Sir Barnes Peacock, C. J., in *Paramanick’s* case (*b*) nor the Mahomedan Law, as pointed out by the Privy Council in *Secretary of State v. Charlesworth Pilling & Co.* (*c*), recognized any law of fixtures. The Transfer of Property Act substantially reproduces the law on the subject as recognized by Hindu and Mahomedan jurisprudence (*d*).

How far nature of attachment material.—The occasion for the limited and yet guarded application of the English rule as to fixtures arises when the question is whether an article is “attached to the earth” as defined by clauses (b) and (c). The English Courts have held that the mode of annexation and the object and

(*v*) *Mulasaddi v. Harkash* (1914) 36 All. 11.
 (*w*) *Somu v. Rangammal* (1871) 7 M. H. C. 13.
 (*x*) *Hobson v. Gorringe* (1897) 1 Ch. 182.
 (*y*) *Wiltshire v. Cottrell* (1853) 22 L. J. Q. B. 177,
 118 E. R. 589.
 (*z*) (1866) 6 W. R. 228.
 (*a*) *Narayan Das v. Jatindra Nath* (1927) 54 Cal.
 669; 54 I. A. 218; *Sitabai v. Sambhu* (1914)

38 Bom. 716.
 (*b*) (1866) 6 W. R. 228.
 (*c*) (1901) 26 Bom. 1.
 (*d*) *Ismail Kani v. Nazarally* (1903) 27 Mad. 211;
Mofiz Shaikh v. Rasik Lal (1910) 37 Cal.
 815; *Narayana Sa v. Balaguruswami*, A. I.
 R. (1924) Mad. 187.

S. 3

purpose of annexation must be looked at (c). The same principle is embodied in clauses (b) and (c). Holding that machinery fixed by screws, some into the wooden floors of a cotton mill and some by being sunk into the stone flooring and secured by molten lead, was not a part of the freehold, Parke, B., said: "The only question is, whether the machines when fixed were parcel of the freehold and this is a question of fact, depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil, or fabric of the house and the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel" (f). The doctrine which was the basis of many of the older cases that whatever is affixed, however slightly, to the soil, becomes part of the freehold, has been dissipated once for all by *Leigh v. Taylor* (g). The principle laid down in *Hellawell v. Eastwood* (h) was discussed in several cases including *Holland v. Hodgson* (i). In that case, Blackburn, J., laid down the true principle that the onus of showing that a chattel is not a fixture lies on those who assert the contrary, a principle relied on by Sargent, J., in *Vaudeville Electric Cinema, Ltd. v. Muriset* (j), a case of seats affixed solidly to a cinema floor. He said: "Now what is the position with regard to those seats? That they are in fact affixed somewhat solidly to the floor, there can of course be no question. That being so, it seems to me, on the principle laid down by Lord Blackburn, when he was Blackburn, J., in *Holland v. Hodgson* (k), that the onus of showing they are not fixtures lies on those who assert the contrary. There is no doubt that for the purpose of determining whether they are fixtures or not, one very material circumstance, perhaps the most material circumstance, to be taken into account is, the purpose for which they were fixed. The classic illustration which was given is in regard to an anchor. What Blackburn, J., said was this: 'There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land: but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose.' It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When, the article in question is no further attached to the land than by its own weight it is generally to be considered a mere chattel; see *Wiltshire v. Cottrell* (l) and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land. See *D'Eyncourt v. Gregory* (m). Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the

(a) *Elliott v. Bishop* (1854) 10 Exch. 496; 156 E. R. 534.

(f) *Hellawell v. Eastwood* (1851) 6 Exch. 295; 155 E. R. 554.

(g) (1902) A. C. 157.

(h) (1851) 6 Exch. 295, 155 E. R. 554.

(i) (1872) 7 C. P. 328.

(j) (1923) 2 Ch. 74.

(k) (1872) 7 C. P. 328, 334.

(l) (1853) 1 E. & B. 674; 118 E. R. 589.

(m) (1866) L. R. Eq. 382.

land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. Applying that to the present case here, I find the seats were affixed to the land, and therefore, as I have said, the onus lies on those who say they were not fixtures."

This case went in a direction opposite to what was decided in *Lyon & Co. v. London and City and Midland Bank* (n) but there are certain distinguishable features. The contest there was between the persons who owned the chairs and the bank, who were the mortgagees of the interest of the hirer, while in the present case the object and effect of their annexation was the permanent improvement of the building as a place of public entertainment. In the other case the chairs were kept on hire for a comparatively short time. The above rule as to onus does not mean that there must be an inquiry into the motive of the persons who annex them but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case (o). It must be conceded that there are dicta in other cases and even decisions which shew that for some purposes even machines fixed in concrete beds by bolts and nuts, as in *Reynolds v. Ashby & Son* (p), have been treated as chattels. There is *Hellawell v. Eastwood* (q), a case of distress which has been much commented on in later cases and is of questionable authority; there are rating cases such as *Chidley v. West Ham* (r) and *Tyne Boiler Works Co. v. Overseers of Longbenton* (s); there is the case of the miners huts, *Wake v. Hall* (t) which arose between miners in the Peak District and landowners, and turned entirely on a local custom; there is the tapestry case, *Leigh v. Taylor* (u), which arose between a tenant for life and a remainderman; there is *Fisher v. Dixon* (v), which arose between the heir and the executors of the deceased owner of the land and the machinery fixed to it. *Reynolds v. Ashby & Son* (w) afforded the House of Lords an opportunity of re-establishing the true principle. It was there held that machines fixed in a concrete bed by nuts and bolts is a fixture and not a chattel. Where a chattel is for the permanent benefit of the property or where it is essentially a part of the building itself it is a fixture in English Law. Thus a stone garden seat (x), bolts and bars, locks, keys, doors and windows (y), chimney-piece, not ornamental, or brick or mortar pillars built on a dairy floor to hold pans (z), grate built into a chimney (a), advertisements exhibited on substantially fixed boardings (b), boiler screwed to a stone foundation (c), furnaces (d), are fixtures,

(n) (1903) 2 K. B. 135.

(o) *Re. De Falbe, Ward v. Taylor* (1901) 1 Ch. 523.

(p) (1904) A. C. 466.

(q) (1872) 6 Exch. 295; 155 E. R. 554.

(r) (1874) 32 L. T. 486.

(s) (1888) 18 Q. B. D. 81.

(t) (1883) 8 A. C. 195.

(u) (1902) A. C. 157.

(v) (1845) 12 Cl. & F. 312; 8 E. R. 1426.

(w) (1904) A. C. 466.

(x) *DeEyncourt v. Gregory* (1866) L. R. 3 Eq.

382.

(y) *Bishop v. Elliott* (1855) 11 Exch. 113; 156 E. R. 766; *Climie v. Wood* (1869) L. R. 4 Exch. 328.

(z) *Leach v. Thomas* (1835) 7 C. & P. 327.

(a) *R. v. Lee (Inhabitants)* (1866) 1 Q. B. 241.

(b) *Provincial Bill Posting Co. v. Law Moor Iron Co.* (1909) 2 K. B. 344.

(c) *Metropolitan Counties, etc., Society v. Brown* (1859) 26 Beav. 454.

(d) *Simpson v. Hartoff* (1744), Willes 512, 126 E. R. 1295.

S. 3 but not the pipes of a heating apparatus connected with the boiler by screws (e). Exceptions have been engrafted on the above rules in favour of trade (f), and in a minor degree for agriculture. Accessories or adjuncts to trade fixtures and which have no other existence or purpose may be removed but not brick buildings let into the freehold although used as such accessories (g). One cannot profess to reconcile all the cases on fixtures under English Law, but a fire-engine to work a colliery (h), copper and brewing vessels (i), sheds (j), engines and boilers (k), the pipes of a heating apparatus (l), lime-kilns (m) have all been held to be moveable as a latitude to trade. The same indulgence has been carried still further in case of ornamental fixtures such as chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws and the like (n), as also pumps, stoves, grates and other articles of domestic convenience (o). Similarly, chairs in a theatre screwed to the floor (p). Unless, as already observed, the articles form an essential and integral part of the property to which they are attached and are for the permanent benefit thereof. Gasaliers are not (q), though electric filament lamps are (r), chattels; the former are necessary to the practical enjoyment of the gas-pipes to which they are attached, in the latter case the electric installation is complete without the lamps.

In India also doors and windows (s), tiled huts (t), materials of a house before it is pulled down (u), have been held to be attached to the earth. A factory is a part of the land, so also fixed machinery comprised therein (v), but a baling press placed under a building intended to shelter it, was held to be moveable on the ground that it was not attached to a building imbedded in the earth for the beneficial enjoyment thereof but on the other hand the building was put up for the purpose of sheltering the machinery from weather (w).

The Madras High Court, refusing to apply the technical English Law of fixtures, observed that it would be "a dangerous doctrine to hold in this country that plant and machinery brought into a building for the purpose of trade being carried on whether by the owner or by the mortgagee were so annexed to the building as to make them pass for fixtures merely because the building is sold either by the owner or by the Court in execution" and held that a sale of a distillery did not include vats, pipes and stills (x), and where machinery was brought in by a mortgagor after his purchasing the land it was held to be included in his security where under section 8 it would pass to the purchaser on a sale (y). Thus a fixture as understood in English Law may or may not be under Indian Law "attached to the earth."

- (e) *Jenkins v. Gething* (1862) 2 John & H. 520, 70 E. R. 1165.
- (f) *Elwes v. Maw* (1802) 3 East 38, 102 E. R. 510; *Gibson v. Hammersmith and City Railway Co.* (1863) 32 L. J. Ch. 337, 62 E. R. 748; *Climie v. Wood* (1869) 4 Exch. 328.
- (g) *Whitehead v. Bennett* (1858) 27 L. J. Ch. 474; *Wake v. Hall* (1880) 7 Q. B. D. 295; *Pole-Carew v. Western Counties and General Manure Co.* (1920) 2 Ch. 97.
- (h) *Dudley (Lord) v. Warde (Lord)* (1751) Amb. 113, 27 E. R. 73.
- (i) *Lawton v. Lawton* (1748) 3 Atk. 13, 26 E. R. 811.
- (j) *Dean v. Allaley* (1799) 3 Esp. 11 N. P.
- (k) *Climie v. Wood* (1869) 4 Exch. 328.
- (l) *Jenkins v. Gething* (1862) 2 John & H. 520, 70 E. R. 1165.
- (m) *Thresher v. East London Water Works Co.* (1824) 2 B. & C. 608, 107 E. R. 510.
- (n) *Elwes v. Maw* (1802) 3 East 38, 102 E. R. 510.
- (o) *Grymes v. Boweren* (1830) 6 Bing. 457, 180

- E. R. 1349.
- (p) *Lyon & Co. v. London City and Midland Bank* (1903) 2 K. B. 135; *Vaudeville Electric Cinema Ltd. v. Muriset* (1923) 2 Ch. 74 *contra*.
- (q) *Lewell v. Angerstein* (1868) 18 L. T. 300.
- (r) *British Economical Lamp Co., Ltd. v. Empire Mile End, Ltd.* (1913) 29 T. L. R. 386.
- (s) *Peru Bepari v. Ronuo Maisfarash* (1885) 11 Cal. 164; *Purushottama v. Municipal Council of Bellary* (1891) 14 Mad. 467; *Krishnasami v. Venkatarama* (1890) 13 Mad. 319.
- (t) *Deno Nath v. Adhor Chunder* (1900) [4 C. W. N. 470.
- (u) *Punnayya v. Venkatappa*, A. I. R. (1926) Mad. 343.
- (v) *Amrattal v. Keshavlal* (1926) 28 Bom. L. R. 939.
- (w) *Meghraj v. Krishna* (1924) 46 All. 286.
- (x) *Narayana Sa v. Balaguruswami Nadar*, A. I. R. (1924) Mad. 187.
- (y) *Veerappa v. Ma Tin*, A. I. R. (1925) Rang. 250.

The English Law itself on the subject is not easily reconcilable. What is not a fixture by that law is also in our law not "attached to the earth." The test whether a structure is "attached to the earth" is incorporation with or adherence to the soil or physical incorporation as part of a structure so incorporated with or adhering to the soil.

Hire-purchase system.—There are cases, however, where, in spite of the protection afforded, trade fixtures have been absorbed by the owner of the freehold or by the mortgagee and so where a machine was fastened down to its concrete bed by bolts and nuts the House of Lords, in a contest between the mortgagee and the owner of the machine who had supplied it to the mortgagor on the hire-purchase system, held that the machine had been so fixed as to pass by the mortgage to the mortgagee. There Lord Lindley observed that "in dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment but to the circumstances under which it was attached, the purpose to be served and last but not least to the position of rival claimants to the things in dispute" (z). And in such cases any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture (a). In the latter case the mortgage was after the hiring agreement and without notice of it, where an engine was affixed to the freehold by bolts and screws to prevent it from rocking. In the former mortgage was before the hiring agreement.

Buildings.—The question which frequently arises is whether a building is a parcel of the tenement? To be so it must be part and parcel of the freehold. It cannot be so unless it is affixed to it or to something previously connected with it. Thus, a barn set upon pillars (b) or on a foundation of brick and stone (c), the foundation being let into the ground but the barn resting upon it by its own weight alone, and so a wooden shed which could be taken down and removed (d), is a mere chattel. In a Bombay case where a shed was no further attached to the land than by its own weight it was considered to be a chattel (e). Prior to the passing of the Act, oil and flour mills and steam engine and boiler seized in execution of a decree (f), so also a hut (g) and a superstructure of a house referred to in a hypothecation bond which excluded the land beneath (h), were held to be fixtures while the observations of the Full Bench case in *Thakoor Chunder Poramanick* (i) are "we have not been able to find in the law or custom of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

Actionable claim means.—1. A claim to any debt other than a debt secured

- (a) by mortgage of immoveable property, or
- (b) by hypothecation or pledge of moveable property, or

2. A claim to any beneficial interest

- (a) in moveable property
- (b) not in possession, actual or constructive, of the claimant

3. Which the Civil Courts recognize as affording grounds for relief.

(z) *Reynolds v. Ashby & Son* (1904) A. C. 466.

(a) *Hobson v. Gorringe* (1897) 1 Ch. 182.

(b) *R. v. Otley Suffolk (Inhabitants)* (1830) 1 B. & Ad. 161, 109 E. R. 747.

(c) *Wandsborough v. Maton* (1836) 4 Ad. & El. 884, 111 E. R. 1016; *Wiltshire v. Cottrell* (1853) 22 L. J. Q. B. 177, 118 E. R. 589.

(d) *Stedman v. Moore* (1847) 10 L. T. O. S. 289.

(e) *Chaturbhuj v. Bennett* (1905) 29 Bom. 323.

(f) *Miller v. Brindaban* (1879) 4 Cal. 946.

(g) *Nathu Miah v. Nand Rani* (1872) 8 Beng. L. R. 508.

(h) *Narayana Pillay v. Ramaswamy* (1875) 3 Mad. H. C. 100.

(i) (1866) 6 W. R. 228.

exact amount would not make that amount any the less a debt (*k*). At Common Law a debt was looked upon as a strictly personal obligation and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was looked upon as open to the objection of maintenance. After a time the Common Law Courts recognized the right of anyone who had a pecuniary interest in the debt to sue in the name of the creditors. But Courts of Equity took a different view. They admitted the title of an assignee of a debt regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident (*l*). In order to constitute an assignment of a debt or other chose in action in equity no particular form is necessary. In India it must be signed by either the transferor or his duly authorized agent, but no particular form of words seems to be necessary. The language is immaterial if the meaning is plain (*m*). An order for payment of money is not the same thing as an assignment of the debt, but a direction in writing to pay the amount due on instrument endorsed on such instrument by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment is directed, is a valid assignment within the meaning of section 130 (*n*). The test is whether or not the right of the seller of the goods to the price of the same has been transferred to a third party by an effectual assignment that the assignee becomes entitled as of right to the payment.

The endorsement on the back of a bill was in these terms: "K. kindly remit to B. who will collect on behalf of E." Held that the endorsement did not amount to an assignment of the debt which was owing by K. to E. and that it was nothing more than an order to pay (*o*). Where an endorsement on a bond was worded as follows: "*Is ruppa ko wasul karne ka malik Nanak Chand haiga, main ne ruppa ko Nanak Chand hath baich dai haiga.*" Dastkhat Bishambar Dyal. Miti Bhadon Sudi 9, Samat 1979" and immediately after there was another endorsement to the following effect: "*Is ruppa ka rupai biyaj Nanak Chand Kishori Lal set le lie.*" Dastkhat Bishambar Dyal. *Rupai sab aur biyaj le lie.* Dastkhat Bishambar Dyal. Bhadon Sudi 9, Sambat 1979" and the endorsement was also thumb-marked by Bishambar Dyal, held, that the words *ruppa ko Nanak Chand hath baich diya haiga* clearly indicate that a complete assignment was effected (*p*). An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor or an order given by a debtor to his creditor to pay such funds to the creditor operates as an equitable assignment (*q*). In order to constitute an equitable assignment there must be an engagement to pay out of a particular fund (*r*) and may take the form of an order upon a debtor (*s*). But a cheque is not (*t*), nor is a letter of credit (*u*), though a banker's deposit receipt duly endorsed and delivered would be a good gift though non-transferable (*v*).

Part of a debt.—There has been a difference as to whether a partial transfer of a debt is valid. Under the Judicature Act, 1873, an assignment of an amount due or to become due has been upheld and so an ascertained part of an existing

(*k*) *Mathu v. Achu* (1934) 57 Mad. 1074.

(*l*) *Row v. Dawson* (1749) 1 Ves. 331.

Prosser v. Edwards (1835) 1 Y. & C. 481.

(*m*) *Brandts v. Dunlop Rubber Co.* (1905) A. C. 454.

(*n*) *Rama Iyer v. Venkatchellam* (1906) 30 Mad. 75.

(*o*) *Kisen Gopal v. Bavin*, A. I. R. (1926) Cal. 447.

(*p*) *Firm Nanak Chand v. Firm Ram Sarup*, A. I. R. (1924) Lab. 684.

(*q*) *Thakar Das Bhatia v. Malik Chand* (1933)

14 Lab. 325.

(*r*) *Watson v. Wellington (Duke)* (1830) 1 Russ & M. 602, 39 E. R. 231.

(*s*) *Diplock v. Hammond* (1854) 23 L. J. Ch. 550, 43 E. R. 893; *Fisher v. Calvert* (1879) 27 W. R. 301; *Greenway v. Atkinson* (1881) 29 W. R. 560.

(*t*) *Hopkinson v. Forster* (1874) 22 W. R. 301.

(*u*) *Morgan v. Lariviere* (1875) 7 H. L. 423.

(*v*) *Griffin v. Griffin* (1899) 1 Ch. 408; see *Sethna v. Hemingway* (1914) 38 Bom. 618.

S. 3 debt (*w*). In a later case such an assignment was held not to pass a legal but only an equitable right so as to constitute the assignee a creditor of the original debtor (*x*). But a judgment debt cannot be split up (*y*). In India the partial transfer of a debt has been regarded as valid (*z*). The same Court in an earlier case held that the assignment of a debt must be of the whole debt (*a*). This was followed by the Calcutta High Court in a recent case (*b*).

Hypothecation or pledge.—See commentaries on section 58, *post*.

Beneficial interest.—To attract the application of Chapter VIII this must relate to moveable property only. The benefit of a contract as distinguished from the liability thereunder is assignable because the term “benefit” connotes beneficial right or interest with the attendant right to sue and therefore falls within the definition of actionable claim. Such assignments are, however, subject to two qualifications. First, that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil and, secondly, that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it (*c*). Examples of transfer of benefits of contracts are found in brewers’ leases (*d*), contract for the purchase of reversionary interest (*e*). Not uncommon are assignments of contracts for the purchase of lands and of builders’ leases where persons buy building plots and sell them before buildings are erected thereon. But, as observed above, as liabilities cannot be transferred all acts are done and obligations fulfilled in the name of the assignor by the assignee, the assignor remaining liable till the contract is carried out to the original party. A vendor’s right under an executory contract to exercise an option at a certain future date to obtain a reconveyance of immovable property at a certain price is assignable (*f*). The benefit of a contract under a “counterpart document” to reconvey property sold has been held assignable (*g*). But a personal right or covenant cannot be validly transferred (*h*).

Civil Courts.—The claim to the “debt” or “beneficial interest” must be one cognizable by a Civil Court. Where the claim is one which would lie in a Revenue Court (*i*) or a Criminal Court it would not be an actionable claim.

Notice and its sub-divisions.—Mere rumours (*j*), casual conversation (*k*), statements by strangers (*l*), do not amount to notice. An advertisement is not notice unless it is proved to have reached the knowledge of the person sought to be charged (*m*). Notice may be actual or constructive or, as sometimes termed, “imputed” in dealings where an agent represents a principal. The definition and explanation have been held not to have a retrospective effect (*m*¹).

(*w*) *Brice v. Hannister* (1878) 3 Q. B. D. 569; *Skipper and Tucker v. Holloway and Howard* (1910) 2 K. B. 630.

(*x*) *Re Steel Wing Co., Ltd.* (1921) 1 Ch. 349.

(*y*) *Forster v. Baker* (1910) 2 K. B. 636.

(*z*) *Raja of Ramnad v. Subramaniam Chettiar* (1929) 52 Mad. 465.

(*a*) *Doraiswamy Mudaliar v. Doraiswamy Iyengar* (1925) 48 M. L. J. 432.

(*b*) *Ghisulal v. Gumbhirmall* (1935) 39 C. W. N. 606.

(*c*) *Jaffer Meher Ali v. Budge Budge Mills Co.* (1906) 34 Cal. 28; *Kodusao v. Surajmal* (1935) 31 Nag. L. R. (Supp.) 154; *Hunsraj v. Nathoo* (1907) 9 Bom. L. R. 838.

(*d*) *Manchester Brewery Co. v. Coombs* (1901) 2 Ch. 608.

(*e*) *Torington v. Magee* (1902) 2 K. B. 427.

(*f*) *Munuswami Naidu v. Sagaloguna Nayudu* (1926) 49 Mad. 387.

(*g*) *Sakalaguna Naidu v. Chinna Munuswami Nayakar* (1928) 51 Mad. 533.

(*h*) *Desa v. Girdharilal Ghanshamdas, A. I. R.* (1932) Sind 128; *Gobardhan v. Raghuraj Singh* (1930) 28 A. L. J. 799.

(*i*) *Lallu Singh v. Chandra Sen* (1934) 56 All. 624.

(*j*) *Cornwallis's case* (1595) Toth 186, 21 E. R. 163; *Wildgoose v. Wayland* (1601) Gouldsb 147, 75 E. R. 1056.

(*k*) *Lloyd v. Banks* (1868) 3 Ch. App. 488.

(*l*) *Barnhart v. Shields* (1853) L. R. 2 Eq. 1217.

(*m*) *Nagle v. Baylor* (1842) 3 De. & War 60.

(*m*¹) *Syed Aziz v. Mt. Arifa Begum, A. I. R.* (1937) Oudh 1.

Actual notice.—Actual notice must be given to a person in the character in which the notice is intended to affect him and not in any other character (n). It must be given not by a stranger but must proceed from a person interested in the property (o). It will bind, though inaccurate in particulars or extent of interest claimed (p). It will not be carried beyond the reason of the rule (q). The fact that for some purpose at some time or other the mortgagee informed the Court of the mortgage is not evidence of notice on the auction purchaser (r).

Imputed notice.—Imputed notice has been dealt with in the commentaries to explanation III.

Constructive notice.—The cases on constructive notice resolve themselves into two classes: first, where a party charged has had actual notice that the property has in some way been charged or encumbered: and where he has been held to have had notice of the particular charges or encumbrances affecting it and, secondly, where the Court has been satisfied that the party charged has designedly abstained from inquiry for the very purpose of avoiding notice. The proposition of law, upon which the former class of cases proceeds, is, not that the party charged had notice of a fact or instrument but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds, is, not that a party charged has incautiously neglected to make inquiries but that he had designedly abstained from making inquiries for the purpose of avoiding knowledge, a purpose which if proved would clearly shew that he had a suspicion of the truth and a fraudulent determination not to learn it (s). It was held in the case of *Hewitt v. Loosemore* (t) that constructive notice is knowledge which the Court imputes to a person, from the circumstances of the case, upon a legal presumption so strong that it cannot be allowed to be rebutted, that the knowledge must exist though it may not have been formally communicated (u). In an earlier case this presumption was described as so violent that the Court will not allow even of its being controverted (v). It follows when a person closes his eyes to a single fact or procession of facts which he would have discovered had he made the usual inquiries or searches which he ought to have made or where but for his gross negligence in failing to follow up an inquiry or making an inquiry he would have known it. Further, constructive notice is affected apart from the case of principal and agent by registration as well as by possession. Notice must be in the same transaction (w). The doctrine of constructive notice ought not to be extended but confined within certain boundaries (x). It has gone to its full length and must not be extended and it has never been held that it is the duty of a proposed purchaser or mortgagee to inquire of every person who may be on the premises or any part of those premises. Nor has it been suggested that occupation of a part of the premises would put him on inquiry as to the possible rights of the

(n) *Beioley v. Carter* (1869) 4 Ch. App. 230.
(o) *Barnhart v. Greenshields* (1853) 9 Moo. P. C. 80, 40 E. R. 204.

(p) *Gobind Chunder v. Doorgapersad* (1874) 22 W. R. 248 (1875) 14 Beng. L. R. 337.

(q) *Fuller v. Bennett* (1843) 2 Hare. 394, 67 E. R. 162.

(r) *Nursing v. Roghoobur* (1884) 10 Cal. 609.

(s) *Jones v. Smith* (1841) 1 Hare, 43, 66 E. R. 943; *Doorga Narain v. Baney Madhub* (1881) 7 Cal. 199; *Macneil & Co. v. Saroda Sundari, A. I. R.* (1929) Cal. 83; *Manji v. Hoorbai* (1911) 35 Bom. 342.

(t) (1851) 9 Hare 449.

(u) *Espin v. Pernbuton* (1859) 28 L. J. Ch. 311, 44 E. R. 1330; *Cave v. Cave* (1880) 15 Ch. D. 639.

(v) *Plumb v. Fluit* (1791) 2 Anst 432, 145 E. R. 926.

(w) *Warrick v. Warrick* (1745) 3 Atk. 291, 26 E. R. 970; *Bulpett v. Sturges* (1870) 22 L. T. 739; *Meyer v. Charters* (1918) 34 L.T. R. 589.

(x) *Wyllie v. Pollen* (1853) 32 L. J. Ch. 782, 46 E. R. 767; *Knight v. Bowyer* (1858) 27 L. J. Ch. 520, 44 E. R. 1053; *Ware v. Egmont (Lord)* (1854) 24 L. J. Ch. 361 43 E. R. 586.

S. 3 occupier of that portion over the remainder of the premises (y). The Bombay High Court refused to extend the doctrine of constructive notice to a bank in which an executor and trustee opened a number of deposit accounts with corresponding current account to which interest was credited holding that there was nothing in the nature of his dealings with the bank to shew that he was using trust assets for improper purpose at the time (z). The tendency of modern decisions is unwillingness to apply the principle to companies or persons with knowledge of facts of which they had no knowledge whatever (a). This equitable doctrine is not applicable to commercial and mercantile transactions (b). In this country English decisions on constructive notice should be applied with care and only when the Court is sure that circumstances are similar. The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself.

It is not the turning away from every information that amounts to constructive notice (c). The question whether seeing a window was notice was answered in the negative in *Allen v. Seckham* (d), where the dictum of Lord Chelmsford in *Miles v. Tobin* (e), that the existence of windows was constructive notice of a right of access to them, was not followed. That doctrine, as applied by the Vice-Chancellor, would come to this, that a purchaser is to be held to have constructive notice of every agreement relating to any structure which he sees on the adjoining ground. The case of *Miles v. Tobin* (e) was one in which the defendants had taken a lease of building land with knowledge that the same lessees had let other land to the plaintiffs for building purposes and that under that lease a building had been erected with windows overlooking the land taken by the defendants. The doctrine of constructive notice ought to be narrowly watched and not enlarged. Indeed, anything "constructive" ought to be narrowly watched because it depends on a fiction. Disputes having arisen between the plaintiff and W. whether a window in the plaintiff's house overlooking W.'s land was an ancient light an agreement was entered into between them whereby plaintiff agreed to keep the window opaque and make it open only in such a way that no person could look out of it. W.'s land was afterwards sold to the defendants who had no actual notice of the agreement but knew of the existence of the window. It was held that the mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them (f). Where a person makes an inquiry and receives an answer which he may reasonably believe to be true, he is entitled to act upon it (g). In Malabar a person who takes a *melkanam* the term of which is to begin after the expiry of a *kanam* in force in favour of a third party must be held to have had notice of an agreement for renewal obtained by the *kanamdar* (h).

Where in execution of a simple money decree obtained for some of the instalments due on his mortgage bond a mortgagee brought to sale the property which he

(y) *Parthasarathy v. Subbaraya* (1924) A. I. R. Mad. 67; *Manji v. Hoorbai* (1911) 35 Bom. 342; *Hunter v. Walters* (1901) 1 Ch. 428.
 (z) *The Bank of Bombay v. Pasulbhoy* (1922) 24 Bom. L. R. 513.
 (a) *The Birnam Wood* (1907) P. 1.
 (b) *Manchester Trust v. Furness* (1895) 2 Q. B. 539; *The Draupner* (1909) P. 219; *Lloyds Bank, Ltd. v. Swiss Bankcorin* (1913) 108 L. T. 143.

(c) *Miles v. Tobin* (1867) 17 L. T. 432; *Ramji v. Municipal Board*, A. I. R. (1937) Oudh 31.
 (d) (1879) 11 Ch. D. 790.
 (e) (1867) 17 L. T. 432.
 (f) *Allen v. Seckham* (1879) 11 Ch. D. 790; *Chaturbhuj v. Man Sukhtam* (1925) 27 Bom. L. R. 73.
 (g) *Macbryde v. Eyhyn* (1871) 25 L. T. 192.
 (h) *Kalyani v. Krishnan* (1932) 55 Mad. 519.

held in mortgage, but in his application for execution did not mention his lien on the property for the instalments that were still to fall due, the purchaser was held to have purchased the property free of the mortgagee's claim if he supposed that he was buying the full proprietary title (i). A contrary decision of the same Court proceeded on the theory of registration being notice (j).

Notice of a deed.—Notice of a deed has been held to be notice not only of its contents but of the facts the knowledge of which then insisting on its production would have necessarily led to (k). And this rule has been extended where the original deed was lost or destroyed and what purported to be a true copy was produced to the purchaser which subsequently proved to be defective inasmuch as a restrictive building covenant contained in the original deed was absent from the copy and the purchaser was held liable (l). In this case the purchaser had notice that the original was in existence and was aware of the provisions of the deed before he commenced to build. So also where a sale is subject to an agreement by the vendor to execute a mortgage the purchaser is bound by the terms which the vendor and mortgagee may agree to insert in the mortgage (m). A recital in a deed is notice of the contents of that deed (n). The true inquiry seems to be in every case whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor (o). A general recital in a deed that there were mortgages on the estate, was held to affect parties claiming under the deed with notice on a mortgage not specified therein (p).

The recital of a settlement conveys notice of the will referred to therein (q). Even though the will be inaccurately recited in a conveyance the purchaser has notice of the real contents of the will (r). In the case of leases general notice to purchaser that there are leases is notice of all their contents (s). A leasehold title puts the purchaser on notice as to restrictions contained in the lease (t). A purchaser of leasehold has notice of ordinary but not unusual covenants in the original lease (u). And this rule is equally applicable to sales by auction (v). In case of an underlease the grantee has constructive notice of the original lease provided he has had a fair opportunity of ascertaining the terms (w).

In *Patman v. Harland* (x), Jessel, M.R., held that a purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor has constructive notice of the contents of such deed and is not protected from the consequences of not looking at the deed even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants nor anything

(i) *Ramchandra v. Jairam* (1893) 22 Bom. 686.
 (j) *Dhondo v. Ranji* (1896) 20 Bom. 290.
 (k) *Peto v. Hammond* (1861) 31 L. J. Ch. 354, 54 E. R. 981; *Morland v. Cook* (1868) L. R. 6 Eq. 252; *Oliver v. Hinton* (1899) 2 Ch. 264; *Rajaram v. Krishnasami* (1893) 16 Mad. 301; *Bank of Bombay v. Suleman Somji* (1909) 33 Bom. 1, 35 L. A. 139.
 (l) *Hooper v. Bromet* (1903) 89 L. T. 37 varied in (1904) 90 L. T. 234.
 (m) *Leigh v. Lloyd* (1865) 34 L. J. Ch. 646, 46 E. R. 403.
 (n) *Plumb v. Fluit* (1791) 2 Anst. 432, 145 E. R. 926.
 (o) *Prosser v. Watts* (1821) 6 Mad. 59, 56 E. R. 1012.
 (p) *Farrow v. Rees* (1840) 4 Beav. 18, 49 E. R. 243.
 (q) *Davies v. Thomas* (1838) 7 L. J. Exch. Eq. 21, 160 E. R. 383; *Jones v. Smith* (1841)

1 Hare. 43, 66 E. R. 943.
 (r) *Hope v. Liddell* (1855) 25 L. J. Ch. 90, 52 E. R. 829.
 (s) *Taylor v. Stibbert* (1794) 2 Ves. 437, 30 E. R. 713; *Hiern v. Mill* (1806) 13 Ves. 114; *Lewis v. Stephenson* (1898) 67 L. J. Q. B. 296.
 (t) *Lewis v. Bond* (1853) 18 Beav. 85, 52 E. R. 34.
 (u) *Wilbraham v. Livesey* (1854) 18 Beav. 206; 52 E. R. 81; *Parker v. Whyte* (1863) 32 L. J. Ch. 520, 71 E. R. 73; *Reeve v. Berridge* (1888) 20 Q. B. D. 523; *Re. White and Smith's Contract* (1896) 1 Ch. 637; *Melzak v. Lilienfeld* (1926) 1 Ch. 480.
 (v) *Re. White and Smith's Contract* (1896) 1 Ch. 637; *Hone v. Gakstatter* (1909) 53 Sol. Jo. 286.
 (w) *Hyde v. Warden* (1877) 3 Exch. D. 72.
 (x) (1881) 17 Ch. D. 353.

S. 3 in any way affecting the title. There is a class of cases of which *Jones v. Smith* (y) is most notorious, where the purchaser was told of a deed which might or might not affect the title and was told at the same time that it did not affect the title. That line of cases has no bearing at all on a case where you know that the deed does affect the land and the question as to the extent to which it does affect the land is to be ascertained only by looking at the deed itself (z). Where a mortgagee taking a mortgage in one of the towns mentioned in section 59 where he knows that mortgages by deposit of title-deeds were legal and usual and does not ascertain whether the title-deeds are already pledged there is such an abstention from an inquiry which he ought to have made or such negligence as to infer notice in terms of the section (a).

Wilful abstention from inquiry or search.—This is another form of constructive notice. It arises from disregard of information as where a person who has the means of knowledge of facts neglects to avail himself of them, it will be concluded as though he had actual knowledge. Means of knowledge is equivalent to knowledge (b). Knowledge must be available (c). A purchaser, which term includes a mortgagee or a transferee of a mortgage of land, will be deemed to have notice of all facts which he would have learned upon a proper investigation of title under a contract containing no restriction of his rights in that respect (d). Further, the observations of Lord Selborne in *Agra Bank v. Barry* (e), throw a considerable light on the question as to what is the duty which is cast upon a person to make inquiry or search the abstention from which amounts to notice. His Lordship observed that the duty, if there is a duty, is not a duty which is owed to the possible holder of a latent title or security. It is a duty merely which a person owes to himself and the non-observance of which, unless it is explained, affects his own *bona fides*. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case. But if there is not actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied (f). The words "wilful abstention from inquiry and search" must be taken to mean such abstention from inquiry or search as would show want of *bona fides* on the part of the purchaser or mortgagee (g). A mortgagee who is informed that there are "charges" affecting the property, and is cognizant of two only, cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others. The rule with respect to the consequence of a purchaser abstaining from making inquiries, does not depend exclusively on a fraudulent motive from such abstinence. When the circumstances of a case put a purchaser on inquiry, a false answer or a reasonable answer given to an inquiry, may dispense with the necessity of further inquiry; but where no inquiry

(y) (1841) 1 Hare. 43, 66 E. R. 943.

(z) *Ramcoomar Koonloo v. John and Maria McQueen* (1873) 11 Beng. L. R. 46; *Nursing v. Raghobar* (1883) 10 Cal. 609; *Jolland v. Stainbridge* (1797) 3 Ves. 478, 30 E. R. 1114.

(a) *Imperial Bank of India v. U. Rai Gyaw Thu & Co., Ltd.* (1924) 51 Cal. 86, 50 I. A. 283; *Kshetra Nath v. Harasukdas*, A. I. R. (1927) Cal. 538.

(b) *Milnes v. Duncan* (1827) 2 B. & C. 671, 108 E. R. 598; *Balakrishna v. Bhawanipur Banking Corporation, Ltd.* (1932) 59 Cal.

662; *Hamiduddin v. Ramani*, A. I. R. (1933) Cal. 321.

(c) *Broadbent v. Barlow* (1861) 30 L. J. Ch. 569 45 E. R. 999.

(d) *Berwick & Co. v. Price* (1905) 1 Ch. 632.

(e) (1874) L. R. 7 H. L. 135; *Lee v. Chilton* (1876) 46 L. J. Ch. 48; *Northern Counties of England Fire Insurance v. Whipp* (1884) 28 Ch. D. 482.

(f) *Doorga Narain Sen v. Bansy Madhub Mosoomdar* (1881) 7 Cal. 199.

(g) *Joshua v. Alliance Bank of Simla* (1895) 22 Cal. 185 (203).

has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry (h). A purchaser or mortgagee who does not investigate the title is affected with constructive notice of what he would have discovered on investigation although not of such matters as he would not have ascertained without going behind the documents of title themselves (i).

Where there is wilful abstention from inquiry or search it is not open to the plaintiff to plead section 55 (1) (a) of the Transfer of Property Act nor to charge the defendant with fraud within the meaning of the last paragraph of that section. The same result follows from the consideration of the sections relating to fraud and misrepresentation in the Indian Contract Act (j). The occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights. Actual knowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the vendor is constructive notice of that person's rights but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all (k). The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser (l). Such a case does not fall within the exception to section 19 of the Indian Contract Act. A mortgagee advancing money on the security of a considerable estate, and omitting to investigate the title to a particular portion of it, will not be affected with notice of equities affecting the residue of the estate, which upon such investigation he might possibly have discovered (m). This doctrine of constructive notice was also qualified by the Calcutta High Court where the owner after carving an estate numbered them 93 and 93A. An absolute sale of the former dated 11th April 1911, contained a recital of two encumbrances created by the vendor on 93A. A sale on 19th September 1911 of 93A contained a recital by the vendor that it was not encumbered by mortgage or otherwise, a statement contradicting the recital in the former conveyance. The Court held that the purchaser could not be said to have constructive notice of the encumbrances (n). The ground of the decision rested on the well-known principle enunciated by Lord Redesdale in *Hamilton v. Royse* (o) and quoted with approval by Smith, M.R., in *Tressilian v. Caniffee* (p). "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase."

Ought.—"Ought" here does not import a duty or obligation ; for a purchaser need make no inquiry. It means a matter of prudence, having regard to what is usually done by men of business under similar circumstances (q).

(h) *Jones v. Williams* (1857) 24 Beav. 47, 53 E. R. 274.

(i) *Gainsborough (Earl) v. Watcombe Terra Cotta Clay Co., Ltd.* (1885) 54 L. J. Ch. 991.

(j) *Harilal v. Mulchand* (1928) 52 Bom. 883.

(k) *Hunt v. Luck* (1902) 1 Ch. 428.

(l) *Hormasji Temulji v. Mankuvarbai* (1875) 12 Bom. H. C. R. 262; *Morgan v. The*

Government of Haiderabad (1858) 11 Mad. 419.

(m) *Hunter v. Walters* (1871) 7 Ch. App. 75.

(n) *Bepin Krishna v. Priya Brata* (1921) 26 C. W. N. 36.

(o) (1804) 2 Sch. & Lef. 315.

(p) (1855) 4 Ir. Ch. Rep. 389.

(q) *Bailey v. Barnes* (1894) 1 Ch. 25 (35).

S. 3 Explanation 1.—The rule as to how far registration operates as notice has been laid down in explanation I added to the definition of notice under section 3, which addition has been made by section 4 of the Transfer of Property (Amendment) Act, 20 of 1929.

Registration as notice.—Previous to the amendment above referred to opinions in India differed as to whether registration of a document under the Indian Registration Act was itself a constructive notice of the transaction affected by the instrument. The Madras (r) High Court uniformly held that registration was not notice and such has been the view of the Nagpur Courts (s). A contrary opinion was expressed by the Lahore (t), Patna (u), and Rangoon (v) High Courts.

The view of the Bombay High Court that registration was notice (w) was subsequently modified in a later case when it was held that registration did not necessarily give notice to anybody of anything unless the registered document was so indexed as would come to the notice of an inquirer anxious to know whether there were any documents relating to the property (x). The modified view was adopted by the Allahabad High Court (y). In the Calcutta High Court the decisions were not uniform, one line of decisions was that registration was not notice (z), while another line held that registration was notice (a). Yet a third view was expressed by the same Court, which held that whether registration was or was not notice in itself depended upon the facts and circumstances of each case and upon the degree of caution which an ordinary prudent man would necessarily take for the protection of his own interest by search in the registers kept under the Registration Act (b). On the matter coming up for determination before the Judicial Committee of the Privy Council their Lordships approved the last view (c) which the Indian Courts subsequently adopted (d). To set this conflict at rest the Legislature has codified the law of notice.

What transactions are within the rule.—All transactions relating to immoveable property required by law to be and which have been effected by a registered instrument are within the rule. Constructive notice of a deed is constructive notice of its contents (e). The qualification as to unregistered instruments engrafted by the Bombay High Court (f) is not law now.

- (r) *Damodara v. Somasundara* (1889) 12 Mad. 429; *Madras Building Co. v. Rowlandson* (1890) 13 Mad. 383; *Shan Maun Mull v. Madras Building Co.* (1892) 15 Mad. 268; *Rangasami v. Annamalai* (1908) 31 Mad. 7.
 (s) *Mt. Kasturi v. Baliram*, A. I. R. (1923) Nag. 15.
 (t) *Punjab Banking Co., Ltd. v. Muhammad Hassan* (1925) 6 Lah. 344.
 (u) *Mt. Waji-hun-nissa v. Valmiki*, A. I. R. (1924) Pat. 359.
 (v) *Aung Kaing v. Maung San*, A. I. R. (1923) Rang. 41.
 (w) *Lakshmandas v. Dasrat* (1882) 6 Bom. 169; *Dundaya v. Chenbasapa* (1885) 9 Bom. 427; *Chintaman v. Dareppa* (1890) 14 Bom. 506; *Narayan v. Bapu* (1893) 17 Bom. 741; *Dina v. Nathu* (1902) 26 Bom. 538; *Mahomed v. Bai Cooverbai* (1904) 6 Bom. L. R. 1043; *Tatyarao v. Pullappa* (1910) 12 Bom. L. R. 940.
 (x) *Gordhandas v. Mohanlal* (1921) 45 Bom. 170.
 (y) *Ashiq Husain v. Chaturbhuj* (1928) 50 All. 328; *Janki Prasad v. Kishen Das* (1894) 16 All. 478.
 (z) *Joshua v. Alliance Bank of Simla* (1895) 22 Cal. 185; *Inderdewan v. Gobind* (1896) 23 Cal. 790; *Pranath v. Ashutosh* (1900) 27 Cal. 358; *Nanda Lal v. Abdul Aziz*

- (1916) 43 Cal. 1052.
 (a) *Magniram v. Mehdi Hossein* (1904) 31 Cal. 95, (102).
 (b) *Manindra v. Troyluckho* (1898) 2 C. W. N. 750; *Bunvari v. Ramjee* (1902) 7 C. W. N. 11.
 (c) *Tilakdhari Lal v. Khedan Lal* (1921) 48 Cal. 1, 47 I. A. 239.
 (d) *A. L. R. M. Firm v. L. P. R. Chettiar Firm*, A. I. R. (1926) Rang. 195; *Gunabai v. Motilal*, A. I. R. (1925) Nag. 398; *Parbhu Lal v. Chattar*, A. I. R. (1925) All. 557; *Kali Din v. Madho*, A. I. R. (1923) All. 169; *Gulam Muhammad v. Mt. Mirza* A. I. R. (1925) Lah. 25; *Jhand Singh v. Harnam Singh*, A. I. R. (1926) Lah. 415; *Begraj v. Alisher*, A. I. R. (1923) Sind 50; *Maung Hlaw v. M. N. S. Chettyar Firm*, A. I. R. (1933) Rang. 153; *Nasir Khan v. Tara Chand*, A. I. R. (1927) All. 357; *Ashiq Husain v. Chaturbhuj*, A. I. R. (1928) All. 159; *Mt. Pran Dei v. Sai Deo Tiwari*, A. I. R. (1929) All. 85.
 (e) *Rajaram v. Krishnasami* (1893) 16 Mad. 301; *Palman v. Harland* (1881) 17 Ch. D. 353.
 (f) *Sharfudin v. Govind* (1903) 27 Bom. 452; *Chunilal v. Ramchandra* (1898) 22 Bom. 213.

The date from which the notice operates.—Registration operates as notice from the date of registration or where property is not all situated in one district or where the instrument registered has been registered under sub-section (2) of section 13 of the Indian Registration Act of 1908 from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired is situated.

Who is deemed to have notice.—A subsequent and not a prior transferee is affected by registration. This is made clear by the words "any person acquiring." Hence payment by a mortgagor without knowledge of a registered sub-mortgage does not vitiate the payment (g). There is no duty on the part of a mortgagee to keep on searching the registers for further dealings of the mortgagor with the property comprised in his mortgage and a prior mortgagee cannot be said to have notice of subsequent encumbrances (h). Registration of a prior transaction is notice to a party entering into a transaction with respect to the same property on a subsequent date (i).

Mutation entry.—A purchaser who with ordinary care could have pursued his investigations beyond the point he did, cannot complain of fraud on the part of his vendor. Both under section 55 (1) (a) and the definition of "notice" in section 2 there would be want of care or a wilful abstention from inquiry or search (j).

When is registration notice.—Registration to operate as notice must comply with the following conditions:—

- (1) The instrument must be registered according to the Act and rules thereunder.
- (2) A memorandum of the transaction must be duly entered in books kept under the Act.
- (3) The particulars of the transaction must be correctly indexed.

Registration by mistake in a wrong book.—Non-compliance with the provisions of the Registration Act does not affect any immoveable property comprised therein (k). And on a failure to make a proper index in the registration office primarily due to the negligence of the mortgagee in giving proper description of the properties the subsequent purchaser was preferred to him (l). When there is such an error registration would not be notice according to provisos 2 and 3. The rulings of the various High Courts to the contrary are no longer law (m).

Error of procedure.—Registration of an instrument not duly stamped, contrary to section 35 of the Indian Stamp Act, 1899, is an error of procedure, not an act done without jurisdiction, consequently, if it is done in good faith the registration is valid under section 87 of the Indian Registration Act, 1908, and upon payment of the proper duty and penalty the instrument is admissible in evidence (n).

Explanation II.—The explanation is in accordance with the third illustration to clause (b) of section 27 of the Specific Relief Act, 1877, which authoritatively

(g) *Sahadev Ravji v. Shekh Papa Miya* (1905) 29 Bom. 199.
 (h) *Tilakdhari Lal v. Khedan Lal* (1921) 48 Cal. 1, 47 I. A. 239; *Ashiq Husain v. Chatarbhuj* (1928) 50 All. 328; *Ram Narain v. Bandi Pershad* (1904) 31 Cal. 737.
 (i) *Ram Lal v. Shiama Lal*, A. I. R. (1931) All. 275.
 (j) *Harilal v. Mulchand* (1928) 52 Bom. 883.
 (k) *Indra Bibi v. Jain Sirdar* (1908) 35 Cal. 845; *Narasamma v. Subbarayudu* (1895) 18 Mad. 864; *Najibulla v. Nusir Mistri*

(1881) 7 Cal. 196.
 (l) *K. V. Galliera v. U. Thet*, A. I. R. (1929) Rang. 117.
 (m) *Parasharam v. Rama* (1910) 34 Bom. 202; *Subbalakshmi v. Narasimiah* (1927) 52 M. L. J. 482; *Gordhandas v. Mohanlal* (1921) 45 Bom. 170.
 (n) *Ma Paw May v. S. R. M. M. A. Chettyar Firm* (1929) 7 Rang. 624, 56 I. A. 379; *Sarada Nath v. Gobinda Chandra* (1919) 23 C. W. N. 534.

S. 3 declares the law in accordance with the case of *Daniels v. Davison* (o), repeatedly acted upon, and the remark of Wigram, V. C., in *Jones v. Smith* (p), "that possession is *prima facie* evidence of seisin in fee." In India it is ordinarily a presumptive proof of title (q). Prior to this addition it was not clear how far possession was to be regarded as notice. Till then possession was considered as sufficient to put the would-be transferee on inquiry as to the title of such person. Dealing with the case of a tenancy, their Lordships of the Privy Council, in *Barnhart v. Green-shields* (r), observed, "in all the cases to which we have referred it will be observed that possession relied on was the actual occupation of the land; and that the equity sought to be enforced was on behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on." That case is referred to and cited in a number of decisions of the High Courts in this country. The earliest decision of the Bombay High Court is *Man-charji Sorabji Chulla v. Kongscoo* (s), in which it was held by Chief Justice Couch that the English authorities on the question were applicable where a person bought an estate of which someone, not the vendor, had possession. The leading case cited was *Daniels v. Davison* (t), in which the doctrine of constructive notice was pushed to the extreme where the Lord Chancellor held, "that where there is a tenant in possession under a lease or an agreement a person purchasing part of the estate must be bound to inquire on what terms that person is in possession... that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession." That principle was followed in *Sharafudin v. Govind* (u). Prior and subsequent decisions of the same Court have adopted the same long and undisputed principle (v). To the same effect is the view of the Patna High Court (w). According to the Calcutta High Court, occupation of property by tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice (x). Such a transferee is liable to any equity which the tenant in occupation could raise against him; but he is not bound by notice of the lessor's title and he has no equity whatever (y). The Allahabad High Court has held, where an encumbrancer is in possession the fact of such possession is sufficient to put the would-be mortgagee on inquiry as to the title of such person (z). The Madras High Court has held that where it is proved that a subsequent encumbrancer

(o) (1809) 16 Ves. 249, 33 E. R. 978.

(p) (1841) 1 Hare 43, 66 E. R. 943.

(q) See sec. 110, Indian Evidence Act, 1872.]

(r) (1849) 9 Moo. (P. C.) 18.

(s) (1869) 6 Bom. H. C. (O. C. I.) 59.

(t) (1809) 16 Ves. 249, 33 E. R. 978.

(u) (1902) 27 Bom. 452.

(v) *Lakshmandas v. Dasrat* (1880) 6 Bom. 168; *Dundaya v. Chenbasappa* (1893) 9 Bom. 427; *Waman v. Dhondiba* (1879) 4 Bom. 126; *Sohagchand v. Bhaichand* (1882) 6 Bom. 193; *Balaram v. Appa* (1872) 9 Bom. H. C. R. 121; *Mancharji v. Kongscoo* (1869) 6 Bom. H. C. R. 59; *Narsesh v. Balurnirav* (1872) 9 Bom. H. C. R. 151; *Manmal v. Dashrath* (1872) 9 Bom. H. C. R. 147; *Moreshevar Balkrishna v. Dattu* (1888) 12 Bom. 569; *Shivram v. Genu* (1892) 6 Bom. 515; *Hathising v. Kuvarji* (1895) 10 Bom. 105; *Sharafudin v. Govind* (1903)

27 Bom. 453; *Kondiba v. Nana* (1903) 27 Bom. 408; *Faki Ibrahim v. Faki Gulam* (1921) 45 Bom. 910; *Manji v. Hoorbai* (1911) 35 Bom. 342.

(w) *Bilchand v. Balaki*, A. I. R. (1929) Pat. 284.

(x) *Bahuram v. Madhah Chandra* (1930) 40 Cal. 565; *Tiloke Chand v. Beattie & Co.*, A. I. R. (1926) Cal. 204; *Maau Brahma v. Bholi Das* (1913) 18 C. W. N. 657; *Jugul Kissors v. Kartic Chunder* (1894) 21 Cal. 116; *Denowth Ghose v. Auluck Moni* (1881) 7 Cal. 753.

(y) *Gunamoni v. Bassant Kumari*, (1889) 16 Cal. 414; *Nani Bibee v. Hafizullah* (1884) 10 Cal. 1073; *Narain v. Dataram* (1882) 8 Cal. 597.

(z) *Bhikki Rai v. Udit Narain* (1903) 25 All. 366; *Ram Autar v. Dhanauri* (1886) 8 All. 540.

under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession by such encumbrancer or of such conveyance without possession the Courts are not bound to interpret the Registration Act so as to defeat the title of the prior encumbrancer (a). There is no duty to attend on the premises and examine narrowly every person (b) and the English decisions in regard to principle of constructive notice must be applied with care (c).

Constructive possession.—Constructive possession is not possession of such a nature as to be notice of a prior title (d).

Amendments.—Section 3 repeated the general principles of law enacted in section 229 of the Indian Contract Act. But this definition was found to be defective as the words “given to or obtained by his agent” suggested that the rule was restricted to the facts of which the agent had express notice (e) and the reference to the section of the Indian Contract Act did not extend the scope of the definition in section 3 of the Transfer of Property Act. This paragraph with the explanations was substituted for the original paragraph by section 4 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929). By the amendment the following words which followed the paragraph as it stands now were deleted, namely, “when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.” These words have been omitted and the explanations have been added as to when a person is deemed to have notice of a fact by reason of registration or possession or the employment of an agent.

Explanation III.—Notice to agent in the course of business has the same effect as if it had been given to or obtained by the principal (f).

Notice to agent is notice to principal.—It is not a mere question of constructive notice or inference of facts but a rule of law which imputes the knowledge of the agent to the principal (g). In a later decision the same Tribunal while holding a minor's contract void observed that the money-lender was throughout the transaction absent from Calcutta and personally did not take part. It was entirely in charge of his attorney whose full authority to act was not disputed and who stood in his place for the purpose of the mortgage and his acts and knowledge were acts and knowledge of his principal (h). To affect the principal with constructive notice the agent's knowledge must have been derived in the particular transaction in hand; it must have been knowledge of something material to the particular transaction and something which it was the duty of the agent to communicate to his principal (i). Constructive notice is of two kinds. There is the notice through an agent which Lord Chelmsford in *Espin v. Pemberton* (j) had called imputed notice. The other is which Lord Chelmsford thought would more properly be called constructive notice, that kind of notice which the Courts have inferred against a person from his wilfully abstaining from making inquiry or inspecting documents. Where the mortgagor constituted his solicitor as general agent the knowledge of the solicitor must be imputed to him (k). A mortgagee is to be taken to have notice

(a) *Krishnamma v. Suranna* (1893) 16 Mad. 148.

(b) *Parthasarathy v. Subbaraya*, A. I. R. (1924) Mad. 67; *Baba Sah v. Hajee Mohamad*, A. I. R. (1923) Mad. 563.

(c) *Kalyani v. Krishnan* (1932) 55 Mad. 519.

(d) *Chunilal v. Ramchandra* (1898) 22 Bcm. 213; *Moreswar v. Dattu* (1888) 12 Bcm. 569.

(e) *Greender Chunder v. Mackintosh* (1879) 4 Cal. 897.

(f) *Haroon v. Meherali*, A. I. R. (1927) Sind 24;

Kanhaya Lal v. Devi Das, A. I. R. (1927) Lzh. 227.

(g) *Raja Ramfal Singh v. Baltaladdar Singh* (1904) 24 All. 1, 29 I. A. 203.

(h) *Mohori Bitee v. Dhurmodas Ghose* (1903) 30 Cal. 539, 30 I. A. 114 (121).

(i) *Wyllie v. Pollen* (1863) 32 L. J. Ch. 782, 46 E. R. 767.

(j) (1859) 3 De G. & J. 547, 44 E. R. 1380.

(k) *Dixon v. Winch* (1900) 1 Ch. 736.

S. 3

that there was a charge on the land leading him to make proper inquiries as to its character from the mortgagor (*l*).

Where a solicitor is employed by a mortgagee his knowledge is the imputed knowledge of his client (*m*). Evidence will not be admitted to prove that a solicitor did not in fact communicate his knowledge to the client (*n*). A solicitor employed by both parties in a mortgage transaction by whom it was not completed concealed from the mortgagee the existence of a settlement, notice was not imputed to him (*o*). So a purchaser who does not ask to have the title-deeds delivered (*p*), or if they also relate to other property, to have them produced (*q*), is deemed to have notice if they turn out to be in the possession of a stranger and of that stranger's rights, whatever they may be. It is quite immaterial whether the purchaser employs a solicitor or not (*r*). The above rule is, however, subject to certain limitations, viz., that the matter for which the agent was employed should be taken into consideration and it is necessary that the agent should be acting in the course of a particular business for which he was employed. This general principle will be found embodied in section 199 of the English Property Act, 1925. The doctrine of constructive notice imputing to the principal the knowledge of the agent cannot be extended to knowledge acquired by the agent prior to the agency being established. An auction purchaser completed his contract to purchase without notice of the depreciatory condition of the sale described by the mortgagee. It was observed that his employment of the mortgagee's solicitors subsequently to the contract did not affect him with constructive notice so as to upset a transaction of a date before the agency commenced (*s*). Again, if the agent had an interest which would lead him not to disclose to his principals the information which he has obtained, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose and which he did not disclose (*t*); without considering earlier decisions it is sufficient to refer to the two cases of *Cave v. Cave* (*u*) and *In re David Payne & Co.* (*v*). In the former a solicitor, who was the sole trustee of a settlement, paid the trust money in the joint name of his brother and himself and used the fund in the purchase of land, which was conveyed to his brother alone. The property was then mortgaged in favour of a mortgagee for whom the trustee acted as solicitor; but it was decided that this fact could not affect the mortgagee with notice of the improper use of the trust money in the purchase of the estate. In the latter case, the director of a company induced the advance by them of £6,000 on the security of a second mortgage debenture in another company, with the intention of using the money for the purpose of forwarding a scheme in which he was personally interested, a scheme outside the scope of their business. No other director of the lending company knew anything of the circumstance. It was sought to affect the lending company by the knowledge which the director possessed. It was decided that no such knowledge could be imputed. The knowledge of the agent must have come to him in

(*l*) *In re The Alms Corn Charity* (1901) 2 Ch. 750; *Jones v. Smith* (1841) 24 Beav. 62, 66 E. R. 943; *Jones v. William* (1857) 24 Beav. 47, 53 E. R. 274.
 (*m*) *Rolland v. Hart* (1871) 8 Ch. 678; *Bradley v. Riches* (1878) 9 Ch. D. 189; *Le Neve v. Le Neve* (1747) 3 Atk. 646, 26 E. R. 1172; *Berwick & Co. v. Price* (1905) 1 Ch. 632.
 (*n*) *Bradley v. Riches* (1878) 9 Ch. D. 189; *Kettlewell v. Watson* (1882) 21 Ch. D. 685; *Bomsol v. Savage* (1866) L. R. 2 Eq. 134.
 (*o*) *Sharps v. Foy* (1866) 4 Ch. App. 35.
 (*p*) *Worthington v. Morgan*, 1849) 16 Sim. 547

60 E. R. 987; *Maxfield v. Burton* (1873) L. R. 17 Eq. 15; *Lloyd's Banking Co. v. Jones* (1885) 29 Ch. D. 221.
 (*q*) *Oliver v. Hinton* (1899) 2 Ch. 264.
 (*r*) *Atterbury v. Wallis* (1856) 2 Jur. (N. S.) 343, 44 E. R. 465; *Oliver v. Hinton* (1899) 2 Ch. 264.
 (*s*) *Chabildas Lalloobhai v. Dayal Mowji* (1907) 81 Bom. 566, 34 I. A. 179.
 (*t*) *Texas Company v. Bombay Banking Company* (1920) 44 Bom. 139, 46 I. A. 250.
 (*u*) (1880) 15 Ch. D. 639.
 (*v*) (1904) 2 Ch. 608.

the transaction in which he was employed (*w*). When one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both companies. The knowledge acquired by him as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected and some duty imposed on him by that company to receive the notice (*x*). An employment of a solicitor in effecting an investment does not make him an agent to receive notice of subsequent encumbrances or dealings by *cestuis que trust* of that trust fund (*y*).

A principal cannot be imputed with knowledge of agent not acquired in the course of his employment (*z*) unless the agent has it at the time of his transaction with him (*a*) or acquired accidentally (*b*), or in a casual conversation (*c*) when there is no duty to communicate (*d*). Where it is certain the agent will not communicate (*e*) or tells the third party he will not communicate (*f*).

Concealment of fact.—Knowledge of agent is not to be imputed to the principal where the circumstances of the case shew that the agent intended a fraud which required the suppression of the knowledge from the principal (*g*). So also where a third party and agent conspire to conceal notice (*h*). The presumption which arises from the duty of an agent to communicate what he knows to his principal may be repelled by showing that whilst he was acting as agent he was also acting in another character, viz., a party to a scheme or design of fraud and the knowledge which he attained was attained by him in the latter character and therefore there is no ground on which you can presume that duty of the agent was performed by the person who filled that double character (*i*). Where an agent acts for an undisclosed principal and that fact is known to the agent of the other party the principal of the latter is affected by such knowledge (*j*). Where an agent is clothed with ostensible authority no private instructions prevent his acts within the scope of that authority from binding his principal (*k*). Where his authority depends, and is known to those who deal with him to depend, on written mandate it may be necessary to produce, or account for the non-production of that writing to prove the scope of his authority (*l*). If the same person is agent both for the vendor and purchaser or is himself vendor and agent for the purchaser, whatever notice he may have will affect the purchaser (*m*).

The doctrine of imputed and constructive notice discussed.—In *Kettlewell v. Watson* (*n*), this doctrine was discussed by Fry, J. That was a case which exhibited in a forcible manner the dangers to which purchasers of small plots of land were exposed in not investigating the title according to the regular forms of conveyancing. After stating the facts, his Lordship observed: "Constructive notice is of two kinds. There is the notice through an agent, which Lord Chelmsford called imputed notice. The other, which Lord Chelmsford thought would more properly be called constructive notice, which the Courts have inferred against a person from his wilfully abstaining from making inquiry or inspecting documents. Fraud is a ground upon

(*w*) *In re Cousins* (1886) 31 Ch. D. 671.
 (*x*) *In re Hamshire Land Company* (1896) 2 Ch. 743.
 (*y*) *Saffron Waldon Second Benefit Building Society v. Rayner* (1880) 14 Ch. D. 406.
 (*z*) *Wells v. Smith* (1914) 3 K. B. 722.
 (*a*) *Steed v. Whitaker* (1740) Barn. Ch. 220, 27 E. R. 621.
 (*b*) *Bolekov v. Fisher* (1882) 10 Q. B. D. 161.
 (*c*) *Re Croggan Ex-parte Carbis* (1834) 4 Deae & Ch. 354.
 (*d*) *Gould v. Oliver* (1840) 2 Man. & G. 208, 133 E. R. 723.
 (*e*) *Kennedy v. Green* (1834) 3 My. & K. 699, 40 E. R. 266.

(*f*) *Sharpe v. Foy* (1868) 4 Ch. App. 35.
 (*g*) *Roland v. Hart* (1871) 6 Ch. App. 678.
 (*h*) *Wells v. Smith* (1914) 3 K. B. 722.
 (*i*) *Kennedy v. Green* (1834) 3 My. & K. 699, 40 E. R. 266; *Kettlewell v. Watson* (1882) 21 Ch. D. 685.
 (*j*) *Dresser v. Norwood* (1864) 34 L. J. C. P. 48, 144 E. R. 188.
 (*k*) *National Bolivian Navigation Co. v. Wilson* (1880) 5 A. C. 176 (209).
 (*l*) *National Bolivian Navigation Co. v. Wilson* (1880) 5 A. C. 176 (209).
 (*m*) *Dryden v. Frost* (1837) 8 L. J. Ch. 235, 40 E. R. 1084.
 (*n*) (1882) 21 Ch. D. 685.

S. 3 which the Courts have relieved against registered conveyances, or even against a prior legal title. The fraud may be in an agent, . . . or the fraud may be in the principal himself. The first question then which arises is, did the principal know of the charge? If he did not, had he an agent who knew of the charge? Then the next question is, was it the agent's duty to communicate that fact to the principal? If it was, the Court always holds that he did communicate it, not because, he did in fact communicate it, but because, it would be too dangerous to inquire whether the communication was really made; it would open the door to perjury. Having found then that the agent both knew the fact and communicated it to his principal, the next step is to inquire whether the principal did an act which was unconscientious, having regard to the knowledge which the Court so imputes to him? The Court, therefore, receives evidence of the agency, and it receives evidence of the act of the principal, but it will not receive evidence whether the agent recollected the fact at the time or whether he communicated it to his principal. It deals with those matters by way of irrebuttable presumption when the circumstances are known. This is Lord Chelmsford's imputed notice. The principle which applies to the other kind of notice is that which is said to be derived from the wilful shutting of the eyes to documents or to facts. That appears to rest really on the same principle, viz., that, if you see a man behaving in a way which shews that he desires to avoid knowing something, or having the knowledge of it brought home to him, then you conclude that he knew enough to make him desire not to have evidence of knowledge against him, and, therefore, it has been said there may be negligence which amounts to fraud. That language has always seemed to me not strictly accurate. What a man does through negligence he does not do from a fraudulent motive. Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design. But what is meant is this—that conduct which might be negligent, or which might be attributable to negligence, is really attributable to a design not to know any more and is, therefore, an indication that you knew that of which you desired to avoid the evidence." There is another principle which undoubtedly is well established, and is an exception from the doctrine of imputed notice, that which is familiarly known by reference to the case of *Kennedy v. Green* (o). There, a solicitor was acting for both mortgagor and mortgagee and it was held that the presumption, which arises from the duty of the agent to communicate what he knows to his principal, may be repelled by shewing that, whilst he was acting as agent, he was also acting in another character. So in the case of a vendor and purchaser, where the latter employs the former's solicitor even though the purchaser be an infant and the sale under the sanction of the Court (p).

Gross negligence.—Negligence imports the neglect of some duty towards the person injured (q). It supposes the disregard of a fact known to the purchaser and may without a fraudulent motive be so gross as to justify the charge of constructive notice (r). "Gross negligence" or its convertible term "culpable negligence" sometimes called "wilful blindness" (s) is the same thing as negligence with the addition of a vituperative epithet (t). In *Ware v. Lord Egmont* (u), Lord Cranworth stated no definite rule as to what will amount to gross or culpable negligence can be laid down. "Where a person has actual notice of any matter of fact

(o) (1834) 3 My. & K. 699, 40 E. R. 266.
 (p) *Toulmin v. Steere* (1817) 3 Mer. 210, 36 E. R. 81; *Jones v. Frost* (1872) 20 W. R. 798.
 (q) *Rimmer v. Webster* (1902) 2 Ch. 163; *Swan v. North British Australasian Co., Ltd.* (1868) 2 H. & C. 175.
 (r) *West v. Reid* (1843) 2 Hare 249, 67 E. R. 104.

(s) *Henderson v. Comptoir D'Escompte* (1873) L.R. 5 P. C. 253.
 (t) *Wilson v. Brett* (1843) 11 M. & W. 113, 152, E. R. 757.
 (u) (1854) 4 D. M. & G. 460, 43 E. R. 586; *Re New Chile Gold Mining Co.* (1892) 68 L. T. 15.

there can be no danger of injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless circumstances are such as to enable the Court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question.” That was the law laid down in *Wyld v. Pickford* (v) and upheld and recognized in the Exchequer Chamber in the judgment of Mr. Justice Crompton in *Beal v. The South Devon Railway Company* (w). The confusion seems to have arisen in using the word “negligence” as if it was an affirmative word whereas in truth it is a negative word; it is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. Therefore “gross” is a word of description not as a definition (x). In the same case, Erle, C.J., said: “I advisedly abstained from using a word to which I can attach no definite meaning and no one as far as I know ever was able to do so.” The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. Negligence, however great, does not of itself constitute fraud (y). Negligence is passive while fraud is active. Referring to the duties of directors in *Lagunas Nitrate Company v. Lagunas Syndicate* (z), Lindley, M.R., said: “Their negligence must be not the omission to take all possible care; it must be much more blamable than that; it must be in a business sense culpable or gross.” In his observations in *Giblin v. McMullen* (a), Lord Chelmsford has justified the use of the term “gross negligence,” tracing it as far back as Lord Holt’s celebrated judgment in *Coggs v. Bernard* (b). Lord Lindley, in *Bailey v. Barnes* (c), referring to the above cited passage in *Ware v. Lord Egmont* (d), stated that “gross or culpable negligence” in that passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor’s title. In the judgment of Vice-Chancellor Wigram in *Jones v. Smith* (e), the cases of constructive notice are reduced to two classes to which reference has already been made. The Conveyancing Act, 1882, really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended by the Legislature. It is carelessness of so aggravated a nature as to indicate an attitude of mental indifference to obvious risks (f). It cannot be evidence of fraud although no doubt the facts proved may be evidence of negligence or evidence of fraud. In *Northern Counties of England Fire Insurance Company v. Whipp* (g), Lord Justice Fry observed that “the expression ‘gross negligence’ that amounts to evidence of a fraudulent intention is certainly embarrassing for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud and leads men to do or omit doing a thing not carelessly but for a purpose.” The doctrine of equity upon which Jenkins, J., relied in *Monindra Chandra v. Troyluckho* (h), that gross neglect in section 78 of this Act means neglect that amounts to evidence

(v) (1841) 8 M. & W. 443, 151 E. R. 1113.
 (w) (1864) 11 L. T. 184, 159 E. R. 560.
 (x) *Grill v. General Iron Screw Colliery Co.*
 (1866) 35 L. J. C. P. 321 (330); *Blyth v.*
Birmingham Water Works Co. (1856) 25
 L. J. Ex. 212, 156 E. R. 1047.
 (y) *Le Lievre v. Gould* (1893) 1 Q. B. D. 491.
 (z) (1899) 2 Ch. 392 (435).

(a) (1869) L. R. 2 P. C. 317 (336), 16 E. R. 570.
 (b) (1703) 2 Ld. Raym. 909, 92 E. R. 107.
 (c) (1894) 1 Ch. 25.
 (d) (1854) 4 D. M. & G. 480, 43 E. R. 586.
 (e) (1841) 1 Hare 43, 66 E. R. 943.
 (f) *Hudston v. Viney* (1921) 1 Ch. 98.
 (g) (1884) 23 Ch. D. 482.
 (h) (1898) 2 C. W. N. 750.

S. 3 of fraud as laid down in the cases of *Evans v. Bicknell* (i), *Martinez v. Cooper* (j), *Farrow v. Rees* (k), has not been approved or followed in recent cases and the true rule that regulates the postponement of "legal" mortgages in England was laid down by Lindley, M.R., in *Oliver v. Hinton* (l). His Lordship held that "to deprive a purchaser for value without notice of a prior encumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior encumbrancer of his priority." And the same was in substance stated to be the meaning and effect of the rule for postponement in this country on the ground of "gross neglect" as used in section 78 of this Act by the Calcutta High Court when that term came up for interpretation (m). Wilful departure to avoid knowledge of vendor's title or the earlier title-deeds (n) or that the title-deeds are with another (o) or whether they are with vendor who so asserts (p) or avoiding information obtainable by search of public records (q), wilful blindness to a vendor's lien apparent on the face of the deed (r) unless the vendor by acknowledgment of the whole purchase money voluntarily arms the purchaser with means of dealing with the estate free from every shadow of encumbrance (s), omission to inquire into the facts disclosed in the recital and deeds or whether there are tenancies or easements (t), or to investigate leasehold title for onerous (u) restrictive (v) covenants, or to inquire into the mortgagor's equity of redemption, or into the validity of transfer or to verify the abstract, which is no evidence of title, or whether the deeds are subject to surety bond, or that the vendor or mortgagor is under disability or the vendor being a guardian has failed to give security, are examples of gross negligence. Further, failure to examine earlier title-deeds (w), turning away from information that another is in actual possession is gross negligence (x), but not omission to investigate title of (y), or make inquiry as to access of light to the adjoining property (z), or to investigate deeds which are neither directly nor presumptively connected with the property (a). The defendant was the prior purchaser of an unrecognized portion of a *bhag* from their owner and entered into possession. The plaintiffs, who were subsequent purchasers of the whole *bhag*, were sued for possession from the defendant being purchasers without notice of the defendants' sale and having been assured by the owner and the *talati* that the defendant was the tenant, it was held that abstention from inquiry from the defendant was not wilful or gross negligence amounting to constructive notice in the absence of evidence that the plaintiffs deliberately refrained from going to the defendant because they doubted the information of the vendor and the *talati*

(i) (1801) 6 Ves. 174, 31 E. R. 998.

(j) (1826) 2 Russ. 193, 38 E. R. 309.

(k) (1840) 4 Beav. 18, 49 E. R. 243.

(l) (1899) 2 Ch. 264, 274.

(m) *Lloyds Bank, Ltd. v. P. E. Gurdar & Co.* (1929) 56 Cal. 868.

(n) *Chaturbhuj v. Mansukhram* (1925) 27 Bom. L. R. 73.

(o) *Imperial Bank of India v. U. Rai Gyaw* (1924) 51 Cal. 86, 50 I. A. 283; *Kshetra Nath v. Harasukdas*, A. I. R. (1927) Cal. 538.

(p) *Oliver v. Hinton* (1899) 2 Ch. 264.

(q) See notes to explanation I.

(r) *S. Akwar Chetty v. K. Jagannatha* (1926) 54 M. L. J. 109; *Peto v. Hammond* (1861) 30 Beav. 495, 54 E. R. 981; *Tekilram v. Kashibai* (1909) 33 Bom. 53.

(s) *Rimmer v. Webster* (1902) 2 Ch. 163; *Lickbarrow v. Mason* (1787) 5 Term Rep. 367, 2 E. R. 39; *Rice v. Rice* (1854) 2 Drew. 78, 61 E. R. 646.

(t) *Re. Alms Corn Charity* (1901) 2 Ch. 750;

Nottingham Patent Brick and Tile Co. v. Butler (1886) 16 Q. B. D. 778.

(u) *Rees v. Berridge* (1888) 20 Q. B. D. 523; *Re. White and Smith's Contract* (1886) 1 Ch. 637; *Molyneux v. Hawtrey* (1903) 2 K. B. 487.

(v) *Rogess v. Hosegood* (1900) 2 Ch. 338; *Rowell v. Satchell* (1903) 2 Ch. 212; *Osborne v. Bradley* (1903) 2 Ch. 446; *Elliston v. Reacher* (1908) 2 Ch. 374; *Sobey v. Sandbury* (1913) 2 Ch. 513.

(w) *Peto v. Hammond* (1861) 31 L. J. Ch. 354, 54 E. R. 981; *Morland v. Cook* (1868) L. R. 6 Eq. 252; *Oliver v. Hinton* (1899) 2 Ch. 264; *Rajaram v. Krishnasami* (1893) 16 Mad. 301; *Bank of Bombay v. Suleman Somji* (1909) 33 Bom. 1, 35 I. A. 139.

(x) See notes on explanation II.

(y) *Chaturbhuj v. Mansukhram* (1925) 27 Bom. L. R. 73.

(z) *Allen v. Seckhan* (1879) 11 Ch. D. 790.

(a) *West v. Reid* (1843) 2 Hare 249, 67 E. R. 104

as to record of rights (a¹). Observing informality in the attestation of a will is not constructive notice of its being forged (b).

Ss. 3-4

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 ;

Enactments relating to contracts to be taken as part of Contract Act.

And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

Enactments relating to contracts.—These are, according to section 4, to be taken as part of the Contract Act, 1872, but not *vice versa*. They are scattered over the Act, being such portions thereof as relate to transactions antecedent to actual transfer or to conduct vitiating a transfer or to the rights and obligations of the parties resulting on a transfer (c).

Alteration in the section.—The figures " 1877 " in paragraph two were substituted by the figures " 1908 " by section 5 of Act 20 of 1929. It will be observed that in the cases in which the controversy arose over the second paragraph " 1908 " was referred for " 1877 " even prior to the amendment therein. Such a reference was sanctioned by the General Clauses Act 10 of 1897, section 8.

The second paragraph.—This paragraph had no existence prior to 1885. According to the law as it then stood, while a transfer of immoveable property of a value less than Rs. 100 could be effected without registration, such a transfer by virtue of paragraph 3 of section 54 of this Act could only be by a registered instrument or by delivery of the property so that where a transaction was not effected by delivery, registration was compulsory while under section 17 of the Registration Act its registration was optional. To rectify this inconsistency this paragraph was added by the Amending Act 3 of 1885 making paragraphs 2 and 3 of section 54 supplemental to the Indian Registration Act, 1877. This amendment led to further discussion in the various High Courts as to whether the sections of the Transfer of Property Act enumerated in this paragraph fell within the comprehensive and stringent prohibition of section 49 of the Registration Act. The effect of the decisions of the Madras (d) and Allahabad (e) High Courts and of one of the Judges of the Bombay High Court (f) was that any unregistered deed of transfer of immoveable property below the value of Rs. 100 would not only not be effectual to transfer the property but would not fall within section 49 and could be admitted in evidence of the transaction. By clause (a) of sub-clause (3) of section 10 of Act 21 of 1929 section 49 of the Registration Act has been amended subjecting documents registrable under the provisions of the Transfer of Property Act under the same disability as those under the Registration Act. In the Madras case an unregistered lease for a period of less than one year, required to be registered under section 107 of the Transfer of Property Act but not under section 17 of the Registration Act, was

(a) *Zaverchand v. Jesang* (1931) 33 Bom. L. R. 499.

(b) *Jones v. Powles* (1834) 3 L. J. Ch. 210, 40 E. R. 222.

(c) *Dip Narain Singh v. Nakshar Prasad* (1930)

52 All. 338 ; *Tatia v. Babaji* (1898) 22 Bom. 178.

(d) *Rama Sahu v. Gowro Ratho* (1920) 44 Mad. 55.

(e) *Sohan Lal v. Mohan Lal* (1928) 50 All. 986.

(f) *Dawal v. Dharma* (1917) 41 Bom. 550.

S. 4

admitted in evidence to prove the nature of the evidence under the instrument. Among the specified sections in this paragraph, section 123 requires that a gift of moveable property may be effected either by registered instrument or delivery while under section 17 of the Registration Act a gift of moveable property does not need registration. As applicable to mortgages the section does not in any way do away with the effect of section 59 which expressly provides that in certain areas a mortgage can be only by means of a written instrument (g), nor does it apply to a charge under section 100 (h).

“*Dam-dupat*.”—A rule of Hindu Law that the amount of interest recoverable at any one time cannot exceed the principal (i) though you may take any amount as interest by degrees. It does not apply when the debtor is other than a Hindu. It has nothing to do with any legality or illegality of any contract but it is rather a rule of limitation, which applies to all loans, whether unsecured or secured, on moveable or immoveable property (j). But the Madras High Court held that a claim for interest exceeding principal was maintainable after the repeal of Regulation XXXIV of 1802 and that as a rule of Hindu Law it was not binding in the mofussil since the passing of Act XXVIII of 1855 (k). It does not, however, apply where the mortgagee has been placed in possession and is accountable for profits received by him as against the principal and interest due (l), but where these profits are, by the terms of the bond, received for only a portion of the interest on the mortgage debt, the general rule of *Dam-dupat* will govern such mortgage accounts (m). The Act for the repeal of the Usury Laws (XXVIII of 1855) which deals exclusively with the rate of interest is not inconsistent with the rule in question (n). It is in force in the Presidency of Bombay (o) and in the town of Calcutta (p) but not in other parts of the Presidency of Bengal (q) on the ground adopted by the Madras High Court, where it was considered not binding, as aforesaid, and abrogated by the Transfer of Property Act (r), overlooking the provision of section 4 of the Transfer of Property Act taken with section 37 of the Contract Act (s). The principle is restricted to transactions where the contract is between Hindus (t). It ceases to operate if the original debtor ceases to be a Hindu by transfer or otherwise. In Bombay the original debtor alone need be a Hindu. But if the Hindu debtor's interest is transferred to a Mahomedan the stop is removed and interest which may have ceased begins to run again (u). Where the original debtor is a Mahomedan the rule does not apply though the original creditor be a Hindu not even if the debt be transferred to a Hindu (v). It was so held where the original mortgagor, a

- (g) *Gurdas v. Punjab-Sind Bank, Ltd.*, A. I. R. (1933) Lahore 972.
 (h) *Maneckchand v. Ganeshlal* (1933) 35 Bom. L. R. 588.
 (i) *Narayan v. Salvaji* (1872) 9 Bom. H. C. 83; *Dhondu v. Narayan* (1863) 1 Bom. H. C. 47; *Ram Lal v. Haran* (1869) 3 Beng. L. R. 130.
 (j) *Nathubhai v. Mulchand* (1868) 5 Bom. H. C. 196; *Narayan v. Salvaji* (1872) 9 Bom. H. C. 83; *Narayan v. Gangaram* (1868) 5 Bom. H. C. 157 *contra*; *Sundarabai v. Jayavant* (1900) 24 Bom. 114.
 (k) *Annaji v. Ragubai* (1871) 8 Mad. H. C. 400.
 (l) *Sundarabai v. Jayavant* (1900) 24 Bom. 114; *Dhondshet v. Ravji* (1898) 22 Bom. 86; *Gopal v. Gangaram* (1896) 20 Bom. 721; *Nathubhai v. Mulchand* (1868) 5 Bom. H. C. 196 (199).
 (m) *Sundarabai v. Jayavant* (1900) 24 Bom. 114.
 (n) See *Nobin Chunder v. Romesh Chunder* (1887) 14 Cal. 781 (and cases cited there).

- (o) *Dhondu v. Narayan* (1863) 1 Bom. H. C. 47; *Narayan v. Salvaji* (1872) 9 Bom. H. C. 83; *Khusalchand v. Ibrahim* (1866) 3 Bom. H. C. 23; *Ramkrishnabhai v. Villoba* (1866) 3 Bom. H. C. 25.
 (p) *Kunja Lal v. Narasamba* (1915) 42 Cal. 826; *Nobin Chunder v. Romesh Chunder* (1887) 14 Cal. 781.
 (q) *Het Narain v. Ram Dein* (1883) 9 Cal. 871; *Surjya Narain v. Sridhany Lall* (1883) 9 Cal. 825; *Deen Doyal v. Koylash Chunder* (1876) 1 Cal. 92.
 (r) *Madhwa v. Venkataramanjulu* (1903) 26 Mad. 662.
 (s) *Kunja Lal v. Narasamba* (1915) 42 Cal. 826.
 (t) *Nobin Chunder v. Romesh Chunder* (1887) 14 Cal. 781.
 (u) *Ali Saheb v. Shabji* (1897) 21 Bom. 85.
 (v) *Harilal v. Nagar* (1897) 21 Bom. 38; *Dawood v. Vullubhdas* (1894) 18 Bom. 227; *Nanchand v. Bapusaheb* (1879) 3 Bom. 131.

Mahomedan, transferred the lands to a Hindu. There the security being a san-mortgage, no question of personal liability arose (*w*). Capitalisation of interest is supported by texts of Codes of Hindu Law, but in no case is it suggested that arrears of interest cannot by a subsequent adjustment, be capitalised (*x*). In this state of the authorities the capitalisation clause in an English mortgage cannot override the rule.

S. 4

(*w*) *Harilal v. Nagar* (1897) 21 Bom. 38.

| (*x*) *Sukalal v. Bapu* (1900) 24 Bom. 305.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) *Transfer of Property, whether moveable or immoveable.*

S. 5 5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

"Transfer of property" defined.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

Additions to the section.—In paragraph 1, the words "or to himself" were added by section 6 of the Transfer of Property Amendment Act, 1929 (20 of 1929), in order to make it clear that a transfer can be made by a person to himself as when he makes a settlement or trust in which he constitutes himself a trustee. Paragraph 2 has been added by way of explanation as to what is included in the words "living person" by the same section.

Transfer of property—its ingredients.—Is the purpose of an act by which

(a) Property is conveyed

(i) In present or in future

(ii) By a living person

(1) To one or more other living persons

(2) or to himself

(3) or to himself and one or more other living persons.

The definition of transfer of property given in the section includes a transfer purporting to be made by deed of appointment (y). In England it has been held that "property" and "power" are two distinct ideas and that "power" is not "property" within the meaning of that word as used in law (z).

Transfer of property.—An actionable claim constitutes property (a). It has been doubted whether the definition in the section applies to the term "transfer" used in section 130 (b). It is often used as a convertible term with "alienation,"

(y) *Joshua v. Alliance Bank of Simla* (1895) 22 Cal. 185, 202.

(z) *Re. Armstrong, Ex-parte Gilchrist* (1886) 17 Q. B. D. 521; *Stamp Duties Commissioner v. Stephen* (1904) A. C. 137; *Tremayne v. Rashlingh* (1908) 1 Ch. 681.

(a) *Rudra Perkash v. Krishna Mohun* (1887) 14 Cal. 241; *Muchiram v. Ishan Chunder* (1894) 21 Cal. 568, 586.

(b) *Bhopatrao v. Shri Ramchandra, A. I. R.* (1928) Nag. 469.

"conveyance," and "assignment," a distinction based on the tenure of the property. The word is used in its generic signification comprehending all the species of contracts which pass real right in property from one person to another (c). It does not apply to the Presidency Town Insolvency Act (d). The mere fact that documents of title were delivered does not either show or constitute a transfer of the property (e). The phrase excludes a partition according to the Allahabad High Court (f) though a contrary view is adopted by the Madras (g) and Calcutta (h) High Courts. An exchange under section 118 of the Act is a transfer of property but a compromise is not (i), nor is the creation of an easement (j). Similarly, recital of acts done (k) and entries in records of Survey or of the Municipality or the Police Department (l) do not supply the conditions of the law of transfer. The Bombay High Court has held that a legal presumption arose on the passing of the *rajinama* and *kabuliyat* that a transfer of ownership was intended to be effected and that accordingly it operated just as if it was a sale to extinguish the equity of redemption. The earlier cases (m) did rather go that way but later decisions took a contrary view (n).

Property.—There is no definition of this term in the Act. It includes both moveable and immoveable property. The enactment must be read subject to the interpretation required by the General Clauses Act, 1 of 1868. According to section 2, clause 34 of that Act, "moveable property" has been defined to mean property of every description except immoveable property and the latter, according to sub-clause 25, is said to include benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. The Act itself in section 3 excludes from the phrase "immoveable property," standing timber, growing crops or grass. But section 6 dealing with the subject of transfer, excludes what according to the Act would not be property and thereby indicates what the enactment considers to be the meaning of property. Under English Law the main distinction is between real and personal property. "It is generally understood that those things are a man's property which are the object of ownership on his part The owner in possession of a thing has a right to exclude all others from the possession or enjoyment of it This right to maintain or recover possession is an essential part of ownership Ownership may be absolute or else limited or restricted. Absolute ownership would seem to include the right of free as well as right of exclusive enjoyment. . . . Another incident of absolute ownership is free power of disposition and it is essential to an absolute ownership that it should be of indeterminate duration. The word property is mainly used by lawyers (1) as denoting right

(c) *Gopal v. Badri* (1888) 5 All. 121; *Mata Din v. Kazim Husain* (1891) 13 All. 432.

(d) *In re Mahomed Hasham & Co.* (1922) 24 Bom. L. R. 861.

(e) *Kalusu v. Madhorao*, A. I. R. (1926) Nag. 357.

(f) *Pohkar v. Dulari* (1930) 52 All. 716, 727.

(g) *Rasa Goundan v. Arunachela Goundan*, A. I. R. (1928) Mad. 577.

(h) *Atrabanessa Bibi v. Safatullah Mia* (1916) 43 Cal. 504.

(i) *Barati Lal v. Salik Ram* (1916) 38 All. 107; *Basangowda v. Irgawdatti* (1923) 47 Bom. 597; *Krishna Tanhaji v. Aba Shetti* (1910) 34 Bom. 139; *Pohkar v. Dulari* (1930) 52 All. 716, 727; *Khunni Lal v. Gobind* (1911) 33 All. 356, 38 I. A. 87; *Hanuman v. Abbas Bandi* (1929) 4 Luck. 452; *Ram Gopal v. Tulshi Ram* (1929) 51 All. 79; *Hiran Bibi v. Lohan Bibi* (1914) 18 C. W. N.

929.

(j) *Sital Chandra v. Delanney* (1916) 20 C. W. N. 1158.

(k) *Immudipattam v. Periya Dorasami* (1901) 24 Mad. 377, 28 I. A. 46.

(l) *Kartar Singh v. Mst. Mehr Nishan* (1935) 16 Lah. 313; *Muhammad Sulaiman v. Sakina Bibi* (1922) 44 All. 674; *Merwanji Muncherji Cama v. The Secretary of State for India in Council* (1915) 19 C. W. N. 1056 P. C.; *Kumar Raj Krishna v. Barabani Coal Concern, Ltd.* (1934) 60 C. L. J. 477.

(m) *Venkaji Narayan v. Gopal Ramchandra* (1914) 39 Bom. 55; *Imam Valad Ibrahim v. Bhau Appaji* (1917) 41 Bom. 510; *Narso Ramaji v. Nagava* (1918) 42 Bom. 359.

(n) *Chandanmal v. Bhaskar* (1919) 22 Bom. L. R. 140; *Rachappa v. Ningappa* (1925) 49 Bom. 847.

S. 5 of ownership, (2) as denoting the object of the right of ownership, and (3) as denoting valuable things . . . things which can be turned to money or assessed at a money value (o).” Further, English Law classifies property as consisting of corporeal or incorporeal things, a distinction observed in section 54 of our Act which refers to tangible immovable property or intangible thing. It also includes every interest in property in present or in future. In short, everything is included in this term other than those excepted in section 6 of the Act. The property must be in existence. Of future property there can be no transfer, but a contract to transfer property which is to come into existence in future is a valid transaction enforceable by Courts of Equity (p). In *Collyer v. Isaacs* (q), Jessel, M.R., remarked, “A man can contract to assign property which is to come into existence in the future and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property and the contract to assign then becomes a complete arrangement.” The same view was taken where G. executed a lease in favour of J. and stipulated that J. was to defray costs of litigation for redeeming the property under lease and that if he succeeded in redeeming it, he was to obtain possession of it and was to pay rent to G. from the date of such possession, and it was held that such a document could not transfer the property leased but was only a contract to be performed in future and upon the happening of a contingency (r). The above view is supported by the decision of the Privy Council in the cases of *Rajah Sahib Perhlad Sein v. Doorga Persaud Tewarree* (s) and *Ranee Bhobo Soondree v. Issur Chunder Dutt* (t). Recently the Calcutta High Court held that in India hypothecation of moveables existing on the premises at the time and also of moveables which may be subsequently acquired and brought there is valid (u).

Living person.—These words are used as the transfer under the Act must be by a deed *inter vivos* and not by will. According to the section, both the transferor and the transferee must be living, which includes under section 13 a person not in existence at the date of the transfer. The explanation to the section further includes in the phrase a company or association or body or individuals whether incorporated or not. So does also “person” according to the General Clauses Act, 1897.

The Almighty is not a living person and a gift to Him does not require registration (v). Though an idol is considered by a fiction of law as a juristic person clothed for some purposes with rights of persons yet a juristic person is not a living person for all purposes (w). A Hindu idol is a “juristic entity.” It has a juridical status with power of suing and being sued (x). It is conceived as a living being and is treated in the same way as a master of the house would be treated by his humble servant (y). The provisions of section 123 of the Transfer of Property Act apply also to gifts through the intervention of a trust and therefore title in an endowment property passes to the idol which must be treated as a juristic person on the execution of the deed of endowment (z).

(o) Williams on Real Property, 24th Ed., pages 1-3.

(p) *Baldeo Parshad v. Miller* (1904) 31 Cal. 667; *Clements v. Matthews* (1883) 11 Q. B. D. 808; *Holroyd v. Marshall* (1862) 10 H. L. 191; *Bandsidhar v. Sant Lal* (1887) 10 All. 133; *Misri Lal v. Mozhar Hossain* (1886) 13 Cal. 262.

(q) (1881) 19 Ch. D. 342.

(r) *Mohendra Nath v. Kali Proshad* (1903) 30 Cal. 265.

(s) (1869) 12 M. I. A. 286, 2 Beng. L. R. 111.

(t) (1872) 11 Beng. L. R. 36.

(u) *H. V. Low & Co. v. Pulinbiharilal* (1932) 59 Cal. 1372.

(v) *Narasimha v. Venkatalingum* (1927) 50 Mad.

687; *Harihar v. Gurugranth*, A. I. R. (1930) Pat. 610.

(w) *Narasimha v. Venkatalingum* (1927) 50 Mad. 687; *Tammireddy v. Gangireddy* (1922) 45 Mad. 281; *Ramalinga v. Sivachidambara* (1919) 42 Mad. 440; *Pallayya v. Ramavadhanulu* (1903) 13 M. L. J. 364.

(x) *Pramatha Nath v. Pradyumna* (1925) 52 Cal. 809, 52 I. A. 245; *Jodhi Rai v. Basdeo Prasad* (1911) 33 All. 735; *Bhopatrao v. Shri Ramchandra*, A. I. R. (1926) Nag. 469.

(y) *Rambrama v. Kedar Nath* (1922) 36 C. L. J. 478.

(z) *Shaukat Begam v. Shri Thakurji*, A. I. R. (1931) Oudh 14.

In *Bhupati Nath v. Ram Lal* (a), a Full Bench of the Calcutta High Court, dealing with a Hindu will, held that the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it does not apply to a bequest to the trustees for the establishment of an image and the worship of a Hindu deity after the testator's death nor does it make such a bequest void. The Full Bench, after examining the Hindu texts and authorities, observed that according to strict Hindu juridical notion there can be no gift in favour of the gods for in the case of deities there cannot be any acceptance and therefore necessarily any gift.

In present or in future.—These words mean that the conveyance may be one which takes effect immediately on execution or at some distant date, that is to say, the interest of the transferee arises immediately on the execution of the document or at a date fixed by the parties. In *Re. Mahomed Hasham & Co.* (b), Marten, J., in holding that section 5 did not apply to the Presidency Town Insolvency Act, observed: "I am not absolutely sure what the words 'in present or in future' refer to. I should have thought grammatically they refer to property." In *Shumsuddin v. Abdul Husein* (c), Jenkins, C.J., remarked, "there is no definition in the Act of 'convey' or of 'property,' but it is to be noticed that a transfer means a conveyance of property not only in present but also in future.

Or to himself.—These words have been added by the Amending Act. Prior to the amendment, the words "Transfer of Property Act" had been defined in the section as to exclude a conveyance or delivery of property by a man to himself. The change has been made to enable a person to transfer property to himself as trustee on the execution of a settlement or trust of his own property (d). The authorities, however, prior to the amendment were against a person transferring property to himself as when he is a trustee or executor conveying property to himself as beneficiary.

6. Property of any kind may be transferred, except
What may be transferred. as otherwise provided by this Act or by
 any other law for the time being in force.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(a) (1910) 37 Cal. 128.

(b) (1922) 24 Bom. L. R. 861.

(c) (1907) 31 Bom. 165.

(d) *Bai Mahakore v. Bai Mangla* (1911) 35 Bom. 403.

S. 6 (dd) *A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.*

(e) A mere right to sue...cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, *naval*, air-force and civil pensioners of Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee.

(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

Amendments.—The amendments, additions and omissions made in this section are the following :—

Clause (dd) was inserted by section 7 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929). In clause (e) the words "for compensation for a fraud or harm illegally caused" were omitted by section 3 (i) of the Transfer of Property Act (2 of 1900). The words "air force" in clause (g) were inserted by section 2 of Schedule 1 of the Repealing and Amending Act of 1927 (10 of 1927). In clause (h) the words "for an illegal purpose" were omitted and the words "for unlawful object or consideration" within the meaning of section 23 of the Indian Contract Act, 1872, were inserted instead of them by section 3 (ii) of the Transfer of Property Act, 1900 (2 of 1900). Clause (i) was added by section 4 of the Transfer of Property Act (1882) Amendment Act, 1885 (3 of 1885).

The section.—The section deals with what may be the subject of transfer under the Act. It proceeds on the maxim "*expressio unius exclusio alterius*" in that every property except those specified in the section may be transferred. The word property as here used includes interest in property. As already seen in section 5 under the caption "property" that only is a man's property which is the object of ownership on his part accompanied by possession or enjoyment of it to the exclusion of all others and giving him a free power of disposition. Where any one of the three ingredients are not absolute in their nature the usual term "property" used to denote the object or ownership is not used but the phrase "interest in property" is used, thereby connoting that the essential elements of property are

wanting and that the right is restricted or limited in some sense, hence the right of a mortgagee in property is denoted by the word 'interest' in property. So also is the case of a lessee, co-sharer or co-owner or a Hindu coparcener or a Hindu widow whose right to maintenance is made chargeable on the property.

S. 6

Code of Civil Procedure, 1908.—Section 60 of the Code gives particulars of properties not liable to attachment or sale. No sale can take place without an attachment but the decisions under this section of the Code cannot be appropriately applied in dealing with properties declared to be non-transferable under section 6 of the Transfer of Property Act. Much under the law cannot be sold in execution which is capable of being dealt with under a voluntary transfer (e). The prohibitions against attachment in section 60 of the Code and the prohibition against transfer in section 6 of the present Act rest on grounds of public policy. Prohibition against attachment so far as it relates to some properties mentioned in section 60 of the Code is not intended to interfere with the right of the owner to effect private alienations of those properties (f).

What is property.—According to Case Law the following instances of property may be quoted :—

The interest of a person's holding on which he has planted a grove (g). A Hindu religious endowment cannot be sold or permanently alienated though the income may be temporarily pledged for necessary purposes, such as repairs of the temple (h). A sale by Receiver of the property of an insolvent when his claim to it is in dispute is void (i). In the term "property" may be included a mortgagee's rights of his mortgagor (j). The equity of redemption (k), a lease from year to year, a *hat*, a vested remainder, a reversion expectant on the determination of a lease, a Hindu idol (l), a contingent remainder, an estate of an adopted son postponed during the life of the widow (m), vested right in income and contingent right in corpus of settled property (n). Right to receive offerings made at a temple independent of an obligation to render services involving qualifications of a personal nature is property (o). Remuneration which Maha Brahmins receive for services rendered at Hindu funerals is property (p). Offerings made at Mahomedan shrine (q) or in a Hindu temple unconnected with personal service is property (r). Right of worship is property but has not all the incidents of property (s). A distinction must be drawn between cases where emoluments are attached to a priestly office and where offerings are made to a deity and the persons who receive the same are not to render services of a personal nature as consideration for receipt of the offering. The former right is not ordinarily transferable while the latter is (t). A document by which a Hindu widow consents to give possession of the property to the reversioner is not

(e) *Brahmadeo v. Harjan Singh* (1898) 25 Cal. 778.

(f) *Palikandy v. Krishnan Nair* (1917) 40 Mad. 302.

(g) *Lal Baijnath v. Chandrapal* (1925) 47 All. 55; *Mahomed Ali v. Maderisak*, A. I. R. (1927) Oudh 297; *Sheo Mangal v. Jagan Lohar*, A. I. R. (1930) All. 377.

(h) *Collector of Thana v. Hari Sitaram* (1882) 6 Bom. 546.

(i) *Nasir Hasan v. Matin-uz-zamin*, A. I. R. (1925) Oudh 299.

(j) *Ram Shankar Lal v. Ganesh Prasad* (1907) 29 All. 385.

(k) *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 33; *Mata Din v. Kasim Husain* (1891) 13 All. 432.

(l) *Golam v. Parbati* (1909) 36 Cal. 665; *Surendra*

Narain v. Bhai Lal Thakur (1895) 22 Cal. 752.

(m) *Balwant Singh v. Joti Prasad* (1918) 40 All. 692.

(n) *Ma Yait v. The Official Assignee* (1930) 32 Bom. L. R. 125 (1930) 8 Rang. 8, 57 I. A. 10.

(o) *Balmukund v. Tula Ram* (1928) 50 All. 394; *Bhagwan Deen v. Billeshur* A. I. R. (1937) Oudh. 15.

(p) *Sukh Lal v. Bishambhar* (1916) 39 All. 196.

(q) *Ahmad-ud-din v. Ilahi Baksh* (1912) 34 All. 465.

(r) *Balmukund v. Tula Ram* (1928) 50 All. 394.

(s) See *Nitya Gopal v. Nani Lal* (1920) 47 Cal. 990, 1001.

(t) *Balmukund v. Tula Ram* (1928) 50 All. 394.

- S. 6 a transfer of property (u). Whatever is compulsorily registrable under section 17 of the Indian Registration Act, 1908, would be property. A mortgage of a chargee's rights is valid in law. The right to hold immovable property as security for repayment of a loan and the further rights corresponding to the rights of a mortgagee given to a chargee are property within the meaning of sections 5 and 6 (v). A deed of relinquishment does not confer a title and that title to land cannot pass by admission when the statute requires a deed and so parties cannot effect by release what could only be effected by a conveyance (w).

What may be transferred.—According to the general law all property is transferable under this section (x) unless there is some legal restriction to the contrary (y). Section 6 makes property of any kind alienable subject to the exception set out which cannot be supposed to be selected by reason of the future character of the chances. The truth is that an attempted conveyance of non-existent property may, when made for consideration, be valid as a contract and when the object comes into existence equity fastens upon the property and the contract to assign becomes a complete assignment. This was precisely the point of view of the Judicial Committee in *Budhoo Singh v. Perhlad Sein* (z). The principle underlying *Holroyd v. Marshall* and *Tailby v. Official Receiver* makes it clear that an instrument which purports to be a transfer of a chance or possibility mentioned in section 6, clause (a), can as such have no operation. Thus when an instrument of mortgage was executed by a person next in succession it was ruled that a mortgage suit could not be instituted against him after his succession (a). To the same effect was the decision in *Nund Kishore v. Kanee Ram* (b). Further illustrations of this principle may be found in the undermentioned cases (c).

Distinction between sections 6 (a) and 43.—Transfers which come within the purview of section 6 (a) are void *ab initio* and do not include the case of a person who transfers property which he erroneously believes to be his own. The latter transfers are governed by section 43 (d).

Interests vested or contingent.—In dealing with clause (a) the distinction between vested interest, contingent interest and *spes successionis* has to be noted. An estate or interest is vested as distinguished from contingent, either when enjoyment of it is presently conferred or when its enjoyment is postponed, but the time of enjoyment will certainly come to pass; in other words, an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed, or in the case of a gift to take effect in future, it cannot be ascertained in the meantime whether there will be anyone to take the gift; in other words, an estate or interest is contingent when the right of enjoyment is to accrue, on an event which is dubious or uncertain. And as regards certainty, the law does not regard as uncertain the event of a person attaining a given age or of the death of somebody

- (u) *Kalka Singh v. Jagwant Kunwar*, A. I. R. (1926) Oudh 89.
 (v) *Mohan Singh v. Sewa Ram*, A. I. R. (1924) Oudh 209.
 (w) *Munshi Gobind v. Lal Jagdeep*, A. I. R. (1924) Pat. 185; *Jadunath v. Ruplal*, (1906) 33 Cal. 987; *Dharam Chand v. Mouji Sahu* (1912) 16 C. L. J. 436.
 (x) *Lal Baijnath v. Chandrapal* (1925) 47 All. 55.
 (y) *Mahomed Ali v. Maderisah*, A. I. R. (1927) Oudh 297.
 (z) *Katar Singh v. B. Bishamber* A. I. R. (1929)

- All. 578.
 (z) (1869) 12 M. I. A. 292, 307.
 (a) *Ramasami v. Ramasami* (1906) 30 Mad. 255.
 (b) (1906) 30 Mad. 255.
 (c) *Laliteswar v. Rameswar* (1909) 36 Cal. 481; *Hargovan v. Baijnath* (1909) 32 All. 88; *Dhoorjeti v. Dhoorjeti* (1906) 30 Mad. 201; *Pindiprolu v. Pindiprolu* (1907) 30 Mad. 488; *Abdool v. Goolam* (1905) 30 Bom. 304.
 (d) *Shyam Narain v. Mangal Prasad* (1935) 57 All. 474; *Syed Bismilla v. Manulal*, A. I. R. (1931) Nag. 51.

beyond which his enjoyment is postponed; because if he lives long enough the event is sure to happen. A *spes successionis* is merely an expectation or hope of succeeding to the property; a chance or possibility which may be defeated by an act of somebody else (e). Transfer of an estate vested (f) or contingent (g) or where it consists of a vested right in income and contingent right in corpus of settled property (h) is not obnoxious to the rule in this clause.

Clause (a)—Expectancies or Possibilities.

Heir-apparent.—An heir-apparent is one whose right to inherit is indefeasible provided he outlives the ancestor.

Legacy.—This is a gift by will of property. It may be general, specific or demonstrative (i). Residue is not legacy (j).

The chance.—Known to English Law as *spes successionis*, it is not capable of valid assignment and any purported assignment thereof operates only by way of covenant which will not be enforced in favour of a volunteer (k). A testator bequeathed a sum of money to his daughter for life and in case she died without issue for her next of kin. During the lifetime of the daughter her mother as presumptive next of kin, by a voluntary deed, assigned her expectant interest in reversion to the husband. Held, on the death of the daughter without issue, the assignment operated only as a covenant and being voluntary was not enforceable (l). A *spes successionis* is not a title to the property by English Law and confers no interest in property (m).

Bare expectation of future right.—There is a distinction between an interest that has arisen and is represented and an interest that has not arisen and that never may arise but with regard to which there is a remote possibility that the event which has not occurred, and upon which it is made to hang, may hereafter occur. The latter is not an interest, it is not a right, it is nothing more than a bare expectation of a future right. The expectation of a future interest, or rather of a future event that may give an interest, is not a thing which would justify a Court of Equity in entertaining a suit at the instance of a party having that and nothing more. A testator by his will bequeathed a legacy to a specified nephew on his marrying a specified niece of the testator to be held in trust for him and after his decease for his eldest or only child who should attain twenty-one, directing that if he did not marry the particular niece the bequest was not to take effect. The nephew married, with the testator's assent, a person other than the niece. He died leaving the nephew, nephew's wife and son of the nephew and also the named niece who was unmarried. Held, the possibility of the nephew marrying the niece was not sufficient to entitle the son to file a bill to have his share secured (n). The words "in expectancy" seem to have been taken from the Infants Settlements Act, 1855

(e) *Basantakumar Basu v. Ramshankar Ray* (1932) 59 Cal. 859.

(f) *Balwant Singh v. Joti Prasad* (1918) 40 All. 692; *Basantakumar v. Ramshankar* (1932) 59 Cal. 859; *Ma Yait v. Mahomed Ebrahim*, A. I. R. (1927) Rang. 165 (1927) 5 Rang. 145; *Shujaul v. Muhammad* (1927) 25, A. L. J. 41; *Umesh Chandra v. Zahur Fatima* (1891) 18 Cal. 164, 176, 17 I. A. 201.

(g) *Phulvanti v. Janeshar* (1924) 46 All. 575, 592; *Ma Yait v. Official Assignee* (1930) 32 Bom. L. R. 125 (1930) 8 Rang. 8, 57 I. A. 10.

(h) *Ma Yait v. The Official Assignee* (1930) 32 Bom. L. R. 125 (1930) 8 Rang. 8, 57 I. A. 10.

(i) See Indian Lunacy Act, 1925, sections 142 and 150.

(j) *Ward v. Grey* (1859) 29 L. J. Ch. 75.

(k) *Re. Ellenborough, Towry Law v. Burne* (1903) 1 Ch. 697.

(l) *Meek v. Kettlewell* (1843) 13 L. J. Ch. 28, 41 E. R. 662.

(m) *Re. Parsons, Stockley v. Parsons* (1890) 45 Ch. D. 51; *Allcard v. Walker* (1896) 2 Ch. 369; *Re. Mudge* (1914) 1 Ch. 115; *Re. Green, Green v. Meinall* (1911) 2 Ch. 275; see The Code of Civil Procedure 1908, sec. 60 (m).

(n) *Davies v. Angel* (1862) 4 De. G. F. & J. 524, 45 E. R. 1287; *Bright v. Tyndall* (1876) 4 Ch. D. 189; *Clowes v. Hilliard* (1876) 4 Ch. D. 413.

- S. 6 (18 and 19 Vict. c. 43), s. 1. *In re Johnson* (o) affords an interpretation of the words as used in that section. They are to be found in Key and Elphinstone's Precedents in Conveyancing, 9th Ed., Vol. II, p. 577.

Possibility.—At law a possibility could not be assigned though it might be released (p). A person attempting to deal with it has no present interest. He has an expectation of the possibility of a future event which if it occurs may give birth to an interest (q). Any other possibility of a like nature referred to in the section is a possibility of a nature akin to the two chances expressly mentioned. The possibility in clause (a) is “mere,” that is, a bare or naked possibility such as the hope of an inheritance entertained by the heir distinguished from a possibility coupled with an interest, such as a contingent remainder, executory devise springing or shifting use. The latter class may with propriety be denominated contingent interests, the former mere expectancies, inasmuch as a possibility coupled with an interest is more than a possibility and is a present devisable interest (r). While the expectancy of an heir-apparent during the lifetime of his ancestor is less than a possibility, being but a mere hope or anticipation. It is indisputable law that no one can have any estate or interest at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next of kin; during the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property *nemo est hæres viventis*. This doctrine is not peculiar to English jurisprudence. The right to receive offerings from pilgrims resorting to temples or shrines is inalienable because “the chance that future worshippers will give offerings is a mere possibility” (s). Where the right to receive offerings cannot be separated from the duty of officiating at the worship the law disfavours the transfer of such emoluments (t). An assignment of rent does not operate in respect of future possible leases that may come into existence as a result of renewal (u). The right of a vendor of immoveable property to the purchase money payable on execution of the conveyance is a mere possibility (v).

Offerings to a temple.—A sacerdotal office which belongs to the priest of a particular temple cannot be transferred (w). So also offerings from pilgrims resorting to a temple or shrine (x). Again, offerings made to a deity and appropriated by the officiating priest is not a right in which he is entitled to traffic (y). The Allahabad High Court, referring to the case of *Puncha Thakur v. Bindeswari* (z), observed that the offerings at a temple do not stand on the same basis as remuneration which Maha Brahmins receive for the services they perform at a Hindu funeral, holding that there is nothing in law to prevent a Maha Brahmin from mortgaging his right to offerings receivable by him in his personal capacity (a). In a later case (b) the same Court, following its earlier decision (c), drew a distinction between cases in which emoluments are attached to a priestly office and cases where offerings

(o) (1891) 3 Ch. 48.

(p) *Thomas v. Freeman* (1706) 2 Vern. 563, 23 E. R. 967.

(q) *Davies v. Angel* (1862) 4 De G. F. & J. 524, 45 E. R. 1287; see the Code of Civil Procedure, 1908, sec. 60 (m).

(r) *Perry v. Phelps* (1810) 17 Ves. 173, 34 E. R. 67; *Re. Parsons Stockley v. Parsons* (1890) 45 Ch. D. 51.

(s) *Puncha Thakur v. Bindeswari Thakur* (1915) 43 Cal. 28.

(t) *Rajah Varmah v. Eavi Varmah* (1876) 4 I. A. 76; *Durga Bibi v. Chanchal Ram* (1881) 4 All. 81; *Srimati Mallika v. Ratnamani* (1897) 1 C. W. N. 493.

(u) *Rama Pillar v. Kumaran Chidayath*, A. I. R.

(1923) Mad. 316.

(v) *Ahmad-ud-din v. Majlis Rai* (1881) 3 All. 12.

(w) *Lakshmanaswami v. Rangamma* (1902) 26 Mad. 31.

(x) *Puncha Thakur v. Bindeswari* (1916) 43 Cal. 28; *Kashi Chandra v. Kailas Chandra* (1899) 26 Cal. 356.

(y) *Dino Nath v. Pratap Chandra*, (1899) 27 Cal. 30, 32; *Shoilojanund Peary Charan* (1902) 29 Cal. 470.

(z) (1916) 43 Cal. 28.

(a) *Sukh Lal v. Bishambhar* (1917) 39 All. 196.

(b) *Balmukund v. Tula Ram* (1928) 50 All. 394.

(c) *Ahmad-ud-din v. Ilahi Baksh* (1912) 34 All. 465.

are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings, and held that emoluments of the former kind were not transferable while the latter were.

S. 6

Agreement between expectants.—A fair agreement between expectants or their heirs to divide the property which might be left between them or to any one of them has been held not to be contrary to public policy and capable of being enforced in equity. In a case (d) before the Transfer of Property Act, a compromise deed was held not a conveyance of expectant right but an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency. This was mentioned with approval in a subsequent case (e) by the Allahabad High Court.

Hindu Law.—The interest of a reversioner does not constitute a present or vested interest in the estate which is completely represented by the female heiress, during her lifetime, with a restricted power of alienation. It is neither devisable nor transmissible by inheritance. Ordinarily he is an expectant heir with a *spes successionis* (f). If a reversioner proposes to relinquish his interest in favour of the widow, the widow's interest is not thereby enlarged, since the reversioner has nothing to relinquish (g). A transfer of an expectancy which has most frequently come before the Courts is a transfer by a Hindu reversioner. The exposition of the law in clause (a) will be found in an elaborate judgment of Mookerjee, A.C.J., in *Annada Mohan Roy v. Gour Mohan Mallik* (h) affirmed on appeal by the Judicial Committee of the Privy Council (i). That was a case for specific performance of the contract for sale executed by defendant on the 7th of May 1908 and confirmed on the 20th November 1909. The subject-matter was a share in an estate left by one G., the maternal uncle of the defendant, who died intestate on the 25th of May 1902 leaving two widows and five nephews (sister's sons) including the defendant. After the death of G., a will was set up which was pronounced a forgery by the Judicial Committee so that the estate left by G. vested in the two widows with the right of survivorship *inter se*. On the death of both of them the estate would pass to such of the nephews as were alive when the succession opened. Pending the litigation mentioned, the defendant agreed to convey for consideration to the plaintiff his interest in the estate of his paternal uncle, whether it was on the basis of the will or on the basis of his position as a reversionary heir. On the pronouncement above mentioned against the will, the defendant executed a supplementary agreement on the 20th of November 1900 to convey his interest in the estate of his maternal uncle whenever and howsoever which may vest in him. In consequence of diverse events which thereafter happened, the defendant obtained one-fifth of a half share of the estate of G., under a consent decree whereupon the plaintiff sought to enforce the agreement for sale of the 7th of May 1908, confirmed on the 20th of November 1909. His claim was resisted on the ground that it was void, illegal and unenforceable, as it was an expectancy. It was held that so long as the estate vested in a female heiress the interest of the reversioner was a mere chance of succession and could not form the subject of any contract, surrender or disposal. This view is now

(d) *Ram Nirunjun v. Payag Singh* (1881) 8 Cal. 138.

(e) *Nasirul Haq v. Faiyazul* (1911) 33 All. 457.

(f) *Basanta Kumar v. Ramshankar* (1932) 59 Cal. 859; *Ponnambala v. Sivagnan* (1894) 17 Mad. 343, 21 I. A. 71; *Bahdur Singh v. Mohar Singh* (1901) 24 All. 94, 29 I. A. 1; *Narayan Ganesh v. Baliram* (1918) 46 Cal.

76, 45 I. A. 179; *Mata Prasad v. Nageshar Sahai* (1925) 47 All. 883, 52 I. A. 398.

(g) *Basantakumar Basu v. Ramshankar Ray* (1932) 59 Cal. 859.

(h) (1921) 48 Cal. 536.

(i) *Annada Mohan Roy v. Gour Mohan Mallik* (1923) 50 Cal. 929, 50 I. A. 69.

S. 6 generally accepted in nearly all the High Courts (j) except in the Punjab, as hereafter stated.

The true position of a Hindu reversioner formed the subject of consideration by the Judicial Committee on more than one occasion during the last quarter of a century. He could not by Hindu Law make a disposition of or "bind his expectant interest" or his "future rights" (k). Following this, it was held that the interest of a Hindu reversioner expectant on the death of a Hindu female could not be validly mortgaged by him (l), and the contrary opinion expressed in *Brahmadeo v. Harjan* (m) must be regarded as overruled. The same view was reiterated by the Judicial Committee holding that this reversionary right is a mere possibility or *spes successionis* (n). In *Janakai v. Narayanasami* (o), Lord Shaw described the situation of the reversionary heirs as having those contingent interests which, though differentiated little if at all from a *spes successionis*, is recognized by Courts of Law having a right to demand that the estate be kept free from waste. Although entitled to appear and be heard in probate proceedings (p) he has no right or interest *in presenti* in the property. His right becomes concrete only on the demise of the female owner, until then it is mere *spes successionis*. It cannot be sold, mortgaged, assigned or relinquished for a transfer as a *spes successionis* is a nullity and has no effect in law (q). The prohibition in section 6 (a) being based on principle of public policy, the Court cannot allow such transactions to be affected by a consent decree unless in the meantime the succession opens and the reversion has fallen into possession and the reversioners in law are able to transfer their rights (r). It is true that the reversion is an expectancy but an expectant reversioner's right to sue for a declaration has statutory recognition (s). By becoming a party to a compromise (t) or family arrangement (u) and by taking the benefit thereof the reversioner may be estopped from claiming as a reversioner. A family arrangement to be valid need not necessarily be a compromise of doubtful rights or claims. The existence of a family dispute is not essential to the validity of a family arrangement (v).

- (j) *Nund Kishore v. Kanee Ram* (1902) 29 Cal. 355; *Ram Chandar v. Kallu* (1908) 30 All. 497; *Jagannath v. Dibbo* (1908) 31 All. 53; *Sham Sundar v. Achhan Kunwar* (1898) 21 All. 71, 25 I. A. 183; *Bhana v. Guman Singh* (1918) 40 All. 384; *Manickam v. Ramalinga* (1905) 29 Mad. 120; *Pindiprolu v. Pindiprolu* (1907) 30 Mad. 486; *Dhoorjeti v. Dhoorjeti* (1906) 30 Mad. 201; *Muthuveeru v. Vythilinga* (1908) 32 Mad. 206; *Narasimham v. Madhava* (1903) 13 M. L. J. 323; *Subbaraya v. Muthayammal* (1918) 35 M. L. J. 684; *Marangami v. Meera Labbai* (1913) 24 M. L. J. 258.
- (k) *Sham Sundar v. Achhan Kunwar* (1898) 21 All. 71, 25 I. A. 183.
- (l) *Nandkishore v. Kanee Ram* (1902) 29 Cal. 355.
- (m) (1898) 25 Cal. 778.
- (n) *Bahadur Singh v. Mohar Singh* (1901) 24 All. 94, 29 I. A. 1; *Venkatanarayana v. Subbammal* (1915) 38 Mad. 406, 42 I. A. 125; *Joti Lal v. Beni Madho*, A. I. R. (1937) Pat. 280.
- (o) (1916) 39 Mad. 364, 43 I. A. 207.
- (p) *Brindaban v. Sureswar* (1909) 10 C. L. J. 263.
- (q) *Amrita Narayan v. Gaya Singh* (1917) 45 Cal. 590, 45 I. A. 35; *Harnath Kunwar v. Indar Bahdur Singh* (1923) 45 All. 179, 50 I. A. 69; *Ramasami v. Ramasami* (1906) 30 Mad. 255; *Nund Kishore v. Kanee Ram* (1902) 29 Cal. 355; *Dwarka Prasad v. Nasir*

- Ahmad*, A. I. R. (1925) Oudh 16; *Mahadeo Prasad v. Mathura Chaudhari*, A. I. R. (1931) All. 589; *Sri Jagannada v. Sri Rajahprasad* (1916) 39 Mad. 554; *Venkatasubbayya v. Subramaniam*, A. I. R. (1925) Mad. 941.
- (r) *Ramasami v. Ramasami* (1907) 30 Mad. 255; *Durga Prasad v. Narain*, A. I. R. (1929) Oudh 63.
- (s) *Kondama Naicker v. Kandasami Goundan* (1924) 47 Mad. 181 (189) 51 I. A. 145.
- (t) *Kanhai Lal v. Brij Lal* (1918) 40 All. 487, 45 I. A. 118; *Khuni Lal v. Gobind Krishna* (1911) 33 All. 356; *Hiran Bibi v. Sohan Bibi* (1914) 18 C. W. N. 929; *Upendra v. Bindesri* (1915) 20 C. W. N. 210; *Pulliah Chetty v. Varadarajulu* (1908) 31 Mad. 474; *Barati Lal v. Salik Ram* (1916) 38 All. 107; *Chahlu v. Parmal* (1919) 41 All. 611.
- (u) *Mt. Hardei v. Bhagwan Singh* (1919) 24 C. W. N. 105; *Mathuraman v. Ponnuswamy* (1915) 29 M. L. J. 214; *Basangowda v. Irgodatti* (1923) 47 Bom. 597; *Annu v. Shripati* (1930) 32 Bom. L. R. 705; *Bahadur Singh v. Ram Bahadur* (1923) 45 All. 277; *Moti Shah v. Gandharp Singh* (1926) 48 All. 637; *Raghubir Datt v. Narain Datt*, A. I. R. (1930) All. 498; *Kanta Chandra v. Ali Nabi* (1911) 33 All. 414; *Mangal Singh v. Ghasita*, A. I. R. (1929) Lah. 485.
- (v) *Pokhar Singh v. Dulari Kunwar* (1930) 52 All. 716.

It is of the essence of a family settlement that the deed presupposes a *bona fide* claim on either side and an honest settlement thereof. There must be either a dispute or at least an apprehension of a dispute, a situation of a contest, which is avoided by a policy of giving and taking (*w*). Hence the possibility of a Hindu reversioner succeeding to the estate of the last full owner on the termination of the estate of the intermediate female heiress falls within clause (a) of section 6. There is no escape from this position, nor can reliance be placed on the principles of equity which may be invoked by a transferee of non-existent future property as laid down in *Holroyd v. Marshall* (*x*), *Tailby v. Official Receiver* (*y*), *Walsh v. Lonsdale* (*z*) which reached this country in *Mahomed Musa's* case (*a*) and ultimately found its way into section 53A of this Act. That "equity regards that as done which should have been done." And a contract by a Hindu to sell immoveable property to which he is the nearest reversionary heir, expectant upon the death of the widow in possession, and to transfer it upon possession accruing to him is void; the Transfer of Property Act, 1882, section 6 (a), which forbids the transfer of expectancies, would be futile if a contract of the above character were enforceable (*b*), nor can the doctrine of estoppel enunciated in section 43 of the Act and which corresponds to the English doctrine of feeding the estoppel be relied upon. There is a fundamental difference between non-compliance with the formal requisites prescribed for a transaction whereby alienable property is transferred and an attempt to accomplish a transfer of property which has been rendered inalienable by a statutory provision nor can the doctrine of feeding the estoppel be made applicable to such cases as that principle has no application to a contract of assignment of property expressly rendered inalienable by the Legislature. The doctrine of estoppel being that if a man who has no title to the property, grants it and subsequently acquires an interest sufficiently to satisfy the grant, the estate instantly passes (*c*).

But the consideration for the transfer by a Hindu reversioner could be recovered on the agreement being discovered to be void under section 65 of the Indian Contract Act, 1872, with interest from the date of the suit, the period of limitation not running until the rights of the purchaser were discovered to be unenforceable (*d*). Distinguished from a sale or an agreement to sell, a reversionary interest is the settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding (*e*). The position of such a reversioner is in no way affected by the fact that a co-reversioner who had not consented to the alienation had sued for and obtained a declaratory decree in respect of half the property alienated by the widow (*f*). The case of *Parvati v. Dayabhai Muncharam* (*g*) could be distinguished. In that case the widow had transferred her life estate and the reversioner had transferred his reversionary rights. It was held that the reversionary right was not transferable. Moreover, the question of estoppel was

(*w*) *Basantakumar Basu v. Ramshankar Ray* (1932) 59 Cal. 859, 884.

(*x*) (1861) 10 H. L. C. 191.

(*y*) (1888) 13 A. C. 523.

(*z*) (1882) 21 Ch. D. 9.

(*a*) (1914) 42 Cal. 801, 42 I. A. 1.

(*b*) *Basantakumar Basu v. Ramshankar Ray* (1932) 59 Cal. 859; *Annada Mohan Roy v. Gour Mohan Mullick* (1923) 50 Cal. 929, 50 I. A. 239.

(*c*) *Tilakdhari v. Khedanlal* (1920) 48 Cal. 1; *Bhairab Chandra v. Jivan Krishna* (1920) 33 C. L. J. 184; *Dwarka Prasad v. Nasir*

Ahmad, A. I. R. (1925) Oudh. 16; *Bindeswari Singh v. Har Narain Singh*, A. I. R. (1929) Oudh. 185, 4 Luck. 622.

(*d*) *Harnath Kumwar v. Indar Bahadur Singh* (1923) 45 All. 179, 50 I. A. 69.

(*e*) *Ramgowda v. Bhausahab* (1928) 52 Bom. 1, 54 I. A. 396; *Basappa v. Fakirappa* (1922) 46 Bom. 292; *Fateh Singh v. Thakur Rukmini* (1923) 45 All. 339.

(*f*) *Fateh Singh v. Thakur Rukmini* (1923) 45 All. 339.

(*g*) (1919) 44 Bom. 488.

S. 6 not argued in that case. The case was subsequently explained and distinguished in *Basappa v. Fakirappa* (h). The Allahabad High Court (i) refused to follow the former case. The case of *Gur Narayan v. Sheo Lal Singh* (j) is also distinguishable. In that case a remote reversioner who had given his consent to a transfer by a widow was allowed to question the transaction not in his own capacity but as a legal representative of the actual reversioners who had not given their consent to the transfer. A consent even when given after the transaction would be operative (k) whether as an estoppel has been the subject of judicial comment (l). More recently the Courts have, on the ground of election, upheld a gift as against the particular reversioner who has consented to the gift by the widow during her lifetime. The authority of *Bai Parvati's* case (m) must be taken to have been still weakened by the decision of the Full Bench in *Akkawa v. Syadkhan* (n), affirming the principle in *Basappa v. Fakirappa* (o) not indeed on the ground of estoppel on which it actually proceeded but on the ground of election, referred to by their Lordships of the Privy Council in *Rangasami Gounden v. Nachiappa Gounden* (p). In the Full Bench case a Hindu widow sold her husband's property without legal necessity with the consent of the next presumptive reversioner as evidenced by his joining in the deed. The Court held that the reversioner could not, having regard to his election, impugn the validity of the sale after the widow's death. The Full Bench case was followed in a later case by the same Court (q). There a Hindu widow who had succeeded to the estate of her son made a gift of a portion of it to her daughter with the consent of the widow of another son in consideration of the daughter agreeing to maintain both the widows. After the death of the widow and the daughter the daughter-in-law sued to set aside the gift. It was held that the daughter was precluded by her own election from maintaining the suit. The same view in regard to election is taken by the Full Bench of the Allahabad High Court.

As to whether creditors of a consenting reversioner can impeach his transaction is not covered by authority, but it is submitted that they cannot have a higher claim than their own debtor (r). Section 2 of the Transfer of Property Act provided that nothing in the second chapter shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist Law but there is nothing in the Hindu texts that the interest of a reversionary heir is alienable. By the Amending Act, 20 of 1929, the second chapter is now made applicable to Hindus. As the Transfer of Property Act is not made applicable to the Punjab such a contract as a sale of a reversionary right will be enforced where the inheritance falls into possession (s).

Mahomedan Law.—Under the Mahomedan Law, a mere possibility, such as the expectant right of an heir-apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest, or transfer so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan Law is uniform in its application to matters of bequest, inheritance or otherwise (t). There is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests

(h) (1921) 46 Bom. 292.
 (i) *Mahadeo Prasad v. Mata Prasad* (1921) 44 All. 44.
 (j) (1918) 46 Cal. 566.
 (k) *Bajrangī v. Manokarnika* (1907) 30 All. 1. 35 I. A. 1.
 (l) See also *Rangasami Gounden v. Nachiappa Gounden* (1919) 42 Mad. 523, 538 46 I. A. 72.
 (m) (1919) 44 Bom. 488.
 (n) (1927) 51 Bom. 475.

(o) (1921) 46 Bom. 292.
 (p) (1919) 42 Mad. 523, 46 I. A. 72.
 (q) *Annu v. Shripati* (1930) 32 Bom. L. R. 705.
 (r) *Fateh Singh v. Thakur Rukmini* (1923) 45 All. 339; but see *Pokhar Singh v. Dulari Kunwar* (1930) 52 All. 716, 727.
 (s) *Naranjan Singh v. Dharm Singh*, A. I. R. (1930) Lah. 828.
 (t) *Abdul Valid Khan v. Mussumat Nuran Bibi* (1885) 12 I. A. 91.

is prohibited under the Mahomedan Law (u). The rules of Mahomedan Law are not affected by the Transfer of Property Act though section 2 of the Act excludes the operation of this chapter to Mahomedans.

Punjab.—The Hindu Law and section 6 (a) of the Transfer of Property Act govern cases under the Punjab Customary Law as it is well settled that the respective rights of a widow in possession of her husband's estate and her reversioners are analogous under both these systems (v).

Alternative promise.—One of the parties to a transaction were reversioners and the other a mortgagee of their father claiming balance of the mortgage money and the agreement stipulated that on the death of the widow or on her executing a deed of relinquishment in their favour when they became owners of certain shares in three villages they would execute a deed of transfer in favour of the mortgagee. The deed provided that if for any reason they were not able to obtain proprietary possession of the shares in the three villages within a year after the death of the lady or in spite of obtaining possession they did not execute the sale deed, they would execute a sale deed in respect of a share in another property which they had on partition. It was held there were alternative promises, an option being given to the reversioners either to transfer their inheritance or to transfer their share which they had obtained on partition and the case was governed by section 58 of the Indian Contract Act, 1872, which provides that in case of an alternative promise one branch is legal and the other illegal, the legal branch alone can be enforced and that as the first branch defeated the provisions of the law enacted in section 6 (a) the second branch was enforceable (w).

Clause (b) Transfer of a Right of Re-entry.

Proviso for re-entry.—Usually inserted in a lease though limited to non-payment of rent only where the lease is to contain "usual covenants and provisions" it is a right reserved to a lessor on the execution of a lease giving him a right to re-enter the premises leased and determine the lease by forfeiture resulting from the breach or non-observance of a covenant on the part of the tenant. It is one of the modes provided by section 111 for determining a lease of immoveable property on breach of an express condition which provides that on breach thereof the lessor may re-enter. This is further emphasized by section 114A, viz., that there must be a forfeiture incurred by the lessee and enforced by the lessor by due notice. Reading sections 111 (g) and 114A together, this right of re-entry can be exercised only by the owner of the reversion. In England only the legal owner of the reversion can exercise this right so that a mortgagor in possession subject to a lease has no right of re-entry for breach of the covenants of the lease (x). In a Bombay case there was a proviso for re-entry on breach of covenant. After a breach, the lessor assigned the lease to the plaintiff. It was held that the plaintiff was entitled to exercise his right of re-entry. One of the learned Judges constituting the Division Bench held that the case was covered by the words of section 109 of the Transfer of Property Act while to the other it seemed that that section had no bearing on the point and that on general principles of English Law the right of re-entry could be exercised in case

(u) *Asa Beevi v. Karuppan Chetty* (1918) 41 Mad. 365; *Marangami Rowther v. Nagur Meera* (1913) 24 M. L. J. 258; *Sumsuddin v. Abdul Hussain* (1907) 31 Bom. 165; *Rebati Mohan Das v. Ahmed Khan* (1909) 9 C. L. J. 50; *Hasan Ali v. Nazo* (1889) 11 All. 456 *Abdool Hoosein v. Goolam Hoosein*

(1906) 30 Bom. 304.

(v) *Thakar Singh v. Uttam Kaur* (1929) 10 Lah. 613, A. I. R. (1929) Lah. 295.

(w) *Mahadeo Prasad v. Mathura Chaudhari*, A. I. R. (1931) All. 589.

(x) *Mathews v. Usher* (1900) 2 Q. B. 535.

S. 6 of a breach of covenant prior to transfer (y). A similar view was held by the Calcutta High Court in the case of a lease executed prior to the Transfer of Property Act (z). A right of entry always supposes an estate: for what is a right of entry without a right to hold and receive the profits. Therefore, if an estate is granted to a man reserving rent, and in default of payment a right of entry was granted to a stranger, it was void. A right of entry cannot subsist without an estate (a). A proviso for re-entry cannot be enforced unless there is a forfeiture clause.

Not a "usual covenant" in a lease.—A power of re-entry in a lease if the lessee or his assigns becomes bankrupt or makes a composition with his creditors is unusual and an intended assignee is not bound to accept the assignment of lease containing such covenant (b).

Re-entry on "non-performance" or "non-observance."—A power of re-entry on non-performance of covenants does not entitle the lessor to re-enter for breach of a negative covenant, such as a covenant not to assign without consent (c). While a power of re-entry for non-observance of covenant applies only to negative covenants (d). Prior to *Harman v. Anislie* (e), it was held that "non-performance" of a covenant applied only to positive covenants while "non-observance" to negative covenants. That case, however, decided that "non-performance" was appropriate to breaches of both covenants. A conveyance should, however, use both expressions to avoid complicity.

Notice inoperative to determine lease.—Actual re-entry or its equivalent, the issue and service of a writ to recover possession, is necessary in order to determine the lease. A notice is inoperative for this purpose. A notice by the lessor of his intention to re-enter and demand possession is not entry or equivalent to entry and is not sufficient to determine the lease (f). In an action to recover possession it is not necessary that plaintiff should in fact re-enter the premises (g).

Effect of proviso for re-entry.—It is well settled that on a true construction the proviso does not avoid the lease but renders it voidable at the option of the lessor. Consequently, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elects that it shall end the lease must be determined (h).

Requisite formalities to re-enter.—For mere non-payment advantage cannot be taken of the default in payment to re-enter. There must be, according to section 114A, a formal demand and the observance of other formalities.

Severance of reversion.—A severance of the reversion is distinctive of the power of re-entry but where two distinct properties held under separate titles are comprised in one lease and the reversion of one of them becomes vested in the lessee, this does not extinguish a right of re-entry in respect of the property of which the reversion remains in the lessor; the rules as to severance of reversion by assignment to third parties not being applicable to cases where a portion of the reversion is vested by assignment in the lessee himself (i). The latter is illustrated by the

(y) *Visheshwar v. Mahableshwar* (1919) 43 Bom. 28; *Vaguran v. Rangayyangar* (1892) 15 Mad. 125.
 (z) *Kristo Nath v. Brown* (1887) 14 Cal. 176.
 (a) *Smith v. Packhurst* (1741) 3 Atk. 135, 26 E. R. 881.
 (b) *Hyde v. Warden* (1877) 47 L. J. Q. B. 121.
 (c) *Hyde v. Warden* (1877) 47 L. J. Q. B. 121;
West v. Dobb (1870) 39 L. J. Q. B. 190;
Evans v. Davis (1878) 10 Ch. D. 747.
 (d) *Times v. Baker* (1883) 49 L. T. 106

(e) (1904) 1 K. B. 698.
 (f) *Moore v. Ullcoats Mining Co., Ltd.* (1908) 1 Ch. 575; *Jones v. Carter* (1846) 15 M. & W. 718, 153, E. R. 1040; *Ferry v. Smart* (1810) 12 East 444.
 (g) *Ware v. Booth* (1894) 10 T. L. R. 446.
 (h) *Jones v. Carter* (1846) 15 M. & W. 718, 153 E. R. 1040; *Abraham, S. S. Co. v. Westville Shipping Co.* (1923) A. C. 773.
 (i) *Hyde v. Warden* (1877) 47 L. J. Q. B. 121.

following case. H. demised a farm to certain lessees whose interest was vested in defendant. During the continuance of the lease H. died, and under his will the reversion was severed and became vested in several tenants in common, of whom plaintiff was one; held plaintiff could, without joining the other tenants in common, maintain an action to recover damages for wrongful acts causing injury to the reversion, and for breach of a covenant running with the land (j). See now the Law of Property Act, 1925 (c. 20), sections 140-142.

Condition subsequent.—This is dealt with in section 31, the effect of which is that on breach of an expressed condition provided in the lease the lessee is deprived of his interest and the property reverts to the lessor.

Clause (c)—Easements.

Easements generally.—Two tenements are necessary for the existence of an easement and they must belong to different owners (k).

Transfer of dominant heritage.—Where a dominant heritage is transferred or devolves by act of parties or operation of law, the transfer or devolution, unless a contrary intention appears, must be deemed to pass the easement to the person in whose favour the transfer or devolution takes place (l). Hence an existing easement is not transferable, apart from the dominant heritage, and this is the rule in section 6 (c).

Creation of an easement.—The creation of an easement by grant is not such a transfer of ownership as is contemplated by section 54 of the Act. Where an easement is transferred it must be transferred along with the dominant heritage. There is no other way of transferring it and this arises by reason of the nature of the right. It exists only for the benefit of the heritage and to supply its wants (m).

“Profits a prendre.”—This class of beneficial enjoyment is not technically regarded as an easement in English Law, but the Easements Act includes this under easement. In the explanation to section 4 of the Easements Act (V of 1882), the expression “to do something” includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage of any part of the soil of the servient heritage or anything growing or subsisting thereon. Illustration (d) to that section mentions the right to pasture cattle on another’s field or to take water or fish out of another’s tank or timber out of another’s wood or to use, for the purpose of manuring his lands, the leaves which have fallen from another’s lands, as instances of easements. Where the plaintiff claimed and proved a prescriptive right of using certain land belonging to the defendant’s mortgagor for a part of every year for raising rice-plants to be afterwards transplanted to his own land, the right was regarded as an easement of the nature known in French Law as *profits a prendre* (n). And so is a prescriptive right of fishery (o). The right of “lagan” attached to the ownership of the front part of the “ghat” to use the back part under certain conditions is an easement (p).

(j) *Roberts v. Holland* (1893) 1 Q. B. 665.

(k) See sec. 4, the Easements Act, V of 1882; *Mormsey v. Ismay* (1865) 34 L. J. Ex. 52, 159 E. R. 621; *A.-G. v. Copeland* (1901) 2 K. B. 101.

(l) Sec. 19, the Easements Act, V of 1882; *Ackroyd v. Smith* (1850) 10 C. B. 164, 138 E. R. 68.

(m) *Sital Chandra v. Delannoy* (1916) 20 C. W. N. 1158; *Bhagwan Sahai v. Narsingh* (1909)

31 All. 612; *Kondayya v. Veeranna*, A. I. R. (1926) Mad. 543; *Satyanarayana v. Lakshmayya*, A. I. R. (1929) Mad. 79; *Krishna v. Rayappa* (1868) 4 M. H. C. R. 98.

(n) *Sundrabai v. Jayawant* (1899) 23 Bom. 397.

(o) *Chundee Churn v. Shib Chunder* (1880) 5 Cal. 945.

(p) *Brij Mohan v. Bhikhuji*, A. I. R. (1931) All. 207.

S. 6

Clause (d)—Transfer of Interest Restricted in Enjoyment.

Service tenures.—This clause forbids alienation of lands or interest in lands or of an office restricted in its enjoyment to the owner personally as there would be no security that the transferee would be a fit and proper person to discharge the duties attached to such land, interest or office. Illustrations of these are found in ghatwali tenures in Bengal, the office of karnam in Madras and religious offices. In Bengal a ghatwali tenure being ancient and of unknown origin, descended from father to son, and was held by hereditary right. In Moghul times such grants were common. Ghatwali duties may be divided into police duties and quasi-military duties. Though both classes have lost much of their importance, the latter in any strict form is very rarely rendered. Personal performance of the ghatwali services is not essential so long as the grantee is responsible for them and procures them to be rendered (q). For this purpose they were accustomed to employ armed retainers to guard against hostile inroads, as well as a general police force, under the description of thannadars, paiks and chowkidars to repress crime in the villages (r). Ghatwali tenures were not resumable on the Government assuming charge of the police (s). The office cannot, except by special custom, grant or other arrangement, either run with lands or be severed from them. If the lands are alienated piecemeal—and this must be involved in a right to alienate them all—the same difficulty arises in another form, for here, the office being indivisible, the question is to which of a number of several purchasers of the lands is it to pass? (t) A tenure so granted is inalienable and indivisible (u) and cannot be sold in execution of a decree against the person of the incumbent of the office of ghatwal for the time being (v). In *Binode Ram Sein v. Deputy Commissioner of Sontah Parganas* (w) it was held, and, in the opinion of their Lordships who heard *Nilmoni Singh v. Bakranath Singh* (x), rightly, that the surplus proceeds of a Birbhum ghatwali tenure which had passed by descent from ancestor to heir, were not liable, in the hands of the heir, for the debts of the ancestor. The jaghir is strictly a life tenure as far as the jaghirdar is personally concerned. He holds the land in lieu of pay. A newly elected jaghirdar would not be held responsible for the debts of his predecessor, as were he to be so, he would lose the benefit of his pay (y). Ghatwali is a combination of clauses (d) and (f), being public services rendered by a private individual. In the absence of special circumstances, a ghatwal is as a general rule, not competent to grant a lease of the tenure in perpetuity, and his successors are not bound to recognize such an encumbrance (z).

Future rents and profits which may become due to a ghatwal cannot be attached, for a ghatwal prevented from recovering the rents in future would not be in a position to pay the wages of the chowkidars and so to perform the duty which devolves upon him as a ghatwal (a). A receiver of future rents and profits may be appointed for such a receiver could make provisions for payment of wages and other incidental

- (q) *Shib Lal Singh v. Moorad Khan* (1868) 9 Suth. W. R. 126.
 (r) *Joykishen Mookerjee v. The Collector of Burdwan* (1855) 10 M. I. A. 16; *Joykishen Mookerjee v. The Collector of Burdwan* (1864) 10 M. I. A. 16.
 (s) *Rajah Lelanund v. The Government of Bengal* (1855) 6 M. I. A. 101.
 (t) *Hurlal Singh v. Jorawun Singh* (1837) 6 S. D. A. 169; *Lelanund Singh v. Government of Bengal* (1855) 6 M. I. A. 101; *Nilmoni Singh v. Bakranath Singh* (1882) 9 I. A. 104; *Leelanund Singh v. Munooranjan Singh* (1873) I. A. Supp. 181.
 (u) *Narayan Singh v. Niranian Chakravarti*

- (1924) 3 Pat. 183, 51 I. A. 37.
 (v) *Nilmoni Singh v. Bakranath Singh* (1883) 9 Cal. 187, 9 I. A. 104; *Joykishen Mookerjee v. Collector of East Burdwan* (1864) 10 M. I. A. 16.
 (w) (1867) 7 W. R. 178.
 (x) (1883) 9 Cal. 187.
 (y) *Rajah Nilmoney v. Bakranath Singh* (1868) 10 W. R. 255.
 (z) *Narain Mullick v. Badi Roy* (1902) 29 Cal. 227.
 (a) *Uday Kumari v. Hari Ram* (1901) 28 Cal. 483; *Haridas Acharjia v. Baroda Kishore* (1899) 27 Cal. 38.

expenses. However, after deduction of all necessary outgoings from the total rents due to a ghatwal, the residue being his personal property, is as such liable to be seized and appropriated by his decree-holder (b). A tenant who has already acquired a right of occupancy in chowkidari chakran lands is protected by section 51 of Act VI of 1870 and such a right is not destroyed by the Bengal Tenancy Act (c).

In Bombay an alienation of service vatan land by the holder of it is good against himself unless the alienation is made to a vatandar (d). The subsequent abolition of the service renders the title of the alienee in possession undisputable by the alienor's heirs, assuming that there is no family custom operating apart from the law which preserves service lands for the intended uses (e). But though the political and public tie, which kept a vatan estate together, may thus have failed, a concurrent family custom producing an effect wholly or partly the same, may continue and may singly bind the hands of the successive holders of the property as strictly as before (f). It is only necessary to bear in mind that this "estate," the proprietary relation of a family to certain lands, is not by Hindu Law a quality of the lands; it is a jural character of the family (g). The daughter of a vatandar is not a vatandar of the same vatan during her father's lifetime (h). The fact that vatan land is attached to the office, deprives it of some of the incidents, which would attach to it if it were ordinary land in the possession of a Hindu family. According to the decisions of the Bombay High Court, the vatandar is entitled to alienate the land for the term of his natural life and his children, although not separate in interest from him, have no right to object to such alienation until after his death (i). Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs. The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir (j). In Madras military service tenures were known as palayam. They were not inalienable. And none of the successive tenants could by his dealings deprive the next holder of the source from which his duties might be discharged (k).

Lands held on Swastivachakam service tenure are not subject to attachment in execution of a decree, for the sale of such land is opposed to public policy and the nature of the interest affected (l). The land which formed the emolument of the office of a karnam did not become the family property of the person appointed to the office although he may have had a hereditary claim to the office. The land was designed to be the emolument of the person in whose hand the office of the karnam might pass and was inalienable by him (m). A woman cannot hold the office of a karnam and when the immediate heir is incapacitated, the nearest male sapinda of the deceased karnam is entitled to succeed to the office (n). Deducible from the

- (b) *Rajkeshwar Deo v. Bunshidhur* (1896) 23 Cal. 873; *Kustooru Kumari v. Benoderam Sen* 4 W. R. Misc. Rul. 5.
 (c) *Ram Kumar v. Ram Newaj* (1904) 31 Cal. 1021.
 (d) *Narayan v. Kalgaunda* (1890) 14 Bom. 404; *Jagjivandas v. Imdad Ali* (1882) 6 Bom. 211.
 (e) *Radhabai v. Anantrav* (1885) 9 Bom. 198.
 (f) *Keval Kuber v. The Talukdari Settlement Officer* (1877) 1 Bom. 586; *Rajah Lellanund v. Thakur Munrunjun* 1. A. Sup. Vol. 181.
 (g) *Rany Padmavati v. Baboo Doolar Singh* (1847) 4 M. I. A. 259; *Rany Srimuty*

- Dibeah v. Rany Koond Luta* (1847) 4 M. I. A. 292; *Chundro Sheekhur Roy v. Nobin Soondur Roy* 1865 2 C. W. R. 197.
 (h) *Muktabai v. Antaji* (1899) 23 Bom. 715.
 (i) *Narsinh v. Vaman* (1910) 34 Bom. 91.
 (j) *Ravji v. Sakuji* (1910) 34 Bom. 321.
 (k) *Appayasami Naicker v. Midnapore Zamindari Co., Ltd.* (1921) 44 Mad. 575, 48 I. A. 100.
 (l) *Anjaneyalu v. Sri Venugopala* (1922) 45 Mad. 620.
 (m) *Venkatarayadu v. Venkataramayya* (1892) 15 Mad. 284; *Papaya v. Ramana* (1884) 7 Mad. 85.
 (n) *Chandramma v. Venkataraju* (1887) 10 Mad. 226.

- S. 6 above authorities is that freedom from service caused by commutation of money payment or abolition of military service, is destructive of the incident of inalienability of these service tenures (o).

Distinction between grant of office remunerated by use of land and grant of land burdened with service.—In the former case the land is *prima facie*, resumable, in the latter case it is not; but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition (p).

“Res extra commercium.”—There are certain rights, chief among them being spiritual duties and privileges attached to a religious office, that cannot be transferred. They are *res extra commercium*, for instance, a sacerdotal office which belongs to the priest of a particular class. Similarly, a right to receive offerings from pilgrims resorting to a temple or shrine is inalienable. Whenever an image or idol is set up and consecrated there must be a *shebait* to serve and sustain the deity. His office is a sacred one and it does not follow, because in certain circumstances he may be entitled to alienate the temporalities of the deity, that in similar or any circumstances he is entitled to transfer the spiritual duties and privileges which appertain to his office (q). On the death of a husband his widow would take the shebaitship (r). Among the members of a Mitakshara family the right of shebaitship passes by survivorship (s). An alienation of a *pala* or turn of worship only, apart from the debutter land, is unreasonable in the absence of a custom established to that effect (t), nor is a sub-division of *pala* valid and a transfer by a *shebait* of his turn of worship to two persons in different shares is unreasonable (u). Being a point of law, objection to such a division may be taken in second appeal. A *shebait* is incompetent to sell his religious office for his own pecuniary benefit even if he sells to the person next in succession to the office (v). But the Privy Council has said that where custom relied on as sanctioning a transfer of their office and duties implies a right to sell the trusteeship for the pecuniary advantage of the trustees that circumstance alone justified the decision that the custom relied on is bad in law (w). The urallars or managers of a pagoda have no power to transfer their *uramia* right (x). A term of worship is not an interest in immoveable property (y) and therefore a sale thereof does not require registration (z). A right to receive offerings from pilgrims resorting to temples or shrines is inalienable (a). The privileges of a village priest to recover fees for the performance of religious ceremonies, no matter by whom they are performed, cannot be invaded (b). The office of a Maha Brahmin or Birtacharji is a right to perform personal service and not susceptible of transfer (c). *Vritti*, a “right of personal service” (d), is inalienable, being in essence a sacred and personal right (e). Under Hindu Law *Vrittis* are

- (o) *Bansidhar v. Ashutosh* (1925) 4 Pat. 272; *Appayasami Naicker v. Midnapore Zamin-dari Co., Ltd.* (1921) 44 Mad. 575, 48 I. A. 100.
 (p) *Lakhamgounda v. Baswantrao* (1931) 33 Bom. L. R. 974; *Forbes v. Meer Mahomed Tuqee* (1870) 13 M. I. A. 438.
 (q) *Nagendra Nath v. Rabindra Nath* (1926) 53 Cal. 132.
 (r) *Surendro v. Doorga* (1892) 19 Cal. 513, 19 I. A. 108.
 (s) *Kokilasari v. Mohunt Rudranand* (1874) 5 C. L. J. 527.
 (t) *Nitya Gopal v. Nani Lal* (1920) 47 Cal. 990.
 (u) *Nitya Gopal v. Nani Lal* (1920) 47 Cal. 990.
 (v) *Panchanan v. Surendra Nath*, A. I. R. (1930) Cal. 180.
 (w) *Rajah Vurmah v. Ravi Vurmah* (1876) 1

- Mad. 235, 4 I. A. 76.
 (x) *Rajah Vurmah v. Ravi Vurmah* (1876) 1 Mad. 235, 4 I. A. 76.
 (y) *Mahamaya v. Haridas* (1915) 42 Cal. 455; *Jagdeo Singh v. Rama Saran*, A. I. R. (1927) Pat. 7; *Jati Kar v. Mokunda* (1912) 39 Cal. 227; *Eshan Chunder Roy v. Mon-mohini Dasi* (1878) 4 Cal. 683.
 (z) *Mahamaya v. Haridas* (1915) 42 Cal. 455; *Jagdeo Singh v. Rama Saran*, A. I. R. (1927) Pat. 7.
 (a) *Puncha Thakur v. Bideswari* (1916) 43 Cal. 28.
 (b) *Waman v. Balaji* (1890) 14 Bom. 167.
 (c) *Durga Prasad v. Shambhu* (1919) 41 All. 656.
 (d) *Ganesh v. Shankar* (1886) 10 Bom. 395.
 (e) *Manjunath v. Shankar* (1915) 39 Bom. 26; *Raiaram v. Ganesh* (1898) 23 Bom. 131

regarded as generally *extra commercium* (f). As to transfer of the right of management vested in the *mahant* of a *mutt* it is settled beyond controversy that such a transfer is beyond his legal competence. This principle is based on the ground that if the office to which is attached the conduct of religious worship and performance of religious duties were to be held transferable, the very object of the religious foundation might be defeated (g). An *archaka* (a priest who alone is allowed personally to attend upon the idol) cannot sell the emoluments of *paricharika* (assistant to the *archaka* not allowed to touch the idol) (h). An alienation by a *pujari* of his office is not recognized (i). Nor is a purchase of an office involving the performance of Hindu religious worship (j). A *karima* right in a pagoda is unsaleable (k). The office of an *archaka* in a temple could not be alienated where the alienation contemplated the introduction of a different ritual (l). The sale of religious trust is illegal (m).

There is a dictum by the Privy Council that although in the case of a family idol the consensus of the family might give existing dedication another direction, this could not be done in the case of a public temple by consensus of the trustees (n). Gift of a grant for grantee's *parwarish* for lifetime is invalid (o). An hereditary *dharmakarta* of a temple who has assigned his office to a zemindar and consented to a decree being passed on the footing of such assignment is competent, nevertheless, to bring a suit to set aside a Court sale of temple lands treating such assignment as nullity (p). A transfer of Malabar Devaswam, the right to manage a Malabar temple and its lands by way of lease for a sum of money, is illegal (q).

An alienation by the hereditary managers of the management and lands with which a religious foundation was endowed is void (r), unless an alienation is made of a hereditary office in favour of a person standing in the line of succession and not disqualified for the performance of the office by personal unfitness (s). The right of managing a temple, of officiating at the worship and receiving offerings at the shrine cannot be alienated (t). Property annexed to the office of *kurnum* is inalienable notwithstanding that for some time it may have been enjoyed as private property (u). The office of *sajjada nashin* or *mutawali* of a religious endowment or *wakf* cannot be transferred (v). Nor is the sale of a Mahomedan office to which are attached substantially the conduct of a religious worship and the performance of religious duties valid (w). An inam land held by a *kazi* in view of remuneration for his services is inalienable (x).

- (f) *Govind v. Ramakrishna* (1888) 12 Bom. 366 ;
Ganesh v. Shankar (1886) 10 Bom. 395.
 (g) *Paravad Das v. Mohunth Kriparam* (1908)
 8 C. L. J. 499.
 (h) *Narasimma v. Anantha* (1882) 4 Mad. 391.
 (i) *Kuppa v. Dorasami* (1883) 6 Mad. 76.
 (j) *Juggarnath v. Pershad Surmah* (1867) 7 W. R.
 266.
 (k) *Kanni v. Achuda* (1868) 3 M. H. C. R. 380.
 (l) *Venkatarayar v. Srinivasa* (1874) 7 M. H. C.
 R. 32.
 (m) *Rajah of Cherakal v. Mootha Rajah* (1874)
 7 M. H. C. R. 210.
 (n) *Konwar Doorganath Roy v. Rau Chunder*
Sen (1875) 2 Cal. 347, 4 I. A. 58.
 (o) *Mohammed Shabbar v. Harnath Kuar*, A. I. R.
 (1927) Oudh 436.

- (p) *Subbarayudu v. Kotayya* (1892) 15 Mad. 389.
 (q) *Rama Varma v. Raman Nayar* (1882) 5 Mad.
 89.
 (r) *Gnanasambanda v. Velu Pandaram* (1890)
 23 Mad. 271, 27 I. A. 69.
 (s) *Muncharan v. Pranshankar* (1882) 6 Bom.
 298; *Dubo Misser v. Srinivas* (1869) 5
 Beng. L. R. 617.
 (t) *Durga Bibi v. Chanchal Ram* (1882) 4 All. 81.
 (u) *Seshaiya v. Gauramma* (1869) 4 M. H. C. 336.
 (v) *Haji Ali v. Anjuman-i-Islamia*, A. I. R.
 (1931) Lah. 379; *Wahid Ali v. Ashruff*
Hossain (1882) 8 Cal. 732.
 (w) *Sarkun v. Rahaman* (1897) 24 Cal. 83.
 (x) *Deviprasad v. Syed Waziruddin* (1935) Nag.
 L. R. 217.

S. 6

Transferability of palas.—There is no question that though probably religious offices were originally indivisible they are now deemed partible (y). Indeed, the very name *pala* or turn of worship shows that the right is partible. This involves by necessary implication the attribute of transferability as amongst the members of the family of *shebait*s. It is also devisable. It follows consequently that the customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle is closely associated with and possibly developed out of the heritable, devisable and partible character of a *pala*. A custom of this description cannot be characterised as unreasonable or opposed to public policy (z). Where by custom a right to perform *pūja* by turns was conferred on Brahmins only a transfer of such a right in favour of a non-Brahmin is not valid (a). A sale followed by agreement to reconvey amounts to a contract creating a personal right and is not transferable (b). An interest in the income of immovable property assigned by way of maintenance to a Hindu widow by members of a family is not capable of being attached and sold in execution of a decree against the widow (c). So also is exempted from attachment and sale land which is assigned for maintenance of a widow with a proviso against alienation (d). But a heritable right to receive a certain monthly allowance originally assigned in lieu of a share of landed property is not a mere right to maintenance or anything else exempted by the proviso to section 266 of the Civil Procedure Code and is saleable in execution of a decree (e).

Building leases.—A transfer may be prohibited by contract between the parties. Amongst examples of such contracts are building leases where land is agreed to be leased by the freeholder for a period of 999 years entitling a builder to a lease contingently on his erecting and completing specified buildings. Such agreements usually contain a clause that the lessee shall not underlet or part with or otherwise assign the benefit of the agreement without the consent of the lessor except by way of mortgage subject to the terms of the agreement. In the absence of a prohibition the benefit of a contract that is the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby are assignable provided that (a) benefit is not coupled with any liability or obligation that the assignor is bound to discharge, and (b) the contract has not been induced by personal qualifications or considerations as regards the parties to it (f).

Property under a contract which an assignor can pass to an assignee is an “actionable claim” within the meaning of section 3 of the Transfer of Property Act unless vitiated by fraud (g). When personal considerations form the material element of the contract it cannot be assigned without the promisor’s consent (h).

(y) *Trimbak v. Lakshman* (1895) 20 Bom. 495; *Mitla Kunth v. Neerajan* (1874) 14 Beng. L. R. 166; *Sethuramaswamiar v. Mer-swamiar* (1909) 34 Mad. 470; *Damodardas v. Uttamram* (1892) 17 Bom. 271; *Nagia v. Muthacharry* (1900) 11 M. L. J. 215, 222; *Limba v. Rama* (1888) 13 Bom. 548; *Raman v. Gopal* (1897) 19 All. 428; *Rajeshwar v. Gopeshwar* (1907) 34 Cal. 828; *Anund v. Boykantinath* (1867) 8 W. R. 193; *Ram v. Taruck* (1872) 19 W. R. 28; *Debendro v. Odit* (1878) 3 Cal. 390; *Eshan Chunder v. Monmohini* (1878) 4 Cal. 683; *Goopie v. Thakoordas* (1882) 8 Cal. 807.
(z) *Mahamaya v. Haridas* (1915) 42 Cal. 455; *Jagdeo Singh v. Ram Saran*, A. I. R. (1927) Pat. 7.
(a) *Mahamaya v. Haridas* (1915) 42 Cal. 455;

Jagdeo Singh v. Ram Saran, A. I. R. (1927) Pat. 7.
(b) *Uthandi v. Ragavachari* (1906) 29 Mad. 307.
(c) *Gulab Kuar v. Bansidhar* (1893) 15 All. 371.
(d) *Diwali v. Apaji Ganesh* (1886) 10 Bom. 342.
(e) *Salamat Hossein v. Luckhi Ram* (1884) 10 Cal. 521.
(f) *Nathu Gangaram v. Hunsraj Morarji* (1907) 9 Bom. L. R. 114; *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1906), 33 Cal. 702; *Namasivaya v. Kadir Ammal* (1894) 17 Mad. 168; *Farrow v. Wilson* (1869) 4 C. P. 744; *Humble v. Hunter* (1848) 12 Q. B. R. P. 310.
(g) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1907) 34 Cal. 289.
(h) *Toomey v. Rama* (1890) 17 Cal. 115.

Pre-emption.—A right to pre-emption is a right of substitution (i) and is inalienable. It is not a repurchase and operates from the date of the sale in favour of the original purchaser (j). It is incident to the ownership of one land and a burden on the ownership of another land. On general principles the incident and the burden respectively will follow such lands (k). The sole object of the right of pre-emption is the exclusion of such strangers as are objectionable to the pre-emptive co-sharers of the vendor. It is purely a personal right which cannot be transferred to anyone except the owner of the property affected thereby (l). A decree for pre-emption cannot be transferred as the effect would be to place the transferee in possession without the trial of the question whether such a transferee had a pre-emptory right in preference to the purchaser against whom the decree was obtained (m). From its very origin and nature it is a transient right in its very conception and nature and being a personal privilege of the pre-emptor cannot be made the subject of sale or bargain of any other kind (n).

This doctrine of pre-emption is peculiar to Mahomedan Law and based upon justice, equity and good conscience. Applying this doctrine, a co-sharer in a village who had under the *Wajib-ul-arz* a right to the mortgage of a share in such village and in anticipation of obtaining the mortgage mortgaged such share to a stranger thereby forfeited such right (o). There is no objection to a pre-emptor being a Mahomedan and the vendor and purchaser being Hindus (p). The Hindus of Bihar have adopted the Mahomedan Law of pre-emption for a long time (q). Where the existence of the custom under which the Hindus have the same right of pre-emption under Mahomedan Law as Mahomedans in any district is generally known and judicially recognized it is not necessary to assert or prove it (r). There must be no delay in the assumption of the claim of pre-emption (s). There is no right to pre-emption where property is transferred in consideration of a partial release by a Mahomedan wife in respect of dower debt (t) or where a sale is made in exchange for the maintenance right (u) nor is there any right of pre-emption in case of an exchange (v) or mortgage (w) or perpetual lease (x) unless the annual rent is substantially equal to the Government revenue assessed and no right of re-entry is reserved (y). A relinquishment for consideration by the reversioner to the vendee of the widow of his right to sue to set aside the sale does not amount to a sale for purposes of pre-emption (z) but a sale of the bankrupt's property by the Official Assignee (a) or by the Official Receiver (b) is subject to the right of pre-emption and does not defeat that right. And a mortgage by a pre-emptor who had obtained a decree for possession of the pre-empted property, to a stranger to provide the pre-emptive price does not destroy his pre-emptive rights under the decree (c). Under Mahomedan Law, before it can be held that the sale is complete there must

- (i) *Shiwaji v. Ratiram*, A. I. R. (1926) Nag. 171.
 (j) *Collector Singh v. Madari Lal*, A. I. R. (1925) Oudh 132.
 (k) *Mirza Sadiq Husain v. Mahomed Karim*, A. I. R. (1922) Oudh 289.
 (l) *Jasudin v. Sakham* (1912) 36 Bom. 139.
 (m) *Ram Sahai v. Gaya* (1885) 7 All. 107.
 (n) *Rajjo v. Lalman* (1883) 5 All. 180.
 (o) *Rajjo v. Lalman* (1883) 5 All. 180.
 (p) *Zamir Husain v. Daulat Ram* (1883) 5 All. 110.
 (q) *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575; *Fakeer Rawot v. Sheikh Emambuksh* (1863) W. R. (F. B.) 143.
 (r) *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575.
 (s) *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575.
 (t) *Talib Ali v. Kaniz Fatima Begam*, A. I. R.

- (1927) Oudh 204.
 (u) *Rajjo v. Lajja*, A. I. R. (1928) All. 204.
 (v) *Samar Bahadur v. Jit Lal*, A. I. R. (1924) All. 390.
 (w) *Mutsaddi Lal v. Bhola Nath*, A. I. R. (1925) Lah. 55.
 (x) *Bhairo Tewari v. Ramnath Rai*, A. I. R. (1924) All. 60.
 (y) *Zulfar Khan v. Sant Baksh Singh*, A. I. R. (1922) Oudh 81.
 (z) *Nihala Ram v. Pannun Ram*, A. I. R. (1927) Lah. 147.
 (a) *Sheo Baran Singh v. Kulsum-un-nissa* (1927) 49 All. 367, 54 I. A. 204.
 (b) *Brij Narain v. Kedar Nath* (1923) 45 All. 186.
 (c) *Bela Bibi v. Akbar Ali* (1902) 24 All. 119.

- S. 6** be cessation of the right of the vendor in the property and the solution of this matter is to be found in determining in each case what the intention of the party was (*d*).

Clause (dd)—Future Maintenance.

Insertion.—This clause was added by section 7 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929), for the protection of maintenance to which qualified owners are entitled and to set at rest conflicting decisions.

Future maintenance.—The rule prohibits the assignment of future maintenance only in whatsoever manner arising, secured or determined. Arrears of maintenance may be assigned.

In whatever manner arising.—Maintenance of a Hindu widow may arise in several different ways, either as the widow of a coparcener in a joint family or as widow of the last male holder or it may arise under the will of a testator or by deed. Besides the widow, in Hindu Law other females are also entitled to maintenance. Under section 488 of the Criminal Procedure Code, 1898, an illegitimate child is entitled to maintenance, and so in matrimonial proceedings is a wife entitled to alimony. Every father is under a legal obligation to maintain his child during minority.

Secured.—Maintenance of a Hindu widow is not a charge upon the property unless the charge is created by agreement between the parties or by a decree of the Court (*e*). Future maintenance so secured cannot be the subject of an assignment.

Determined.—Maintenance may be a personal right or may be fixed by agreement or by decree of the Court. Prior to the insertion of this clause the Calcutta High Court held that where future maintenance is merged in a judgment the right under the judgment is assignable (*f*). To the same effect was a dictum of the Bombay High Court (*g*). A Full Bench of the Madras High Court followed the same view (*h*). A contrary view was held by the latter Court where the right was personal (*i*). The conflict has been set at rest, for although an agreement or decree would make such a right definite this clause enacts that such a right, being nevertheless created for the personal benefit of the qualified owner, is inalienable.

Property in lieu of maintenance.—Where property has been given in lieu of maintenance the transfer of such property during the lifetime of the person entitled to maintenance is valid (*j*).

Allowances.—Where allowances are reservations out of the income of the estate to which a settlor is fully entitled they are his property and are not in the nature of maintenance grants personal to and inalienable by the holder of the allowances (*k*). Hereditary grant of an allowance of paddy out of the melvaram of certain land is not a right to future maintenance and is not exempt from attachment (*l*).

Surrender of life-interest.—Where a widow who had succeeded as heir to her husband's properties surrendered her life-interest therein to the nearest reversioner who in return agreed to her residing in the family house and sharing the meals of the family or to her receiving a certain amount of paddy annually if she chose to live away from the family house, the option being exercisable by her at her will and

(*d*) *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575.
 (*e*) See commentaries on sec. 39 of the Act.
 (*f*) *Asad Ali v. Haidar Ali* (1911) 38 Cal. 13.
 (*g*) *Narbadabai v. Mahadeo* (1881) 5 Bom. 99.
 (*h*) *Thimmanayanin v. Venkatappa*, A. I. R. (1928) Mad. 713; *Ranee Annapurni v. Swaminatha* (1911) 34 Mad. 7.

(*i*) *Subraya v. Krishna* (1923) 46 Mad. 659.
 (*j*) *Dhup Nath v. Ram Charitra* (1932) 54 All. 366.
 (*k*) *Rajah of Ramnad v. Subramaniam* (1929) 52 Mad. 465 (494).
 (*l*) *Vaidynatha v. Eggia* (1907) 30 Mad. 279.

without her being subject to any liability to elect once and for all, it was held that the right to maintenance conferred on the widow was purely "personal" to her, and was not transferable (m).

S. 6

Attachment.—Under section 60 (n) of the Code of Civil Procedure, 1908, a right to future maintenance is not liable to attachment or sale (n). An annuity given by will can be attached and sold as it is not a right to future maintenance (o).

Alienation.—A compromise by a Hindu widow with the reversioner in relation to her husband's property restricting alienation prevents her from having a disposing power and consequently the property cannot be attached (p). A mortgage by a Hindu widow of property transferred to her in lieu of maintenance for the period of her limited interest does not infringe the rule (q).

A deed of gift was made by a Hindu widow and her mother-in-law to the daughter of the latter in consideration of the daughter agreeing to maintain both the donors. The transaction was held to be a family arrangement binding upon the parties to it (r).

Alimony.—This is maintenance awarded against an erring husband and as such is a personal right of an aggrieved wife, consequently it is not alienable (s).

Residence.—The right of residence is not dealt with by this clause but it would be included in clause (d) as did maintenance prior to the amendment.

Babuana property.—This is property granted in accordance with the family custom of the Darbhanga Raj to the junior male members in lieu of maintenance subject to the proprietary rights of the grantor and his ultimate claim as reversioner on the extinction of the grantee's descendants in the male line. The grantee has a right to alienate the property subject only to the contingent interest of the grantor (t).

Kharch-i-pandan.—This is a personal allowance, and in the absence of any clear provision in the deed signed by the prospective husband, fixing the allowance in favour of his wife, that it was alienable, it could not be held so on the mere fact that the payment was secured by a charge on immoveable property (u).

Clause (e)—Mere Right to Sue.

Amendment.—This clause was amended by section 3 (i) of the Transfer of Property Act, 1900 (2 of 1900), by the omission of the words "for compensation for fraud or for harm illegally caused," thus making it wider than it originally stood.

Mere right to sue.—In the section the word "mere" means bare or naked (v). It is used in the same sense as in sub-clause (a). Prohibition against transfer in clause (e) is principally aimed at suits for recovery of mesne profits and damages arising either in tort or in contract. It is a personal right. A transfer of an actionable claim is not a transfer of a mere right to sue. A mere right to sue for breach of a contract is not assignable either under the Transfer of Property Act or

(m) *Subraya v. Krishna* (1923) 46 Mad. 659.

(n) *Palikandy v. Krishnan Nair* (1917) 40 Mad. 302; *Asad Ali v. Haidar Ali* (1911) 38 Cal. 13; *Nanammal v. The Collector of Trichinopoly* (1910) 20 M. L. J. 97; *Tara Sundari v. Saroda Charan* (1910) 12 C. L. J. 146; *Haridas v. Baroda* (1900) 27 Cal. 38; *Basangowda v. Irgowdatti* (1923) 47 Bom. 597.

(o) *Gopal Lal v. Marsden* (1905) 10 C. W. N. 1102.

(p) *Basangowda v. Irgowdatti* (1923) 47 Bom. 597.

(q) *Bal Krishna v. Paj Singh* (1930) 52 All.

705.

(r) *Annu v. Shripati* (1930) 32 Bom. L. R. 705.

(s) *In re. Robinson* (1884) 27 Ch. D. 150.

(t) *Ram Chandra v. Mudeshwar* (1906) 33 Cal. 1158; *Rameshwar v. Jibender* (1905) 32 Cal. 683.

(u) *Attaf Begam v. Brij Narain* (1929) 51 All. 612; *Subraya v. Krishna* (1923) 46 Mad. 659; *Tara Sundari v. Saroda Charan* (1910) 12 C. L. J. 146.

(v) *Shankarappa v. Khatumbi* (1932) 56 Bom. 403.

S. 6 under the Common Law even though the breach was in respect of the discharge of an obligation binding on the transferee (*w*). A sale by the Official Receiver of an insolvent's property of which he had never been in possession and which was of a nebulous nature is a mere right to sue (*x*) and so also a sale by the Official Assignee in insolvency of lands in possession of alienees from the insolvent are sales of the right to litigate and are to be deprecated, for even if they are not within this clause they are open to the same objection (*y*). A right to take accounts and to recover such sum as may be found due by an agent is not assignable, being a mere right to sue (*z*), but a right to recover an ascertained and definite debt from an agent is transferable (*a*), though in both cases there cannot be a purchase of a mere right to sue for accounts (*b*). The right of a co-sharer to profits against his co-sharer is alienable (*c*). Nor can an agent assign his right of indemnity before rendering accounts (*d*). The test of transferability is whether the inchoate right is attachable.

But where money is due by an agent or purchaser to his principal or vendor the claim of the latter may be attached and sold in execution of a decree against him although the amount of the debt is unascertained at the time (*e*). Interest on a debt due prior to the assignment is not transferable as it is a mere right to sue (*f*). A claim for interest by way of damages under section 73 of the Contract Act is a mere right to sue and cannot be transferred (*g*). There is no provision in the Contract Act for the recovery of earnest money. The remedy is merely one for loss or damage caused as on a contract broken under section 73 of the Indian Contract Act which benefit is merely a right to sue and cannot be transferred (*h*). Where a *chitti* containing a list of borrowed articles with their price was assigned it was held that the assignment was of a personal claim which could not be transferred. What was recoverable was money in the form of damages which after a breach is not an actionable claim but a mere right to sue (*i*). A claim to damages for use and occupation from a tenant holding over is a mere right to sue and not assignable (*j*). Nor can a mere right to sue for the remainder of maintenance allowance that may fall due in future be transferred (*k*). An assignment of rights under an executory contract for the future sale of immoveable property is not a mere right to sue, although a right to sue is involved in it on breach of its conditions (*l*). And a contract providing that the purchaser shall reconvey the property to the vendor for consideration if the vendor offered to purchase the same at the time stated and for the amount mentioned is enforceable by the assignee. It was not an incomplete contract the benefit of which could not be assigned to a stranger until the offer has been accepted by the tender of the price (*m*). Whether a claim

(*w*) *Gopala Iyer v. Ramaswami* (1911) 21 M. L. J. 153 and (1912) 22 M. L. J. 207.

(*x*) *Nazir Hasan v. Matin-uz-zaman*, A. I. R. (1925) Oudh. 299.

(*y*) *Chockalingam Chetty v. Seethai Ache* (1927) 32 C. W. N. 281 P. C.

(*z*) *Lachumi Narayan v. Dharam Chand*, A. I. R. (1926) Nag. 396; *The Joint and United Hindu Family v. Chettiar*, A. I. R. (1927) Rang. 39; *Khetra Mohan Das v. Biswa Nath* (1924) 51 Cal. 972; *Kalusa v. Madhoro*, A. I. R. (1926) Nag. 357.

(*a*) *Ramaseshiah v. Ramiah*, A. I. R. (1926) Mad. 417; *Rajeswar v. Sheikh Yadali*, A. I. R. (1933) Cal. 461.

(*b*) *Khetra Mohan Das v. Biswa Nath* (1924) 51 Cal. 972; *Ramaseshiah v. Ramiah*, A. I. R. (1926) Mad. 417.

(*c*) *Susai Lazar v. Ramaswami*, A. I. R. (1933) Mad. 710.

(*d*) *Ghisulal v. Gambhirmall* (1935) 39 C. W. N.

606.

(*e*) *Madho Das v. Ramji Patak* (1894) 16 All. 286.

(*f*) *Baijnath v. Parmeshwar Dayal*, A. I. R. (1934) Oudh 240.

(*g*) *Indar v. Raghubir*, A. I. R. (1930) Oudh 88.

(*h*) *Pyare Lal v. Meen Mal-Bal*, A. I. R. (1927) All. 621.

(*i*) *Mt. Nakhela v. Kokaya*, A. I. R. (1923) Nag. 67.

(*j*) *Goundasawmi v. Ramasawmi* (1916) 30 M. L. J. 492.

(*k*) *Altof Begam v. Brij Narain* (1929) 51 All. 612.

(*l*) *Akhtar Beg v. Haq Nawaz*, A. I. R. (1924) Lah. 709.

(*m*) *Sakalaguna v. Chinna Munuswami* (1928) 51 Mad. 533, 55 I. A. 43.; *Rajah Bahadur Narsingherji v. Rajah Panuganti*, A. I. R. (1921) Mad. 498.

for damages arising out of a breach of contract or in tort is a mere right to sue is a question to be decided on the facts of each case (*n*). A suit to enforce an agreement to lend money on a mortgage is not maintainable. Though it is open to the mortgagor to sue for damages for breach of the agreement to lend money he cannot transfer such a right. Hence an assignee of his for part of the consideration due for a mortgage not paid is not entitled to recover (*o*). But a personal right under a settlement is transferable (*p*) and so is a right to contribution (*q*).

Mesne profits.—A right to sue for mesne profits is not transferable (*r*) even though they be in the nature of damages (*s*). Mesne profits are unliquidated damages. It is not a claim to any debt or to any beneficial interest in immoveable property. Like other profits, 'mesne' are the difference between the amount realised and the expenses incurred in realising it (*t*).

According to the Code of Civil Procedure, 1908, "mesne profits" mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. These words may be sub-divided into two parts. The cases distinguish between an assignment of an interest to which a right to sue is incident and the sale of a mere right to sue. The former is valid while the latter is not (*u*). Defendants 1 to 4 and one Aminabai were entitled to a certain property which was decreed to them on partition. Aminabai sold to plaintiff her one-fifth share with a right to recover mesne profits for four years from the defendants. It was held that a sale of land together with an incidental right to recover mesne profits attached to the property itself is valid. Section 6 (*e*) does not apply to such a sale (*v*).

The Courts of Calcutta (*w*), Allahabad (*x*), Patna (*y*) and Nagpur (*z*) have adopted the same view, viz., that the assignment of a mere right to sue does not convey any property but it would be otherwise if the property itself be transferred. The Madras decisions have not been uniform. It was there held that a transfer of claim for past mesne profits is invalid (*a*). Their soundness was doubted in a subsequent case by the same High Court (*b*). Again, a right to mesne profits accrued before sale cannot be transferred (*c*). Turning to the English cases they also emphasise the distinction between assignment of a bare right of action for damages and the sale of property with all incidents attached to it and uphold the validity of the latter (*d*), *Seetamma's* case and the earlier cases of the Calcutta (*e*), Allahabad (*f*) and Madras (*g*) High Courts were the result of an unnecessary close adherence to

- (*n*) *Vishindas v. Thawerdas*, A. I. R. (1925) Sind 18.
 (*o*) *Yadavendra v. Srinivasa* (1924) 47 Mad. 698.
 (*p*) *Ma Yait v. Mahomed Ebrahim*, A. I. R. (1927) Rang. 165.
 (*q*) *Ramaswamy Iyer v. Deivasigamani*, A. I. R. (1922) Mad. 397.
 (*r*) *Bal Krishna v. Paj Singh*, A. I. R. (1930) All. 593.
 (*s*) *Durga Chunder Roy v. Koilas Chunder* (1897) 2 C. W. N. 43.
 (*t*) *Jai Narayan v. Kishun Dutta*, A. I. R. (1924) Pat. 551; *Secretary of State v. Saroj Kumar* (1934) 39 C. W. N. 405 P. C.
 (*u*) *Dickinson v. Burrell* (1866) 35 L. J. Ch. 371; *Prosser v. Edmonds* (1835) 1 Y. & C. Ex. 481, 160 E. R. 196.
 (*v*) *Shankarappa v. Khatumbi* (1932) 56 Bom. 403.
 (*w*) *Monmatha v. Matilal* (1928) 33 C. W. N. 614.
 (*x*) *Ganga Din v. Piyare*, A. I. R. (1929) All. 63.

- (*y*) *Jagannath v. Kalidas*, A. I. R. (1925) Pat. 245; *Jai Narayan v. Kishun Dutta*, A. I. R. (1924) Pat. 551.
 (*z*) *Deorao v. Sadasheo* (1906) 2 Nag. L. R. 17.
 (*a*) *Seetamma v. Venkataramanayya* (1913) 38 Mad. 308; *Govindaswami v. Ramaswami* (1916) 30 M. L. J. 492.
 (*b*) *Venkatarama v. Ramasami* (1920) 44 Mad. 539.
 (*c*) *Chandrasekaralingam v. Nagabhushan*, A. I. R. (1927) Mad. 817.
 (*d*) *Ellis v. Torrington* (1920) 1 K. B. 399; *Glegg v. Bromley* (1912) 3 K. B. 474; *Dawson v. Great North Eastern Railway* (1905) 1 K. B. 260; *Dickinson v. Burrell* (1866) L. R. 1 Eq. 337.
 (*e*) *Shyam Chand v. Land Mortgage Bank of India* (1883) 9 Cal. 695.
 (*f*) *Pragi Lal v. Fateh Chand* (1882) 5 All. 207.
 (*g*) *Varahaswami v. Ramchandra Raju* (1915) 38 Mad. 138.

- S. 6 the law of Torts in English Courts overlooking the distinction between a bare right to sue and a right only subsidiary to the enjoyment of the property itself. The Madras decision above referred to was to recover damages from an agent for being negligent in collecting rents and it was held that it was a mere right to sue within the meaning of section 6 (e). A transfer of a right to part mesne profits is invalid (h). Where a right to mesne profits has been declared by a decree but the exact amount has been left to be ascertained at a future stage in the same suit a transfer of such right is not invalid (i). Here the mesne profits are merged in the judgment before the assignment and the right under the judgment is assignable although the original cause of action is not. Transfer of property which is the subject of litigation is not a transfer of a mere right to sue (j).

Damages.—Damages follow on a breach of contract. The benefit of a contract is assignable (k). What is prohibited is the transfer after a breach of a right to sue for damages whether founded on contract or on tort. On breach of contract by the seller the purchaser who was entitled to claim damages transferred his right to recover the same to the plaintiff. It was held that the transfer was not of an actionable claim but of a mere right to sue prohibited by clause (e) of the section (l). And where after the seller's breach the purchasers became insolvent and the Official Assignee assigned the claim to one S.C., who again assigned it to the plaintiff who instituted the suit for recovery of damages, it was held that the assignment of a claim for damages for breach of contract after breach was not an actionable claim but a mere right to sue within the meaning of section 6 (e) and therefore not transferable (m). Both these were cases of unliquidated damages for breach of contract. A claim for unascertained damages for breach of contract is not assignable (n). Applying the last mentioned case, the Madras High Court held that a mere right to recover damages for negligence of an agent in failing to collect rent cannot be transferred (o). Where a claim is founded on tort it is well settled that the claim is not assignable (p). But where a broken contract gives right to specific performance a transfer of such a right is not opposed to law (q). Under the Code of Civil Procedure, section 60 (e), a mere right to sue for damages is not liable to attachment and sale and therefore there can be no assignment of a mere right to sue.

Actionable claim.—This is defined by section 3 of the Act and differs materially from a "mere right to sue." The former is attachable and can be sold in execution while the latter cannot. Actionable claim can be assigned while under this clause the assignment of a "mere right to sue" is prohibited. The definition of actionable claim was inserted by section 2 of the Transfer of Property Act, 1900 (2 of 1900). Where as a result of cross transactions of sale and purchase the total amount of difference in favour of the plaintiff No. 1 amounted to a certain sum and he assigned the right to recover the amount to plaintiff No. 2 in discharge of a debt due by him,

- (h) *Seetamma v. Venkataramanayya* (1915) 38 Mad. 308; *Varahaswami v. Ramchandra* (1913) M. L. J. 298.
 (i) *Venkatarama v. Ramasami* (1921) 44 Mad. 539; *Prasanno v. Ashutosh Ray* (1913) 18 C. W. N. 450; *Hari Parasad v. Kodo Marya* (1916) 1 Pat. L. J. 427; *Ramiah v. Rukmani* (1913) 24 M. L. J. 313.
 (j) *Khadiram v. Shomnath*, A. I. R. (1933) Cal. 454.
 (k) *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (1906) 33 Cal. 702 and (1907) 34 Cal. 289; *Nathu v. Hansraj* (1907) 9 Bom. L. R. 114; *Moti Lal v. Radhey Lal*, A. I. R. (1933) All. 642; *Punjaram v. Harisao*, A.

- I. R. (1934) Nag. 268.
 (l) *Hirachand v. Nemchand* (1923) 47 Bom. 719.
 (m) *Ratansi v. Kuwarji*, A. I. R. (1930) Nag. 22.
 (n) *Abu Mahomed v. S. C. Chunder* (1909) 36 Cal. 345.
 (o) *Jewan Ram v. Ratan Chand* (1921) 26 C. W. N. 285.
 (p) *Varahaswami v. Ramchandra Raju* (1915) 38 Mad. 138.
 (q) *Varahaswami v. Ramchandra Raju* (1915) 38 Mad. 138; *Dawson v. Great Northern City Railway* (1905) 1 K. B. 260; *Defries v. Milne* (1913) 1 Ch. 98.
 (r) *Doraiswamy v. Thangavelu*, A. I. R. (1929) Mad. 251.

the defendant's contention that the amount of differences was really damages for breach of contract and plaintiff No. 1 had merely a right to sue to recover the amount and the assignment to No. 2 was invalid under this clause was disallowed (r). On a transfer of land a covenant running with the land follows with it. A suit on such a covenant is not within this clause (s). Again, money due under a licence is not damages and may be validly assigned (t). Nor is a suit to recover money found due on taking of partnership accounts by the assignee of the partner founded on a mere right to sue but is an actionable claim (u). But where a partner having assigned his share to a stranger without the consent of his other partners, it was held that no immediate rights accrued to the assignee against the others. Such an assignment did not operate as an immediate dissolution of the firm nor has the assignee a right to call for an account of the profits. He has to accept the profit as agreed to by the partners. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done to claim an account as from the date of the dissolution (v). Here the Bombay High Court dissented from the view taken by the Calcutta High Court that the assignment operated as dissolution of the partnership and entitled the assignee to sue (w). This is in accordance with section 29 (i) of the Partnership Act, 1932, sub-section (2) of which enacts that if the firm is dissolved, or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution. A claim to recover sums which the agent fraudulently omits to bring into account with the principal from the agent if he has collected them, if he has not, from the persons from whom they are due, is an actionable claim and not merely a right to sue and can be validly assigned (x). A transfer of rents due prior to the transfer of immoveable property does not fall under section 8 of the Act and clause (e) is not a bar to the maintainability of the suit (y) but a claim to damages for use and occupation from a tenant holding over is a mere right to sue and not assignable (z). And an assignment of rents cannot operate in respect of future possible leases that may come into existence as the result of a renewal.

A lessee covenanted to pay Government revenue and rendered himself liable in damages for breach of covenant. The lessor sold the property to the purchaser after the lessee had failed to pay instalments of revenue which was paid by the purchaser and deducted from the purchase price. Later the lessor executed a deed by which he assigned to the purchaser his right to recover instalments, appointing him an attorney to sue for them. It was held that the assignment was not a transfer of a right to sue but a definite sum of money and was a transfer of actionable claim under section 130 of the Act (a). An assignment of a debt uncertain in amount which will become certain when accounts are finally dealt with does not offend against the terms of clause (e) of the section (b).

(r) *Nagappa v. Badridas* (1930) 32 Bom. L. R. 894.

(s) *Jagannath v. Kalidas* (1929) Pat. 245.

(t) *Ramaswami v. Abdul Kaddus*, A. I. R. (1926) Mad. 978.

(u) *Shrinath v. Kanhaiyalal*, A. I. R. (1924) Nag. 145; *Thawerdas v. Vishandas*, A. I. R. (1925) Sind 72.

(v) *Dhanaji v. Gulabchand* (1925) 27 Bom. L. R. 409.

(w) *Juggut Chunder v. Rada Nath* (1884) 10 Cal. 669.

(x) *Ramiah v. Rukmani* (1913) 24 M.L. J. 313.

(y) *Kowlah v. Yarudala Venkayya*, A. I. R. (1923) Mad. 177; *Ram Charan v. Mt. Nazzeran*, A. I. R. (1935) All. 342.

(z) *Govindaswami v. Ramaswami* (1916) 30 M. L. J. 492; *Rama Pattar v. Raman Kully* (1923) 44 M. L. J. 238.

(a) *Manmatha Nath v. Hedait Ali* (1932) 34 Bom. L. R. 489, 59 I. A. 41.

(b) *Mathu v. Achu* (1934) 57 Mad. 1074; *O'Driscoll v. Manchester Insurance Committee* (1915) 3 K. B. 499.

- S. 6 Right of indemnity.—An agent who has a right of indemnity from his principal is entitled to sue upon it after rendering accounts, but not before he has accounted. It is a mere personal right to sue which cannot be assigned under section 6 (e) of the Transfer of Property Act (c).

Clause (f)—Public Office.

Public office.—In England the sale of public offices is governed by Statutes 5 and 6, Edw. 6. There is no definition of a public office in the Act, but a public office would be one held by a public officer. According to section 134 (5) of the Government of India Act, "office" includes place and employment. Under this clause a public office cannot be transferred. To make an office a public office the pay must come out of national and not out of local funds (d). A partnership agreement is not an assignment as to be void as infringing the Sale of Offices Act, 1551, and Sale of Offices Act (1809) (e).

Salary of a public officer.—This cannot be transferred whether before or after it has become payable. A public officer is defined in section 2 (17) of the Code of Civil Procedure, 1908; under section 60, sub-clauses (h) and (i), the salary or allowance of a public officer is not liable to attachment and sale except as therein provided. A receiver appointed in a suit is a public officer (f). So also one appointed in insolvency (g). A Cantonment Committee (h), a British officer in the Indian Army (i), an officer in the Indian Staff Corps (j), are public officers. An assignment by a Puisne Judge of the Supreme Court of Madras of the sum to be paid to the "legal personal representatives" of such Judge not being payable during the lifetime of the Judge is not an assignment of salary, within the Sale of Offices Acts, 1551 (c. 16) and 1809 (c. 126) contrary to public policy (k).

Clause (g)—Stipends and Political Pensions.

Stipends to pensioners of Government.—Stipends allowed to military, air force and civil pensioners of Government are not transferable. The words "air force" were inserted by section 2 and Schedule 1 of the Repealing and Amending Act, 1927 (X of 1927). There is no mention of naval pensions in sub-clause (g).

"Pension" in section 11 of the Pensions Act, 1871, is a periodical allowance on account of past services or particular merits or as compensation to dethroned princes, their families and dependants (l) or periodical allowances made by Government on political considerations or on account of past services or present infirmities or as a compassionate allowance (m). Evidently "pension," "pay," or "allowance" are treated as all of them *ejusdem generis*, importing persons entitled to periodical money payments. The money paid to a retired military officer for the commutation of pension does not retain its character as pension so far as to prevent it from being taken in execution (n). A percentage received by a khot for collecting the assessment is not "salary," nor is such a khot a "public officer," within the contemplation of section 60, clause (h) of the Civil Procedure Code, 1908 (o). A personal

- (c) *Ghisulal v. Gabhirmall* (1935) 39 C. W. N. 606.
 (d) *Re. Mirams* (1891) 1 Q. B. 594.
 (e) *Sterry v. Clifton* (1850) 19 L. J. C. P. 237.
 (f) *Prasaddas v. K. S. Bonnerjee* (1930) 57 Cal. 1127; *Radharam v. Purna Chandra* (1930) 34 C. W. N. 671.
 (g) *DeSilva v. Govind* (1920) 44 Bom. 895.
 (h) *Cecil Gray v. Cantonment Committee* (1910) 34 Bom. 583.
 (i) *Kering v. Murray* (1919) 42 Bom. 716; *Husain Baksh v. Briggis Shaw* (1933) 55 All. 648; *Hav v. Ram Chandar* (1917) 39 All. 308.

- (j) *Watson v. Lloyd* (1901) 25 Mad. 402; *Calcutta. Trades Association v. Ryland* (1896) 24 Cal. 102.
 (k) *Arbuthnot v. Norton* (1846) 3 M. I. A. 435, 13 E. R. 474 P. C.
 (l) *The Secretary of State for India in Council v. Khemchand Jeychand* (1880) 4 Bom. 432.
 (m) *Subraya Mudali v. Velayuda Chetty* (1907) 30 Mad. 153; *Jiban Krishna v. Sripati Charan Dey* (1904) 8 C. W. N. 665.
 (n) *Crowe v. Price* (1889) 22 Q. B. D. 429.
 (o) *Rauji Moreshwar v. Sayajirao Ganpatrao* (1889) 13 Bom. 673.

covenant by a coroner to pay percentage of fees received at every inquest is not illegal (p). Bonus granted by the Government in addition to pension to an officer compulsorily made to retire on account of reduction in the public service is not a pension (q). Zemindari granted as a reward for services rendered to Government is not a pension (r). Immoveable property granted in lieu of pension is not a pension (s). A grant which purports to be a grant only of the royal share of the revenue given in commutation of cash is a grant of revenue only (t).

A grant of land revenue is not a pension (u) but it may take the form of an assignment of land revenue depending upon the circumstances of each case whether or not a particular assignment of land revenue is a pension (v). There is no prohibition against an assignment of a pension not granted on political considerations or on account of past services or present infirmities or as a compassionate allowance. The same Court, however, was divided in opinion as to whether a pension included a grant of land revenue (w).

Political pensions.—These are exempt from attachment under section 60, sub-section (g). A pension guaranteed payable by the Government of India by a treaty obligation contracted with another sovereign power is in the strictest sense a political pension (x).

A pension payable to a political prisoner by the Government of India under Regulation III of 1818 does not cease to be a political pension because the Government of India under some arrangement gets a foreign State to remit the amount to the Government Treasury for payment. But it falls under the Pension Act, XXIII of 1871. An agreement entered into by such prisoner with a creditor empowering the latter to withdraw the amount from time to time in discharge of his debt is void under the provisions of the Pensions Act as well as clauses (d) and (g) of section 6 of the Transfer of Property Act (y). Even though the political pension be unpaid at the time of the prisoner's death it is not liable to attachment. The character of the fund remained unchanged so long as it remained unpaid in the hands of the Government (z). There is no presumption that a jaghir is a political pension. The onus is on the person who alleges it (a).

Clause (h)—Transfer Opposed to Interest or Against Public Policy or to a Disqualified Person.

Sub-clause (1).—This clause is sub-divided into three parts. The first part forbids the transfer of an interest in property where the act of transfer is foreign to such interest, for example, lands held on Swastivachakam (service tenure) cannot be transferred as the sale of lands is opposed to the nature of interest affected (b). Land burdened with performance of service of a public nature is inalienable, as already seen in dealing with clause (d). Neither titles nor can medals and decorations be disposed of except according to regulations laid down by royal warrant (c).

- (p) *Pugh v. Carttar* (1851) 17 L. T. O. S. 107.
- (q) *Khasim v. Carlier* (1882) 5 Mad. 272.
- (r) *Lachmi Narain v. Makund Singh* (1904) 26 All. 617.
- (s) *Amna Bibi v. Najmun-Nissa* (1909) 31 All. 382.
- (t) *Balvant Ramchandra v. The Secretary of State* (1905) 29 Bom. 480.
- (u) *Duni Chand v. Gurmukh Singh*, A. I. R. (1930) Lah. 816.
- (v) *Alma Ram v. Kehar Singh*, A. I. R. (1930) Lah. 904.
- (w) *Bhoopal Rai v. Shiam Sunder*, A. I. R. (1929) All. 781.

- (x) *Bishambar Nath v. Imdad Ali Khan* (1891) 18 Cal. 216, 17 I. A. 181.
- (y) *Satraji Dongerchand Firm v. Madho Singh* (1927) 50 Mad. 711; *Muthusami Naidu v. Prince Alagia* (1903) 26 Mad. 423.
- (z) *Valia Thamburatti v. Anujani Kunhunni* (1903) 26 Mad. 69.
- (a) *Duni Chand v. Gurmukh Singh*, A. I. R. (1930) Lah. 816.
- (b) *Anjaneyalu v. Sri Venugopala* (1922) 45 Mad. 620.
- (c) Sec. 11, Regimental Debts Act (1893) 56 Vict. Ch. V.; also see sec. 30 of the same Act.

- S. 6 Property settled on trust which does not contain a power of alienation cannot be transferred. A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged (*d*). And where property is transferred to a married woman or for her benefit on condition that she shall have no power during her marriage to transfer or charge the same or her beneficial interest therein cannot be transferred (*e*).

Primogeniture is a custom only and not a right (*f*). The rule of primogeniture which prevails in England is applied to impartible estates in India, some of which by custom have been held not to be alienable. In India succession to certain ancestral estates are governed by family custom according to the rule of lineal primogeniture. According to the law as understood prior to the decision in *Sartaj Kuari v. Deoraj Kuari* (*g*), an impartible Raj had been considered inalienable, but it was recognized in that case that the general rule thus established might be displaced by proof of family local custom restricting alienation; the onus of proving the custom being cast upon the person who alleged it. The trend of modern decisions is that the holder of impartible estates can alienate it by deed *inter vivos* (*h*) or by will (*i*). In the Madras Presidency a single family cannot, by not alienating property for a number of years, create a custom which would compel a Court to uphold that the property is inalienable (*j*).

Religious endowments in this country, whether they are Hindu (Devasathan or Sevasthan) or Mahomedan (*wakf*), are not alienable though their income may be temporarily pledged for necessary purposes (*k*).

Sub-clause (2).—This clause is a restraint on transfers for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act. The word ‘or’ between “consideration” and “object” as occurring in that section is disjunctive and not conjunctive. These two words are not synonymous but distinct in meaning. The word “object” means “purpose” (*l*). This clause has been discussed at length in section 25. Every agreement of which the object or consideration is unlawful according to section 23 of the Indian Contract Act, is void, but possession under a void agreement brings the transaction within the maxim “*Pari delicto potior est conditio possidentis*” and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate that fraud and that there is no difference in the degree of guilt of the plaintiff who seeks redress and that of the defendant the duty of the Court is not to assist either party. In such cases the law favours him who is actually in possession (*m*). The above rule is subject to the exceptions laid down in section 84 of the Indian Trust Act, II of 1882. A further discussion on the subject will be found in section 53 of the Act.

Sub-clause (3).—This sub-clause prohibits the transfer to persons who are not competent to purchase property by any law or enactment in force. It is the converse of section 7 of the Act. Persons disqualified to be transferees are those enu-

(*d*) Sec. 3, Provident Funds Act, XIX of 1925.
 (*e*) Sec. 8, Clause 2 (a), Married Women's Property Act, III of 1874.
 (*f*) Williams on Real Property, 24th Ed., p. 185.
 (*g*) (1888) 10 All. 272, 15 I. A. 51.
 (*h*) *Sartaj Kuari v. Deoraj Kuari* (1888) 10 All. 272, 15 I. A. 51.
 (*i*) *Protap Chandra v. Jagadish Chandra* (1927) 54 Cal. 955; 54 1A 289; *Venkata Surya v. Court of Wards* (1899), 22 Mad. 383, 26 I. A. 83.
 (*j*) *Thirumalai v. Venkatachalam*, A. I. R. (1929) Mad. 234.

(*k*) *The Collector of Thana v. Hari Sitaram* (1882) 6 Bom. 546; *Narayan v. Chintaman* (1881) 5 Bom. 393.
 (*l*) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1906) 33 Cal. 702.
 (*m*) *Vilayat Husain v. Misran* (1923) 45 All. 396; *Raghupati v. Nrishingha*, A. I. R. (1923) Cal. 90; *Banka Behary v. Raj Kumar* (1900) 27 Cal. 231; *Goberdhan Singh v. Ritu Roy* (1896) 23 Cal. 962; *Govinda Kuar v. Lala Kishun* (1901) 28 Cal. 370; *Deivana-yaga v. Muthu Reddi* (1921) 44 Mad. 329.

merated in section 136 of this Act and O. 21, r. 73 of the Code of Civil Procedure, 1908. Although a minor is qualified to be a transferee such transfers are, however, confined to sales (n) and mortgages (o) and not to leases (p) which are after the amendment of section 107 by Act 20 of 1929 required to be executed both by the lessor and the lessee. Again, a person appointed as guardian of a minor cannot purchase property even under an order of the Court if he has failed to furnish the security required of him as a guardian. The disqualification does not extend to a transfer prohibited to a person not holding a certain certificate required to be obtained by him (q), nor does it attach to a Buddhist monk who may hold property such as paddy land (r).

Clause (i)—Other Non-transferable Interest.

Generally.—Clause (i) was added by section 4 of the Transfer of Property Act (1882) Amendment Act, 1885 (III of 1885). It lays down three exceptions to the general rule enunciated in the section that property of any kind may be transferred. Exception to clause (j) of section 108 is a reproduction of this clause. By reason of section 117 that exception cannot be extended to agricultural leases whereas this restriction would apply to such leases.

Exception (1).—This exception lays down that nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy to assign his interest as such tenant. There are various local Acts the policy of which is to secure proprietary rights and all devices for the relinquishments of such rights are contrary to law and are illegal and void (s). An occupancy holding is a holding in respect of which there is an occupancy right. Whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all was considered by a Full Bench of the Calcutta High Court which laid down that:—
In transfer for value of occupancy holdings apart from custom or local usage :

- (1) The transfer of the whole or a part is operative against the raiyat
 - (a) where it is made voluntarily
 - (b) where made involuntarily and the raiyat with knowledge fails or omits to have it set aside.
- (2) The transfer is operative as against a landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent.
- (3) The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat (t).

In the same Court in a suit to recover joint possession of an occupancy holding in respect of his share by a co-sharer landlord on the ground that the defendant acquired no title by purchase as it was not transferable by custom and there was an abandonment of the holding by the former tenant the defence was that the plaintiff was not entitled to joint possession and that he could not get any relief

(n) *Munni Kumear v. Madan Gopal* (1916) 38 All. 62; *Narain Das v. Musammal Dhanial* (1916) 38 All. 154; *Ulfat Rai v. Gauri Shankar* (1911) 33 All. 657; *Thakar Das v. Mt. Putli*, A. I. R. (1924) Lah. 611; *Subba Reddy v. Guruvu Reddy*, A. I. R. (1930) Mad. 425; *Munia Konan v. Perumal Konan* (1914) 37 Mad. 390.
(o) *Raghava v. Srinivasa* (1917) 40 Mad. 308; *Zafar Ahsan v. Zubaide Khatun*, A. I. R. (1929) All. 604; *Balwant Singh v. R. Clancy* (1912) 38 All. 296, 39 I. A. 109.

(p) *Govinda Kurup v. Chovakkaran* (1931) 59 M. L. J. 941; *Indian Cotton Co., Ltd. v. Raghunath* (1931) 33 Bom. L. R. 111.
(q) *Maung Ye v. M. A. S. Firm*, A. I. R. (1928) Rang. 136, A. I. R. (1928) Rang. 3 over-ruled.
(r) *U. Pyinnya v. Maung Law*, A. I. R. (1929) Rang. 354.
(s) *Moti Chand v. Ikram-Ullah Kahn* (1917) 39 All. 173, 44 I. A. 54.
(t) *Dayamayi v. Ananda Mohan Roy* (1915) 42 Cal. 172.

S. 6 except by bringing a partition suit. It was held that the plaintiff was entitled to relief claimed and that the claim for joint possession without partition was maintainable (u). A mortgage of an occupancy holding is void in its entirety and no decree can be obtained on the personal covenant. To enforce such an agreement would be contrary to the provisions of sections 23 and 24 of the Indian Contract Act, IX of 1872 (v). The inclusion of non-transferable occupancy holding along with other properties which could be legally transferred did not make the whole transaction illegal (w).

Neither a relinquishment (x) nor a hypothecation (y) by an occupancy tenant of his holding is a transfer within the prohibition of section 9 of Act XVIII of 1873 (N.W.P. Rent Act), but a mortgage with possession is (z). The policy of the Oudh Rent Act is to keep the relationship of landholder and tenant subsisting in spite of either or both of them and it can be terminated only in the manner provided by the Act (a). On the execution of a usufructuary mortgage of a non-transferable holding and the abandonment of it by the tenant the landlord is entitled to treat the mortgagee as trespasser and to ask for his ejectment (b). As to sale of occupancy right with zemindar's consent a Division Bench of the same Court was divided in opinion (c).

Before the passing of the Transfer of Property Act, 1882, a lease of homestead and was not transferable by law (d). It has been observed that although occupancy land is declared by the Agra Tenancy Act and by section 6 (i) of the Transfer of Property Act to be non-transferable, a transfer thereof is not expressly prohibited by law or declared to be otherwise unlawful within the meaning of sections 23 and 24 of the Contract Act or section 6 (h) of the Transfer of Property Act (e). It is respectfully submitted that the above observations are open to criticism.

Exception (2).—The clause forbids an assignment of an estate by a farmer who is in default in paying land revenue. Arrears of land revenue due on account of land by any landholder are a paramount charge on the holding and every part thereof and failure in payment renders the holding liable to forfeiture (f).

Similar provisions are available in the Revenue Codes of other provinces.

Exception (3).—The Court of Wards established by Legislative enactment is for superintendence and protection of persons and properties of minors and other disqualified proprietors of land. There are various Courts of Wards established for the several provinces of India. In the Bombay Presidency there is Act I of 1905 which extends to the whole of the Presidency except the City of Bombay and Aden. In Madras there is the Court of Wards Act, 1902, and in Bengal, Act IX of 1879 as amended by Act III of 1881 and I of 1906. In the United Provinces of Agra and Oudh there is the Court of Wards Act, IV of 1912, in the Punjab, Act II

(u) *Dilbar Sardar v. Hosein Ali* (1899) 26 Cal. 553.

(v) *Har Prasad Tiwari v. Sheo Gobind Tiwari* (1922) 44 All. 486; *Murlidhar v. Pem Raj* (1899) 22 All. 205; *Bhawani Prasad v. Ghulam Muhammad* (1895) 18 All. 121; *Makund Lal v. Mt. Sunita*, A. I. R. (1931) All. 461; *Mohammad v. Madad Ali*, A. I. R. (1931) Oudh 309.

(w) *Dip Narain Singh v. Nageshar Prasad* (1930) 52 All. 338.

(x) *Lalji v. Nuran* (1883) 5 All. 103.

(y) *Gopal Pandey v. Parsotam Das* (1883) 5 All. 121.

(z) *Ganga Din v. Dhurandhar Singh* (1883) 5 All. 495.

(a) *Amar Nath v. Har Prasad*, A. I. R. (1932)

Oudh 79

(b) *Rasik Lal v. Bidhumukhi* (1906) 33 Cal. 1094

(c) *Durga v. Jhinguri* (1885) 7 All. 511.

(d) *Kamala Mayee v. Nibaran Chandra* (1932) 36 C. W. N. 149; *Sarada Kanta v. Nabin Chandra* (1927) 54 Cal. 333; *Sulin Mohan Banerjee v. Raj Krishna Ghose* (1920) 33 C. L. J. 193; *Manmoth Nath Mitter v. Anath Bandhu Pal* (1918) 23 C. W. N. 201; *Madhusudan Sen v. Kamini Kanta Sen* (1905) 32 Cal. 1023; *Madhab Chandra Pal v. Bijoy Chand Mahatab* (1900) 4 C. W. N. 574.

(e) *Dip Narain Singh v. Nageshar Prasad* (1930) 52 All. 338.

(f) Sec. 56, Land Revenue Code (Bomb V of 1879).

of 1903, in the Central Provinces Act XXIV of 1899, in the provinces of Bihar and Orissa Act IV of 1912 and in Ajmere and Merwara Regulation I of 1888.

Ss 6-7

A lessee of an estate under the management of a Court of Wards cannot assign his lease under section 6, clause (i) of the Transfer of Property Act, 1882. No ward is competent, without the sanction of the Court of Wards, to create any charge upon or interest in his property or any part thereof. Hence a surrender by two Hindu widows, disqualified proprietors under the Court of Wards Act, 1879, to reversionary heirs without the sanction of the Court of Wards, was declared void and the transaction was ineffectual to vest the property in them (g).

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Persons competent to transfer.

Persons competent to transfer.—The qualifications necessary for a transfer are :—

- (1) capacity to contract and
- (2) be entitled to transferable property or
- (3) authorized to dispose of transferable property not his own.

Such a person may transfer such property

- (a) either wholly or in part and
- (b) either absolutely or conditionally

to the extent and in the manner prescribed by any law in force.

Limited estate holders.—Unless armed with authority to transfer a man cannot transfer property not his own (h) and where his estate is limited to the extent of his interest only. The rights of such estate holders are discussed below.

Administrator General.—By section 11 of the Administrator General's Act, III of 1913 (1), the Administrator General has power to sell property according to the directions of the Court. In default of such directions, according to the provisions of the Act on sale, he can enter into covenant against his own encumbrances. A grant of Letters of Administration of the estate of a deceased Hindu vests the property in him and enables him to dispose of immoveable property without the consent of the Court (i). Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Administrator General in which no relief is claimed against him personally (j).

Official Trustee.—Section 7, clause 2 of Act II of 1913 (k), precludes an Official Trustee from selling immoveable property without an order of the Court. He has the same powers and is subject to the same control and orders as any other trustee acting in the same capacity. He is not an officer of the Court within the meaning

(g) *Man Singh v. Nowlakhbati* (1926) 5 Pat. 290, 53 I. A. 11.

(h) *Chitu v. Charan Singh*, A. I. R. (1923) All. 563.

(i) *Alwar Chetty v. Chidambara Mudali* (1915)

38 Mad. 1134.

(j) Sec. 41, Administrator General's Act, III of 1913.

(k) Official Trustee's Act.

S. 7 of rule 13 of Part II of the Original Side Rules of the Bombay High Court (*l*). And nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against him in which no relief is claimed against him personally (*m*).

Executor or administrator.—Under the Indian Succession Act, XXXIX of 1925, the powers of an executor or administrator are subject to the following rules :—

(1) An executor or administrator is the legal representative of a deceased person and all the property of the deceased vests in him as such unless the deceased was a Hindu, Mahomedan, Buddhist, Sikh or Jain and such property would otherwise have passed by survivorship to some other person (*n*).

(2) No right as executor can be established in any Court of Justice unless Probate or Letters of Administration with the will annexed have been granted by a Court of competent jurisdiction in British India. This rule does not apply in the case of wills made by Mahomedans, and in the case of a Hindu, Buddhist, Sikh or Jain where such wills are of the classes specified in clauses (a) and (b) of section 57 (*o*).

(3) No right as administrator can be established in a Court of Justice unless Letters of Administration have first been granted by a Court of competent jurisdiction. This rule has no application in the case of intestacy of a Hindu (*p*), Khoja (*q*), Buddhist, Jain or Indian Christian (*r*).

(4) When probate is granted it establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such (*s*).

(5) When probate has been granted to several executors and one of them dies the entire representation of the testator accrues to the surviving executor or executors (*t*).

(6) An executor or administrator has power to dispose of the property of the deceased vested in him either wholly or in part, in such manner as he may think fit (*u*).

(7) The power of disposal of an executor or administrator (*v*), in the case of a Hindu, Mahomedan, Buddhist, Sikh or Jain shall be subject to the following restrictions and conditions :—

(a) Such as may be imposed by the will unless the Court which granted the probate permits him by an order in writing notwithstanding the restriction to dispose of any immoveable property specified in the order in the manner permitted by the order.

(b) An administrator may not without the previous permission of the Court by which the Letters were granted

(a) transfer by sale any immoveable property vested in him under section 211.

(c) A disposal of property in contravention of clause (a) or clause (b) by an executor or administrator is not void but is only voidable at the instance of any other person interested in the property (*w*). An order giving power to sell does not include a power to mortgage (*x*).

(l) *Omar Tyab v. Ismail Tyab* (1928) 30 Bom. L. R. 177.

(m) Sec. 16, Official Trustee's Act.

(n) Sec. 211.

(o) Sec. 213.

(p) *Chidambara v. Krishnasami* (1916) 39 Mad. 365.

(q) *Abdul Karim v. Karmali* (1920) 22 Bom. L. R. 708; *Mahomed Yusuf v. Hurgovandas* (1923) 47 Bom. 231; *Shaikh Moola v. Shaikh*

Essa (1884) 8 Bom. 241.

(r) Sec. 212.

(s) Sec. 227

(t) Sec. 226

(u) Sec. 307

(v) Sec. 307, sub-sec. 2.

(w) *Jnanendra v. Shorashi* (1922) 49 Cal. 626; *Chandbi v. Abdul Karim* (1927) 51 Bom. 16.

(x) *Chandbi v. Abdul Karim* (1927) 51 Bom. 16.

(8) An alienation with permission is not absolute so as to exclude all inquiries in the question whether permission was obtained through fraud or misrepresentation. All the essential elements of the transaction must be placed before the Court before the sanction is obtained. Non-disclosure would entitle the Court to go behind such permission (y).

(9) If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold (z).

(10) Powers of several executors or administrators may, in the absence of a direction to the contrary, be exercised by any one of them who has proved the will or taken out Letters of Administration (a).

(11) On the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant, all the powers of the office become vested in the survivors or survivor (b).

(12) The administrator of effects unadministered, namely, an administrator *de bonis non*, has the same powers on a *cessante* grant as the original executor or administrator (c). Such an administrator is appointed either on the death of a sole executor or last surviving executor if there be more than one or on the death of an administrator when the estate at the time of such death is left unadministered.

(13) On discharge of funeral and testamentary expenses and debts and legacies an executor ceases to be an executor. His rights, duties and liabilities are those of a trustee (d).

(14) By section 2 of the Trustees Act (e) the words "trust" and "trustee" shall extend to and include the duties incident to the office of executor or administrator of a deceased person.

(15) On bankruptcy probate is not refused otherwise than when executor becomes *non compos* because that is a natural disability (f).

(16) Property held by the insolvent on trust for any other person is not divisible amongst his creditors (g). This rule extends to executors and administrators.

(17) The Court has jurisdiction to restrain a bankrupt executor from acting. Usually in such cases a receiver is appointed (h). A receiver is unnecessary where there is a co-executor who can and will act alone, when the other is restrained (i). In the absence of proceedings the bankrupt may continue to act on bankruptcy of one or two executors who are also trustees. It may be necessary for the plaintiff to take steps to remove the defendant as trustee and to have a new trustee appointed in his place.

(18) If a testator when he makes his will is aware of the circumstances and position of his executors and trustees the Court will not lightly interfere with their discretion; and although the circumstances of an executor being an insolvent may be a reason for appointing a receiver, yet, if the testator was aware of his

(y) *Musammal Jaibai v. Rewaram*, A. I. R. (1927) Nag. 57.

(z) Sec. 310.

(a) Sec. 311.

(b) Sec. 312.

(c) Sec. 313.

(d) *Ex-parte Amerchand Madhowji* (1905) 29 Bom. 188.

(e) XXVII of 1866

(f) *Hill v. Mills* (1691) 1 Salk 36, 91 E. R. 37.

(g) Sec. 52 (1) (a) Presidency Towns Insolvency Act, III of 1909.

(h) *Utterson v. Mair* (1793) 2 Ves. 95, 30 E. R. 540; *Gladdon v. Stoneman* (1808) 1 Mad. 143 n.; 56 E. R. 54; *Rex v. Simpson* (1764) 1 W. Bl. 456.

(i) *Bowen v. Phillips* (1897) 1 Ch. 174.

S. 7 insolvency, the Court will not on that ground alone take the property out of his hands (j).

Official Assignee.—On an adjudication order being made, the estate of the insolvent vests in the Official Assignee under section 17 of the Presidency Towns Insolvency Act, III of 1909, and under section 28 of the Provincial Insolvency Act, V of 1920, in the Official Receiver. The former under section 68 and the latter under section 59 has power to sell all or any part of the property of the insolvent either by public auction or by private treaty (k). It is the duty of the Official Assignee to make the sale with all convenient speed. The Court's sanction is not necessary and the Court has no power to set aside a completed sale (l). It is submitted that in such a case relief may be sought in a regular suit. Conveyance of property sold by the Official Receiver in insolvency is not exempt from the requirements of section 54 (m) and unless guarded by express stipulation he is bound as other persons to make a good title (n). Conveyance by the Official Assignee is exempt from payment of stamp duty (o).

A sale by an Official Receiver without a vesting order is invalid (p) and confers no title on the purchaser (q). He is not an agent of the Court so as to enable the Court to ratify his act. A sale made by him before his appointment as receiver would be operative under section 43 of the Transfer of Property Act on his subsequent appointment as such receiver (r). An order of discharge either under the Presidency Towns Insolvency Act or the Provincial Insolvency Act, V of 1920, does not put an end to the insolvency proceedings and the power of sale can be exercised under the directions of the Court even after discharge (s).

An Official Receiver's sale by public auction is subject to the rules of the Code of Civil Procedure, 1908, in that behalf. A change in the sale proclamation on day of sale would be an irregularity vitiating the sale which may be set aside (t). It is not necessary that there should be *mala fides* on the part of the Official Receiver or the purchaser to warrant interference (u). The Calcutta High Court has held that the procedure for sales in execution of decrees under the Code of Civil Procedure does not apply to the Official Receiver (v). The property, moveable or immovable, acquired by an insolvent after the adjudication order but before his final discharge, can be transferred by him, provided the transaction is *bona fide* and for value and is completed before the intervention of the Official Assignee (w).

Receiver.—A receiver is appointed under the Code of Civil Procedure, 1908. The powers conferred upon him are enumerated in Order 40, rule 1 (d) of the Code.

- (j) *Stainton v. Carron Company* (1854) 18 Beav. 146, 52 E. R. 58.
- (k) *Entazuddi Sheikh v. Ram Krishna Banik* (1920) 24 C. W. N. 1072.
- (l) *Woomculla & Co. v. N. C. Macleod* (1906) 30 Bom. 515.
- (m) *Abdul Hashim v. Aman Krishna Saha* (1919) 46 Cal. 887.
- (n) *M'Donald v. Hanson*, 12 Ves. Jun. 277, 33 E. R. 106.
- (o) Sec. 115, Presidency Towns Insolvency Act, III of 1909.
- (p) *Subba Aiyar v. Ramaswami Aiyangar* (1921) 44 Mad. 547; *Official Receiver of Trichinopoly v. Samasundaram* (1916) 30 M. L. J. 415; *Rama Aiyar v. Official Receiver of Tinnevely* (1917) 32 M. L. J. 520; *Kavali Sankara Rao v. Ramakrishnaya* (1924) 46 M. L. J. 184; *Sankaranarayana Pillai v. Rajamani* (1924) 47 Mad. 462; *Muthusami v. Somoo Kandiar* (1920) 43 Mad. 869.
- (q) *Vythilinea v. Ponnuswami* (1921) 41 M. L. J.

- 78.
- (r) *Basava Sankaran v. Ganapati Anjaneyulu* (1927) 50 Mad. 135.
- (s) *K. P. S. P. P. L. Firm v. C. A. P. C. Firm*, A. I. R. (1929) Rang. 168; *Rowe & Co. Ltd. v. Tan Thean Taik*, A. I. R. (1925) Rang. 105.
- (t) *Tiruvengkatachariar v. Thanayiammal* (1916) 39 Mad. 479.
- (u) *Ramabadra Chetty v. Ramaswami Chetty* (1923) 44 M. L. J. 284.
- (v) *Entazuddi Sheikh v. Ram Krishna Banik* (1918) 22 C. W. N. 1072.
- (w) *Chhot Lal v. Kedar Nath*, A. I. R. (1924) All. 703; *Alimahmad v. Vadilal* (1919) 43 Bom. 890; *Kristocomul Mitter v. Suresh Chunder* (1882) 8 Cal. 556; *Cohen v. Kitchell* (1890) 25 Q. B. D. 262; *Lakshmi Chand v. Kedar Nath*, A. I. R. (1928) All. 12; *Official Assignee v. N. P. A. K. Chettyar Firm* (1927) 5 Rang. 229.

It is the practice to make an order vesting the property in the receiver and authorizing him to make the conveyance. Although the vesting order is made in almost all cases and required by conveyancers as necessary for the purpose of validating the title, it is somewhat difficult to understand on what law this practice is based, for the proper course is, when a receiver is appointed, that he should sell the property and the parties interested should execute the conveyance. With termination of the proceedings in which the receiver is appointed, the receivership comes to an end (x). A receiver of an estate may be either a private person or an Official Receiver. The powers of both are the same. In the case of private person, question often arises as to security. If he be offered to give security and the security is not completed the order is not effective and in spite of the order empowering him to sell he cannot sell without furnishing the requisite security (y). This rule applies when the order is conditional and not absolute in its terms (z). A receiver is a public officer within the meaning of sub-clause (b) and also (h) of clause 17 of section 2 of the Civil Procedure Code, 1908 (a), so that under section 80 of the Civil Procedure Code he is entitled to the statutory notice before a suit is filed against him. The provisions of section 80 are mandatory (b). Even so as regards description and place of residence (c). The words of the section as to how notice is to be served are also mandatory. The plaint must contain the required announcement as to service of such notice (d). A receiver occupies a position towards an estate in his hands different from that of an executor and trustee (e). He cannot, without sanction of the Court, purchase property of which he is receiver (f). A receiver is an officer of the Court and not an agent for the party for whom he is appointed (g). The property is in the custody of the Court (h). No suit can be brought against him without leave of the Court which may be obtained subsequent to institution (i). He cannot sell property without the sanction of the Court. The sale may be by public auction or private treaty with the consent of the parties. On a sale by public auction he may fix a reserve bid. The receiver is often authorized to execute the conveyance by the Court. A receiver cannot delegate his powers (j). A defendant will not be permitted to question the propriety, regularity or necessity of his appointment (k). He cannot enter into any covenant other than the covenant against his own encumbrances. A purchase by a receiver of property of which he is appointed receiver would be set aside at the instance of the beneficiary but he would be entitled to a charge for the purchase-money and interest subject to which he would hold the property in trust for the beneficiary (l). A receiver's sale is sometimes subject to sanction of the Court. Such a condition does not entitle him to test the market.

Trustees.—By section 21 of the Specific Relief Act (I of 1877), contracts of trustees either in excess of their powers or in breach of their trust cannot be specifically enforced. The summary powers conferred by the Trustees Act (XXVII of 1866) may be exercised by the High Court in the case of Hindu trusts (m) as well

- (x) *Rabeholme v. Smith* (1907) 34 Cal. 336.
- (y) *Edwards v. Edwards* (1876) 2 Ch. D. 291;
Srinivas v. Kesho (1911) 14 C. L. J. 489.
- (z) *Bhairab v. Nandiram* (1919) 46 Cal. 70.
- (a) *Prasaddas v. K. S. Bannerjee* (1930) 57 Cal. 1127; *Raja Jagadish Chandra Deo v. Rai Debendra Prasad* (1930) 35 C. W. N. 161.
- (b) *Bhagchand v. The Secretary of State for India* (1927) 51 Bom. 725, 54 I. A. 338.
- (c) *Prasaddas v. K. B. Bannerjee* (1930) 57 Cal. 1127.
- (d) *Raja Jagadish Chandra Deo v. Rai Debendra Prasad* (1930) 35 C. W. N. 161.
- (e) *Mohari Bibi v. Shyama Bibi* (1903) 30 Cal. 937.

- (f) *Nugent v. Nugent* (1907) 2 Ch. 292; *Jiteswar v. Sudha* (1932) 59 Cal. 956.
- (g) *Ward v. Shew* (1833) 9 Bing. 608, 131 E. R. 742; *Re. Flowers & Co.* (1897) 1 Q. B. 14.
- (h) *Musadee Mahomed Cassum Sherazee v. Meerza Ally Mahomed Shoostry* (1851) 6 M. I. A. 27, 19 E. R. 11.
- (i) *Jamshedji v. Husseinbhai* (1920) 44 Bom. 903.
- (j) *Balaji v. Ramchandra* (1895) 19 Bom. 660.
- (k) *Greenawalt v. Wilson* (1893) 52 Kan. 104, 34 Pac. 403.
- (l) *Nugent v. Nugent* (1907) 2 Ch. 292.
- (m) *In the matter of the petition of Khandas Narandas* (1881) 5 Bom. 154; *Lang v. Moolji* (1919) 21 Bom. L. R. 1111.

S. 7 as Mahomedans (*n*). Section 31 of the said Act is repealed by the Transfer of Property Act. That Act (*o*) consolidates and amends the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees in cases to which the English Law is applicable. It defines immoveable property as extending to and including messuages, hereditaments and tenements, corporeal or incorporeal, of every tenure or description whatever may be the estate or interest therein, and trustee as extending to and including implied and constructive trusts.

A direction to dispose of an estate does not import a power to sell but to manage (*p*). Sale is not exchange. Power of exchange does not include a power of sale (*q*), nor does a power to invest, reinvest and lend (*r*). A trust for sale is not spent by the beneficiaries attaining vested interests (*s*), provided the power in its creation does not offend the rule against perpetuities and the *cestui que trust* have not put an end to the trusts by electing to take the property as it stands (*t*). The question, however, depends on the intention of the donor of the power (*u*).

Trustees must sell at the best price (*v*). Test of adequate price is not valuation but market value (*w*). When there was no evidence of market value a sale on the advice of auctioneers of repute was upheld (*x*). A sale may be by private treaty or public auction (*y*) and subject to a reserve (*z*) and either together or in lots and either at one time or at several times (*a*). For the purpose of completing any such sale a trustee has power to convey (*b*), but a trustee is incapable of exercising his power of sale or of executing a conveyance without an order of the Court. Trustees may sell trust property conjointly with property not subject to the trust (*c*). The circumstances under which the trustees of one property may join with the owner of another in selling both properties together was considered in the undermentioned case (*d*), where it was laid down that the duty of trustees who having a trust or power to sell joining with the owner of another property in selling both properties together was first to see that such a mode of sale was beneficial to their *cestui que trust*; secondly, to see their share of the purchase-money was apportioned before the completion of the purchase and to obtain payment of such apportioned share; thirdly, to apportion the share themselves, taking care to act under proper advice. The proper mode of apportioning the life estate and reversion when sold together for a lump sum is to value both interests separately and not to put a value on one and deduct that from the total price.

At the instance of a *cestui que trust* a purchaser would be restrained from completing a sale by trustees with depreciatory conditions inserted without any reasonable grounds. The smallness of the plaintiff's interest and the fact of his infancy are not reasons against granting an injunction (*e*). Trustees for sale put up certain land for sale by auction in lots which were sold "subject to

- (*n*) *Fakrunnessa v. District Judge* (1920) 47 Cal. 592; *Habihar v. Saidannessa Bibi* (1924) 51 Cal. 331.
- (*o*) XXVII of 1866.
- (*p*) *Sheffield v. Orrery (Lord)* (1745) 3 Atk. 282, 28 E. R. 965.
- (*q*) *McQueen v. Farquhar* (1805) 11 Ves. 467, 32 E. R. 1168.
- (*r*) *Re. Holloway, Holloway v. Holloway* (1888) 60 L. T. 46.
- (*s*) *Re. Tweedie & Miles* (1884) 27 Ch. D. 315; *Re. Powell, Bodvel-Roberts v. Poole* (1918) 1 Ch. 407.
- (*t*) *Re. Cotton's Trustees & The School Board for London* (1882) 19 Ch. D. 624.
- (*u*) *Re. Jump, Galloway v. Hope* (1903) 1 Ch.

- 129; *Re. Sadley (Lord) & Baines & Co.* (1894) 1 Ch. 334.
- (*v*) *Ord. v. Noel* (1820) 5 Mad. 438, 56 E. R. 962.
- (*w*) *Wilton v. Hill* (1855) 25 L. J. Ch. 156.
- (*x*) *Grove v. Search, Griffin v. Search* (1906) 22 T. L. R. 290.
- (*y*) Sec. 37, Indian Trusts Act, II of 1882.
- (*z*) *Re. Peytons Settlement* (1862) 30 Beav. 252; 54 E. R. 885.
- (*a*) Sec. 37, Indian Trusts Act, II of 1882.
- (*b*) Sec. 39, Indian Trusts Act II of 1882.
- (*c*) *Rede v. Oakes* (1864) 34 L. J. Ch. 145.
- (*d*) *In re. Cooper & Allen's Contract for sale to Harlech* (1876) 4 Ch. 802.
- (*e*) *Dance v. Goldinham* (1873) 8 Ch. App. 902.

the existing tenancies, restrictive covenants and all easements and quit rents, if any, affecting the same" and the purchasers were to indemnify the vendor against the breach of any restrictive covenants contained in the abstracted muniments of title. There were also certain general conditions restricting the occupation of the land. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions and the vendors stated that they knew of no other restrictive covenants and of no existing tenancies, easements or quit rents affecting the property. Held that the conditions as to existing tenancies and existing covenants were depreciatory and the objection was a good defence to an action for specific performance by the trustees against the purchaser (f). Where a trustee is empowered to sell he may sell subject to a prior charge or not (g). On sale the only covenant that can be required of a trustee is that so far as his own acts are concerned he has not encumbered the property. On a covenant for production of scheduled deeds a trustee covenants to be personally liable so long as the deeds remain in his custody and for the purpose of binding those in whose custody they may thereafter go but not further or otherwise. Power of sale coming into operation on the death of a tenant for life is not exercisable with the concurrence of such tenant (h).

Where an authority to deal with the trust property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of remaining trustees (i). The English rule is the other way (j). An alienation for necessity by one without the consent of the other is not enforceable (k). *Bona fide* payment and receipt of purchase-money of a person to whom money is payable under an express or implied trust shall discharge the person making payment to see to its application or being answerable for its misapplication (l). Trustee for sale is prohibited from purchasing the trust property owing to his fiduciary character unless the trust is dissolved or the trustee and *cestui que trust* agree to stand in the relation of vendor and purchaser. This rule is general and extends to a secret or *benami* purchase by a trustee (m). Being in a fiduciary capacity a trustee cannot delegate his duties (n). When the instrument of trust is silent or there is an express prohibition as to sale, a trustee cannot sell and the sanction of the Court cannot be obtained, but there are exceptional cases, known as cases of "emergency," where in spite of prohibition or absence of any such direction the Court can in its extraordinary jurisdiction sanction the sale. Such jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution (o). Such jurisdiction was exercised when the settlor never contemplated the possibility of a setback nor of municipal requirements necessitated by the property becoming extremely old and in need of repairs (p). It was also exercised on the ground that a refusal would subject the parties to a partition suit and a sale of the property by the Court which would be obviously injurious to the beneficiaries for at a Court's sale the property would hardly realize the price offered at a private sale (q).

(f) *Dunn v. Flood* (1885) 28 Ch. D. 586.
 (g) Sec. 37, Indian Trusts Act II of 1882.
 (h) *Re. Bryant & Barningham's Contract* (1890) 44 Ch. D. 218.
 (i) Sec. 44 of the Trust Act, II of 1882.
 (j) *Lane v. Debenham* (1853) 11 Hare 188, 68 E. R. 1241.
 (k) *Parkum Chirathodi v. Narayanan* (1919) 42 Mad. 335.
 (l) Sec. 31, Trustees and Mortgagees Act (XXVIII of 1886).

(m) *Peary Mohan Mukerji v. Monohar Mukerji*, (1921) 23 Bom. L. R. 913, P. C.
 (n) *Bonnerji v. Sitanath Das* (1922) 49 Cal. 325, 49 I. A. 46; *Parasurama v. Thiruma* (1921) 44 Mad. 636.
 (o) *In re New* (1901) 2 Ch. 534; *In re Tollemeche* (1903) 1 Ch. 955.
 (p) *In re Shirinbai Merwanji* (1919) 43 Bom. 518.
 (q) *De Souza v. Daphtary* (1923) 25 Bom. L. R. 610.

S. 7

Unless authorized by the instrument creating the trust a trustee cannot invest in purchase and when trustees have such power they cannot combine two trusts for the purchase of one immoveable property (*r*).

Vendor selling as trustee without power of sale.—A contract for sale stated that the trustee under the will of a certain deceased person was selling the properties under the trusts and powers vested in him thereunder and that the tenant for life would join for releasing her life-interest. On investigation it was discovered that the trustee had no power or trust for sale. The contract was, however, made by him at the request of the tenant for life and other beneficiaries, including himself, so that he could compel them to join. It was held that the vendor had shown a good title (*s*). But a trustee vendor who offered to procure a conveyance from the life tenant who was not bound to convey at his request (*t*) or offered the concurrence of beneficiaries after the time for completion had expired and long after the contract had been repudiated by the purchaser and the beneficiaries were not even then bound to concur (*u*), cannot be said to have made a good title. Where trustees under a will have power to sell with the consent in writing of a named individual, a prospective assent in writing to any sale which they may make will not enable them to enforce specific performance of a particular contract for sale (*v*).

Appointment of new trustees.—With regard to private trusts and trustees, provision is made in the Indian Trust Act, II of 1882. With regard to conveyances and transfers to which the English Law is applicable, provision is made in the Indian Trustees Act, XXVII of 1866, section 35, and those which follow. While in the Trustees and Mortgagees' Powers Act, XXVIII of 1866, which is enacted for the purpose of giving trustees, in cases where the English Law is applicable, powers as in settlements, provision is made in section 34 and those which follow.

Mortgagee.—A mortgagee can sell by public auction or by private treaty. A sale by him is governed by section 69 of the Transfer of Property Act and by contract between the parties. The only covenant that can be required of him is one against encumbrances. If a mortgagor joins in the sale for concurrence or confirmation he enters into the usual covenants for title given by a vendor, thus superseding his absolute covenants in a mortgage deed. A subsequent mortgagee is entitled to redeem under section 91 of the Transfer of Property Act. If once the prior mortgagee has acquired a right to sell and he enters into an agreement to sell in exercise of his power of sale, it is submitted that the subsequent mortgagee cannot come in and redeem. When the first mortgagee is not entitled to sell without notice to the mortgagor the purchaser is entitled to rescind if no notice has been given even though the mortgagor subsequently waives such notice for the mortgagor could not waive notice as against the subsequent mortgagees (*w*). The second mortgagee is not only entitled to such a notice but would be entitled to damages for default in giving such notice (*x*). But the notice by contract between the parties is in certain events dispensed with, in which case the mortgagee need not give the notice. Again, the mortgagee is protected by the clause making a sale valid notwithstanding irregularity or impropriety. Ordinarily when a mortgagee purchases a part of the equity of redemption, the integrity of the

(*r*) Sec. 20, The Trust Act, II of 1882.

(*s*) *Re. Baker & Selmon's Contract* (1907) 1 Ch. 238; *Re. Atkinson & Horsell's Contract* (1912) 2 Ch. 1; *Re. Hailes & Hutchinson's Contract* (1920) 2 Ch. 233.

(*t*) *In re Bryant & Barningham's Contract* (1890) 44 Ch. D. 218.

(*u*) *In re Head's Trustees & Macdonald* (1890) 49 Ch. D. 310.

(*v*) Illustration (b), sec. 25, Specific Relief Act (I of 1887).

(*w*) *Foster v. Hoggart* (1850) 15 Q. B. 155

(*x*) *Hoole v. Smith* (1881) 17 Ch. D. 434.

mortgage is broken and the parties interested in the other portions of the equity of redemption can redeem piecemeal, but where the mortgagee purchases a part of the mortgaged property at a sale free from all encumbrances, he can throw the whole burden of the mortgage debt on the remaining mortgaged property (y). A co-mortgagor is jointly liable though he receives no part of the consideration (z).

Partners.—Law of partnership in India is regulated by the Indian Partnership Act, 1932, according to which a partner has no implied authority to acquire immoveable property on behalf of the firm or transfer such property belonging to the firm (a). Further, section 8 of this Act is a bar to a partner transferring the partnership property. Although partners were joint owners there is no survivorship between them (b). By mutual consent partnership property may be sold. All partners must join in the conveyance. If some of them are dead the concurrence of the personal representatives of such of them as are dead must be obtained as death operates as a dissolution of the firm. There are several forms of *habendum* which may be adopted on a conveyance of freehold land to partners for partnership purposes. It may be to them as joint tenants without the addition of any words showing what the equitable interest of the partners are, it may be to them as joint tenants with the addition of words "as part of their partnership property" or "in trust for the partners as tenants in common as part of their partnership property." Or it may be to the partners as tenants in common either with or without the words "as part of their partnership property" (c). The powers of an individual partner under Indian Law are sufficiently doubtful to justify a purchaser in refusing to accept a release or reconveyance executed by that one partner only (d). Where a mortgage executed by a partnership firm on dissolution is substituted and for any reason found to be defective, there is always a presumption that the mortgagee intended to keep the prior mortgage alive for his benefit (e).

Drunkard.—This is dealt with by section 12, clause 3 of the Contract Act (IX of 1872) which enacts that a person who is usually of sound mind but occasionally of unsound mind may not make a contract when he is of unsound mind and illustration (b) to that section states that a sane man who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests he cannot contract while such delirium or drunkenness lasts. Although the executant might have been drinking hard and may frequently have been of unsober and unsound mind yet it must be established that at the time when the deed was executed he was of unsound mind (f). A drunkard by his own act becomes *non compos mentis* (g).

Person of weak intellect.—Where a party to a contract is weak but has ample protection and independent advice and the other party is not shown to have taken any undue advantage of his weakness the Court will not extend its protection in favour of such weak party. Mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. With increasing old age there may come a time when there is a vacuity of mind, but all transactions made by the man

(y) *Mohendra Nath Banerji v. Rani Sm. Harshamukhi Dassi* (1935) 40 C. W. N. 108.

(z) *Sm. Annamoyi v. Umesh Chandra* (1936) 40 C. W. N. 339.

(a) See sec. 19, sub-section, 2 clauses (f) and (g).

(b) *Morris v. Barrett* (1829) 3 Y. & J. 384, 148 E. R. 1228.

(c) *Encyclopædia of Forms*, 1st Ed., Vol. 12, p. 503.

(d) *Hirachand v. Jayagopal* (1925) 49 Bom. 245 (267).

(e) *Punjab and Sind Bank, Ltd. v. Kishen Singh-Gulab Singh* (1935) 16 Lah. 881.

(f) *Jai Narain v. Mahabir Prasad*, A. I. R. (1926) Oudh 470.

(g) *Beverley's case* (1603) 4 Co. Rep. 123b, 76 E. R. 1118.

S. 7 prior to his mind becoming blank cannot be set aside. In cases of weak intellect the question may be looked at from the same point of view as in the case of a *pardanashin* lady (h).

Lunatics.—Lunatic means an idiot or person of unsound mind (i). An idiot is a person of unsound mind, incapable of understanding and acting in the ordinary course of life (j). A person is of unsound mind when he is not sufficient for the government of himself (k), though on inquisition he may not be found to be a lunatic (l). The true test is the existence or non-existence of delusion as delusion and insanity may be looked upon as convertible terms (m). A person suffering from delusions may perform acts not influenced by such delusions and when it is sought to set aside a transaction on this ground the Court must be satisfied that it was influenced by delusion (n).

The term unsound mind comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease (o). Between imbecility and unsound mind there is a distinction without a difference (p). Loss of mental power arising from natural decay or paralysis or softening of the brain amounts to lunacy (q). The jurisdiction under sections 62 and 38 of the Lunacy Act, IV of 1912, are not concurrent and before a District Court can institute inquisition it must be satisfied not only as to the alleged lunatic's residence within jurisdiction but that he is not subject to the jurisdiction of the High Court (r). The Judge's functions cannot be delegated to an arbitrator or commissioner to make a report as to the alleged lunatic's state of mind (s). Before an inquisition is ordered under sections 38 and 62 there must be a thorough and careful preliminary inquiry and consideration of evidence including affidavit of applicant, medical certificate as to condition (t), and personal interview by the Judge with a view to ascertain the abnormality of the mind (u). The Act contemplates the question of lunacy or sanity at the date of inquiry and not when the alleged lunatic first became of unsound mind (v). According to section 2 of the Indian Trustees Act (w), a lunatic shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs and a "person of unsound mind" shall mean any person not a minor who not having been found to be a lunatic shall be incapable from infirmity of mind to manage his own affairs. Section 12 of the Contract Act, IX of 1872, lays down rules as to what is sound mind for the purpose of contracting. The cases which may be included in the Contract Act, IX of 1872, are cases which are outside the Lunacy Act, IV of 1912, for when once it is established by inquisition that a person is a lunatic no further question arises of lucid interval or of sound mind at any stage until he is declared to be able to manage his affairs.

(h) *Ram Sundar v. Raj Kumar* (1928) 55 Cal. 285.
 (i) Sec. 3 (5), The Indian Lunacy Act, IV of 1912.
 (j) *Ball v. Mannin* (1829) 1 Dow & Cl. 380, 4 E. R. 1241.
 (k) *Ex-parte Canmer* (1806) 12 Ves. 445, 33 E. R. 168.
 (l) *Re. Martin's Trusts, Land, Building Investment & Cottage Improvement Co. v. Martin, Re. Martin* (1887) 34 Ch. D. 618.
 (m) *Dea v. Clark & Clark* (1826) 3 Add. 79, 162 E. R. 410, 414.
 (n) *Monosseh v. Shapurji* (1908) 10 Bom. L. R. 1004.
 (o) *In re Cowasji Byramji Lialaovala* (1883) 7 Bom. 15.
 (p) *Empress v. Husen* (1881) 5 Bom. 262.

(q) *R. v. Shaw* (1868) 18 L. T. 583.
 (r) *Srimati Anilabala v. Dharendra Nath Chowdhury* (1921) 48, Cal. 577.
 (s) *Murlidhar Pande v. Lachmi Pande* (1921) 43 All. 459.
 (t) *Tawassul Husain v. Abrar Husain* (1927) 49 All. 3; *Muhammad Yakub v. Nazir Ahmed* (1921) 42 All. 504 followed.
 (u) *Muhammad Yakub v. Nazir Ahmad* (1921) 42 All. 504; *Muhammad Munwar Sultan v. Shamunessa Begum* (1923) 51 Cal. 480; *Saroj Basini Debi v. Mahendra Nath Bhadurji* (1927) 54 Cal. 836.
 (v) *Cassim Mamooji v. K. B. Dutt* (1915) 19 C. W. N. 45.
 (w) XXVII of 1866.

A sale at great undervalue from one afterwards found lunatic was set aside but the conveyance would stand as security for what was really paid (x). So also in the case of sale by a vendor of feeble intellect not absolutely incapable of managing his own affairs but in such a state of mental incapacity as to make it necessary that he should have protection (y). It is a fraud to obtain conveyance from an insane person long before a commission of lunacy issued and it should be set aside. Similarly, in case of purchase by lunatic the sale would be void, nor would the auctioneer be liable for any difference between the price obtained at that sale and the subsequent sale (z). In a case, however, where a person of unsound mind made a contract for purchase and subsequently on inquisition was found to be of unsound mind, a committee was appointed to complete the purchase (a). Here the direction to the committee to complete the purchase amounted to an election by the lunacy authorities to adopt the voidable contract.

A sale by manager of a judicially decreed insane Mahomedan is void and incapable of ratification (b). So also when a Hindu woman having a lunatic husband and minor sons and appointed guardian of the lunatic's estate alienated the family property such alienation was held binding as regards the minors but not as regards the lunatic (c). In cases of joint Hindu family the interference of the Courts is strictly limited to acts of the guardian as imperil the lunatic's interest; the Court has no power to interfere with the joint family property (d). The same principle applies to purchase by a lunatic as by a minor, namely, that the Transfer of Property Act does not prohibit a transfer to a person incompetent to contract. Lunacy proceedings are set aside under sections 60 and 82 of the Act. In order to avoid a contract on the ground of unsoundness of mind of one of the contracting parties it must be decided whether such a person was of unsound mind at the date of the contract which largely depends upon the inference to be drawn from the evidence (e). Where a person has been found lunatic by inquisition, so long as the inquisition has not been superseded but continues in force he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property (f). When a person having contracted to sell his estate afterwards becomes a lunatic, the Court may, under section 51 of the above Act, order the manager to execute the conveyance if the Court thinks that the contract is such as ought to be performed. Again, the Court may, if it appears to be just or for the lunatic's benefit, order immoveable property of the lunatic, whether in possession, reversion, remainder or contingency, to be sold for any of the purposes mentioned in section 49 of the Indian Lunacy Act, and the manager of the lunatic's estate may execute all conveyances as the Court may order in the name and on behalf of the lunatic.

Joint managers.—Where there is no provision for survivorship in the order of appointment of joint managers the office of the survivor terminates on the death of his co-manager (g).

Minor's sale.—A minor means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained majority. The Privy

(x) *Addison v. Dawson* (1711) 2 Vern. 678, 23 E. R. 1040.

(y) *Longmate v. Ledger* (1860) 2 L. T. 256. 66 E. R. 67; *Cassim Mamooji v. K. B. Dutt* (1915) 19 C. W. N. 45.

(z) *Samuel v. Robinson* (1846) 7 L. T. O. S. 301; *Frost v. Beaven* (1853) 22 L. J. Ch. 638.

(a) *Baldwyn v. Smith* (1900) 1 Ch. 588.

(b) *Masihuddin v. Matu Ram* (1919) 1 Lah. 109.

(c) *Annapurnabai v. Durgopa* (1896) 20 Bom. 150.

(d) *Trimbaklal v. Hiral* (1896) 20 Bom. 659.

(e) *Ram Sunder v. Kali Narain*, A. I. R. (1927) Cal. 889.

(f) *Subba Naiker v. Solaiappa* (1933) 56 Mad. 904; *In re Walker* (1905) 1 Ch. 160.

(g) *Nabakumar v. Fateh Singh* (1934) 61 Cal. 986; *Ex-parte Lyne* (1735) Talb. 142, 25 E. R. 707; *Ex-parte Clarke* (1822) Jac. 589, 37 E. R. 975; *Bradshaw v. Bradshaw* (1826) 1 Russ. 528, 38 E. R. 203.

- S. 7 Council has held that a minor's contract is void (*h*). A contract for sale of immoveable property being a contract that a sale of such property shall take place on terms settled between the parties (*i*), it follows that a sale by a minor is void. The same decision is an authority for the proposition that under section 41 of the Specific Relief Act, I of 1877, the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make compensation to the other (*j*). But the purchaser was held not entitled to the return of his purchase-money where no fraud was practised by a vendor and the purchaser could have ascertained the age of the vendor by due diligence (*k*).

A minor may ratify on attaining majority, as by acceptance of the surplus left after satisfying a decree against him (*l*). A minor for whose benefit a contract was entered into by his *de facto* guardian is entitled to sue upon it (*m*). He may repudiate by sale, on attaining majority, to a third person (*n*). So also may his heir (*o*). The plea of invalidity of a sale by a minor's guardian is available not only to the minor on coming of age but also to the transferee (*p*). Where there was no equity restoration was refused (*q*). The jurisdiction of the Indian Courts in regard to the appointment of guardians for infants is derived from the Guardian and Wards Act, VIII of 1890. Where a guardian has been appointed by will or other instrument his power to transfer by sale immoveable property belonging to his ward is subject to the restriction imposed by the instrument; unless he has been declared a guardian under the Guardian and Wards Act, VIII of 1890, and the Court which made the declaration permits him by order in writing notwithstanding the restriction to dispose of any immoveable property specified in the order in a manner permitted by the order (*r*). The right of a guardian appointed by the Court to transfer by sale the property of his ward is limited and is subject to the previous sanction of the Court (*s*). A disposal of immoveable property by him in contravention to the above provisions is voidable at the instance of any other person affected thereby (*t*). A sanction of the Court given in 1896 could not validate a sale in 1906. This was held where a Hindu died leaving a widow and two minor sons. The widow was appointed guardian in 1890 and in 1891 obtained sanction of the Court for sale of half the property of the minors. In 1906 a sale of less than half the property was effected by the widow and one of the sons who had attained majority (*u*). Nor can a widow appointed guardian of the person and property of her two minor sons effect a sale of joint family property by joining her eldest son who was a major as the interest of a member of the joint family was not individual property (*v*). A *pardanashin* lady may be appointed guardian of a minor's property (*w*). An Official Trustee cannot be appointed guardian of

- (*h*) *Mohori Bibee v. Dharamdas Gosh* (1903) 30 Cal. 539, 30 I. A. 114.
 (*i*) Sec. 54, Transfer of Property Act.
 (*j*) *Dattaram v. Vinayak* (1904) 28 Bom. 131; *Rang Ilahi v. Mahbub Ilahi* (1926) 7 Lah. 35; *Muhammad Said v. Bishambhar Nath* (1923) 45 All. 644; *Limbaji v. Rahi* (1925) 49 Bom. 576; *Tejpal v. Ganga* (1903) 25 All. 59; *Khiam v. Dheru*, A. I. R. (1927) Lah. 722; *Mt. Hamidan v. Nanhe Lal*, A. I. R. (1933) All. 372.
 (*k*) *Umar Din v. Abdul Haq*, A. I. R. (1934) Lah. 304.
 (*l*) *Midnapore Zamindary Co., Ltd. v. Abdul Zalil Mia* (1933) 60 Cal. 753.
 (*m*) *Great American Insurance Co., Ltd. v. Madanlal* (1935) 59 Bom. 656.
 (*n*) *Kamarajee v. Gunayya*, A. I. R. (1924) Mad. 322; *Muthkumara Chetti v. Anthony Udayar* (1915) 38 Mad. 867.

- (*o*) *Bepanna v. Parachuri*, A. I. R. (1925) Mad. 1288.
 (*p*) *Mohanlal v. Ratan* (1921) 17 Nag. 53; *Hafizullah Khan v. Bulaqui Mal*, A. I. R. (1923) Lah. 299 *contra*.
 (*q*) *Gurushiddaswami v. Parawa* (1920) 44 Bom. 175.
 (*r*) Sec. 28, Guardian and Wards Act, VIII of 1890.
 (*s*) Sec. 29, Guardian and Wards Act, VIII of 1890.
 (*t*) Sec. 30, Guardian and Wards Act; *Solema Bibi v. Hafez Mahomed* (1927) 54 Cal. 687.
 (*u*) *Shami Nath v. Lalji Chanbe* (1913) 35 All. 150.
 (*v*) *Gharib-ullah v. Khalak Singh* (1903) 25 All. 407, 30 I. A. 165.
 (*w*) *Jaiwanti Kumri v. Gajadhar Upadhyaya* (1911) 38 Cal. 783.

the property of a minor (x). The power of a manager or *de facto* guardian to alienate the estate of an infant is under Hindu Law both limited and qualified. It can only be exercised in case of legal necessity which under certain circumstances means benefit to the estate (y). In so doing the Courts considered they were following the decisions of the Privy Council (z). A contrary view was, however, taken by the Madras High Court in *Narayanan v. Ravunni* (a) and by the Bombay High Court in *Limbaji v. Rahi* (b), nor is such power possessed by a manager or *de facto* guardian in case of a Mahomedan (c) or Indian Christian (d) or Buddhist (e) and their sales are void. A Full Bench of the Bombay High Court, after a review of the Case law, held that it would not be accurate to say that no transaction could be for the benefit of a minor which was not of a character to protect or preserve the property of the minor. The sale of land which cannot conveniently be cultivated with other property of the minor, and the investment of the purchase-money in lands which could be so conveniently cultivated; or the sale of lands in order to raise money to secure irrigation or permanent improvement of the other lands of the minor; or a beneficial exchange; or a sale in order to prevent destruction of the minor's property, are transactions which would be for the benefit of the estate.

The mother and guardian of a Hindu minor sold for Rs. 900 a small strip of land normally worth not more than Rs. 600. The purchase-money was invested by the mother in the money-lending business which had been carried on by the minor's father and was at the date of the sale carried on by the mother. The minor on attaining the age of majority sued to set aside the sale. Held by the Full Bench that the sale in question could not be justified as being for the benefit of the estate (f). A Division Bench of the Bombay High Court has held that a person who purported to sell an infant's property was not in fact a *de facto* guardian but a guardian *ad hoc* (g). In this state of authorities the question came before a Full Bench of the Bombay High Court as to whether under the Hindu Law a *de facto* guardian of a minor can validly sell his property to a third person for legal necessity. The two underlying facts that he was a *de facto* guardian and there was legal necessity were assumed. The majority held that he could, overruling *Limbaji Rowji v. Rahi* (h). The dissenting judgment of the Chief Justice was that he could not and that his position was not analogous to that of a manager of Hindu joint family, pointing out the strangeness of the conclusion resulting therefrom, that power should be annexed to an office held without authority which would not be so annexed if the office were held under legal sanction. A so-called guardian *de facto* is not a guardian at all but is merely a person who has assumed, without authority, to act as guardian and it is a strong thing to hold that by such assumption

(x) *Omar Tyab v. Ismail Tyab* (1928) 30 Bom. L. R. 177.

(y) *Hanuman Persad v. Mussammal Babooee* (1856) 6 M. L. A. 393 (mother); *Nagindas v. Mahomed* (1922) 46 Bom. 312 (adult co-parcener); *Jado Singh v. Nartha Singh* (1926) 48 All. 592 (father); *Pandharinath v. Ramchandra* (1931) 33 Bom. L. R. 104 (mother); *Scetharamanna v. Appiah* (1925) 49 Mad. 768 (maternal uncle); *Mohanund v. Nafur* (1899) 26 Cal. 820 (paternal grandmother).

(z) *Hunoomanpersaud v. Mt. Babooee* (1856) 6 M. L. A. 393.

(a) (1924) 47 M. L. J. 686 (step-mother).

(b) (1925) 49 Bom. 576 (step-mother).

(c) *Mata Din v. Ahmad Ali* (1912) 34 All. 213, 39 I. A. 49; *Fakiruddin v. Abdul Hussain* (1911) 35 Bom. 217; *Imambandi v. Mut-*

saddi (1918) 45 Cal. 878, 45 I. A. 73; *Ayderman v. Syed Ali* (1914) 37 Mad. 514; *Sheikh Rajab Ali v. Sheikh* (1916) 1 Pat. L. J. 188; *Mohsiuddin Ahmed v. K. Ahmed* (1920) 47 Cal. 713; *Mohammad Ejaz Husain v. Mohammad Istikhat Husain* (1912) 34 All. 213, 39 I. A. 49.

(d) *Sundara Nadan v. Annamalai* (1931) 60 M. L. J. 695; *Bangarammal v. Lydia Kent* (1934) 57 Mad. 1062 (sale held voidable).

(e) *Ranja Khan v. Ma Chit, A. I. R.* (1931) Rang. 178.

(f) *Hemraj Dattubua v. Nathu* (1935) 59 Bom. 525; *Jagat Narain v. Mathura Das* (1928) 50 All. 969 F. B., dissented from; *Ragho v. Zaga Ekoba* (1928) 53 Bom. 419 discussed.

(g) *Harilal Ranchhod v. Gordhan Keshav* (1927) 51 Bom. 1040 (separated uncle).

(h) (1925) 49 Bom. 576.

§. 7 he has acquired the right to deal with the minor's immoveable property (i). Alienation by Mahomedan brothers on behalf of a minor brother is not binding on the latter nor is such an unauthorized transaction bettered by describing them as *de facto* guardians. In the latter capacity they may assume important responsibilities but they cannot clothe themselves with legal power to sell. The sale must be under the authority of an appointment by the Court (j). Where a minor is, however, a member of a joint Hindu family, no guardian can be appointed under the Guardian and Wards Act of his undivided interest as the interest of such a member in the joint family is not individual property (k). But a chartered High Court has power to appoint a managing member as guardian of such interest with power to alienate the same (l). The Guardian and Wards Act specially preserves pre-existing powers possessed by a chartered High Court (m). An alienation by a guardian of a minor with the sanction of the Court can be relied on by the alienee unless the latter has been a party to a fraud or collusion or guilty of underhand dealing (n). The fact that the order granting sanction has not recited, as required by section 31 (2) of the Guardian and Wards Act, the necessity for the loan, does not render the sanction invalid. Such a defect is a mere irregularity. The Court must be taken as having adopted the grounds set forth in the petition and affidavits though not reproduced in the order (o). Where the order was cancelled by the Court subsequently, the order of cancellation having had no connection with the validity of the debt itself, but the money was advanced by the lender while the order was in existence, held, that the lender was still entitled to rely implicitly on the order (p). But where a guardian appointed under the Guardian and Wards Act makes a transfer of the minor's property without obtaining the permission of the District Judge, the latter has no power to cancel it in the sense that the transfer becomes inoperative by force of that order. Any question as regards the validity of the transfer is to be determined by a competent Court in a regular suit (q).

A private alienation though confirmed by the execution Court under O. 21, r. 83 of the Code of Civil Procedure, 1908, is not validated if such alienation is made by a certificated guardian and the transaction is not confirmed by the Court which appointed the guardian. The inquiry under section 29 of the Guardian and Wards Act is for the benefit of the infant while under the Code of Civil Procedure it is for the protection of the execution creditor, though such a transaction is liable to be avoided in proper proceedings under section 30 of the Guardian and Wards Act, it can, however, be only on the principle that he who seeks equity must do equity and the person seeking to avoid the transaction must be prepared to reimburse the purchaser whose money has benefited the infant (r). The Court, while granting permission to a certified guardian of a minor to transfer the minor's property, can impose conditions on the guardian. A distinction must be drawn

(i) *Tulsidas v. Raisinghji* (1933) 57 Bom. 40.
 (j) *Mata Din v. Ahmad Ali* (1912) 34 All. 213, 39 I. A. 49.
 (k) *Gharib-ullah v. Khalak Singh* (1903) 25 All. 407, 30 I. A. 165.
 (l) *In re Jairam Luxman* (1892) 16 Bom. 634; *In re Jagganath Ramji* (1895) 19 Bom. 96; *In re Manilal Hargovan* (1901) 25 Bom. 353; *In re Hari Naraindas* (1923) 50 Cal. 141.
 (m) Secs. 3 and 6, Guardian and Wards Act, VIII of 1890.
 (n) *Raman Chettiar v. Tirugnanasambandam Pillai* (1927) 50 Mad. 217; *Gangapershad v. Maharani Bibi* (1884) 11 Cal. 379 followed; *Venkatasami v. Viranni* (1922) 45 Mad.

429, dissented from; *Ramdeo Prasad v. Sheonandan Mahaseth* (1935) 14 Pat. 410.
 (o) *Raman Chettiar v. Tirugnanasambandam Pillai* (1927) 50 Mad. 217; *Budhoo v. Sheo Charan* (1924) 22 All. L. J. 851 followed.
 (p) *Ramdeo Prasad v. Sheonandan Mahaseth* (1935) 14 Pat. 410; *Ganga Prasad v. Maharani Bibi* (1884) 11 Cal. 379, P. C.; *Mahant Mahabir Das v. Jamuna Prasad* (1928) 8 Pat. 48.
 (q) *Kundan Lal v. Bhagwati Saran* (1935) 57 All. 485.
 (r) *Dwijendra Mohan Sarma v. Manorama Dasi* (1922) 49 Cal. 911; *Dattaram v. Gangaram* (1896) 23 Bom. 287; *Sarju v. District Judge of Benares* (1909) 31 All. 378.

between condition precedent and a condition subsequent imposed on the guardian. Non-compliance with the former will vitiate the transfer. The same cannot be said with regard to the latter unless there is something in the order granting permission casting an obligation on the transferee of that property to do some act subsequent to the execution of the deed of transfer in his favour. The only duty cast upon the transferee by law is that he must satisfy himself that the order sanctioning transfer has been strictly complied with upto the time of the execution of the deed of transfer and that no condition precedent imposed by the order has been violated (s). On a sale by a guardian with the sanction of the Court :—

- (a) Apart from any covenant personally binding the guardian he is not liable in damages if the purchaser is deprived of the whole or part of the property in consequence of the sanction of the Court found to be invalid.
- (b) Covenants in the deed executed by the guardian as such should be considered covenants binding on the minor if such covenants are valid.
- (c) Merely because the guardian acts on behalf of the minor he does not incur any vicarious liability on the failure of the transaction by reason of the Court's sanction being held to be ineffective.
- (d) If the guardian has agreed expressly or by necessary implication in his personal capacity wholly apart from his capacity as guardian of the minor to indemnify the purchaser he would be personally liable (t).

A guardian appointed by the Court is required to give security. Till such security has been completed, he is not a guardian so that if a guardian appointed by the Court has not given security a transfer made by him would be void. In the absence of any directions in the order a guardian must furnish security. Under Rule 453 of the Rules of the High Court of Bombay a person appointed guardian shall, unless otherwise ordered, first give security. A minor's guardian cannot be compelled to give covenants for title, as no guardian can render a minor liable (u).

Minors' agreement for purchase.—Neither the guardian of a minor nor his manager is competent to bind the minor or his estate by contract for the purchase of an immoveable property and as a minor is not bound by the contract there being no mutuality he cannot, on attaining majority, obtain specific performance of the contract (v).

Purchase by minor.—As regards sale in favour of a minor the Madras High Court held, on the authority of the Privy Council (w), that imposition of liabilities by section 55 of the Transfer of Property Act involved the notion of competency to contract and as it was impossible to conceive of a sale without a reciprocal promise, past or concurrent, there could be no legal sale in favour of a minor (x). The view of the Allahabad High Court is that nowhere in the Act is it provided that a minor is incapable of being a transferee of the property and, moreover, section 127 of the Transfer of Property Act by necessary implication shows that the person who is not competent to contract may be a donee of immoveable property, therefore a minor in whose favour a valid deed of sale is executed is

(s) *Subhan Ali v. Chittu A. I. R.* (1927) All. 631.

(t) *Maida v. Kishan* (1934) 56 All. 997.

(u) *Surendra Nath v. Atul Chandra* (1907) 34 Cal. 892; *Ranmalsinghji v. Vadilal* (1896) 20 Bom. 61; *Waghela v. Shekh Masludin* (1887) 11 Bom. 551.

(v) *Mir Sarwarjan v. Fakhruddin Mahomed* (1912) 39 Cal. 232, 39 I. A. 1.

(w) *Mohori Bibee v. Dharamdas Ghose* (1903) 30 Cal. 539, 30 I. A. 114.

(x) *Navacoti v. Loyalinga* (1910) 33 Mad. 312.

S. 7 competent to sue for possession (*y*). A gift, however, is not the result of contract between the donor and the donee. A Full Bench of the Madras High Court, deciding that a mortgage in favour of a minor was valid (*z*), overruled its previous decision (*a*). The state of the law on the subject is unsatisfactory. In case of sales of freehold as well as leasehold a vendor enters into covenants for title. When a purchaser is a minor, with whom is he to enter into these covenants? Again, in the case of leasehold the purchaser of leasehold property enters into a covenant that he will regularly pay the rents and observe the covenants of the lease and indemnify the vendor against any breach thereof. How can a minor enter into such a contract? In this connection reference may be made to section 7 of the Act which enacts that every person competent to contract and entitled to transferable property or authorized to dispose of transferable property not his own is competent to transfer such property. Further, section 6, clause (h) (3) enacts that no transfer can be made to a person legally disqualified to be a transferee. The word "transferee" is nowhere defined in the Act. Again, every sale is the result of a contract between a vendor and purchaser.

Estoppel.—As regards the doctrine of estoppel, it has been held that section 115 of the Evidence Act does not apply to infants (*b*). But the Bombay High Court has held that where there is a false and fraudulent representation as to age the minor is estopped (*c*). The same view has been adopted by the High Courts of Allahabad (*d*) and Calcutta (*e*). The Privy Council has laid down that this rule of estoppel does not bind a minor (*f*). This was followed by a Full Bench of the Bombay High Court (*g*) overruling its previous decisions (*h*) approving the decision of the Madras High Court (*i*). On a sale by a guardian of a minor the purchaser cannot insist upon covenants for title except as against his own encumbrances (*j*). In England sales and purchases by infants are regulated by special legislation such as the Infants Relief Act of 1874 and the Settled Land Act of 1925.

Custody of minor.—If a minor is in the actual custody of another person with the permission of the guardian he is deemed to be in the constructive custody of the guardian (*k*).

What "guardian" includes.—The term "guardian" in the Act has been used in a wide sense. It does not necessarily mean a guardian duly appointed or declared by the Court, but includes a natural guardian or a *de facto* guardian. A father is the natural guardian of his minor son (*l*).

Residence of guardian.—It is not necessary that the proposed guardian should be resident within the jurisdiction of the Court (*m*).

Willingness of guardian.—The willingness of the proposed guardian need not be intimated by a signed and attested declaration (*n*).

- y*) *Munni Kumwar v. Madon Gopal* (1916) 38 All. 62; *Narain Das v. Musammatt Dhania* (1916) 38 All. 154; *Muniya Konan v. Perumal Konan* (1904) 24 Mad. L. J. 352; *Ulfat Rai v. Gauri Shankar* (1911) 33 All. 657.
- z*) *Raghava Chariar v. Srinivasa* (1917) 40 Mad. 308.
- a*) *Navacoti v. Loyalinga* (1910) 33 Mad. 312.
- b*) *Brahmo Dutt v. Dharma Das Ghose* (1899) 26 Cal. 381.
- c*) *Ganesh Lala v. Bapu* (1897) 21 Bom. 198; *Dadasaheb Dasrathrao v. Bai Nahani* (1917) 41 Bom. 480.
- d*) *Jagar Nath Singh v. Lalta Prasad* (1909) 31 All. 21; *Shiam Lal v. Ram Piar* (1910) 32 All. 25.
- e*) *Surendra Nath Roy v. Krishna Sakhi Dasi* (1911) 15 C. W. N. 239.

- f*) *Sadiq Ali v. Jai Kishore* (1928) 30 Bom. L. R. 1346 P. C.
- g*) *Gadigeppa v. Balangowda* (1931) 55 Bom. 741.
- h*) *Ganesh Lala v. Bapu* (1895) 21 Bom. 198; *Dadasaheb v. Bai Nahani* (1917) 41 Bom. 480; *Jasraj v. Sadashiv* (1921) 46 Bom. 137.
- i*) *Vaikuntarama v. Authimoolam* (1914) 38 Mad. 1071.
- j*) *Gangabai v. Sonabai* (1915) 17 Bom. L. R. 303.
- k*) *Noshirwan v. Sharoshbanu* (1934) 58 Bom. 724.
- l*) *Noshirwan v. Sharoshbanu* (1934) 58 Bom. 724; *Dayabhai v. Parvati* (1915) 39 Bom. 438.
- m*) *Beni Prasad v. Parvati* (1934) 56 All. 20.
- n*) *Narotam v. Tapesra* (1935) 57 All. 208.

Covenant to repurchase.—A contract of sale by a guardian on behalf of the minor containing a covenant to repurchase if the vendee desires to sell is not a standing offer but a completed contract unenforceable by either party for want of mutuality (o).

Joint tenants.—Their holding is to all others except themselves as one single owner. *Inter se* they have separate rights which are equal in all respects, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. It is distinguished by unity of possession, unity of interest, unity of title, and unity of time at the commencement of such title. The property is limited to them and their heirs or to them and their heirs and assigns although the heirs of one of them will only succeed to the inheritance provided the joint tenancy be allowed to continue. A proper form of assurance between joint tenants is a release by deed and this release operates rather as an extinguishment of right than as a conveyance. The incidents of joint tenancy last only so long as the joint tenancy exists. Prior to the Law of Property Act, 1925, any one of them had power to sever the tenancy by disposing of his own share in the estate and destroy the joint tenancy (p). He may now sever the joint tenancy in an equitable but not in a legal estate so as to create a tenancy in common. A joint tenancy is severed upon bankruptcy (q) but not on marriage (r). If the effect is to vest the property in the husband then there will be a severance of the joint tenancy. From the moment of severance, unity of interest and title is destroyed, but unity of possession continues, and the share disposed of is discharged from the incidents of joint tenancy and becomes the subject of a tenancy in common. If there are three joint tenants and one of them severs his interest in favour of a stranger the latter holds an undivided third part of the lands as tenant in common with the remaining two. These two would remain joint tenants of their two-third share. Between a joint tenancy and tenancy in common the only similarity that exists is the unity of possession (s). The incidents of a joint tenancy in a Hindu coparcenery are peculiar to that law. I have not been able to find any text writer dealing with this subject whether a joint tenancy can by contract be created in unequal shares, for example, two joint tenants, one having a third and the other a two-third share in joint tenancy with the chance of survivorship. It is submitted that such an interest cannot be created as being repugnant to law. The point arose in the Bombay High Court in suit No. 663 of 1921, *Gordhandas T. Mangaldas v. Kissondas T. Mangaldas*, but the suit was compromised. It also arose in the Calcutta High Court. By a deed of Sharkatnama the members of a Hindu family, governed by the Mitakshara Law, declared that each of the members was entitled to a definite fractional part of the whole estate. It was held that this was not sufficient to constitute a valid partition according to Hindu Law. No doubt the expression of a joint tenant's interest in the joint estate as a half or a third or any other fraction, is not strictly consistent with the theory of the joint family property as set forth in the judgment of *Appoovier v. Rama Subba* (t), yet a mere definition of the whole without any indication of intention to divide interest and liabilities is not sufficient to constitute a legal dissolution of the joint family. It is impossible to overrule the expressed declaration of continuing joint ownership because the parties have by deed given definitions of their shares by describing

(o) *Venkatachalam v. Sethuram Rao* (1933) 56 Mad. 433.

(p) *Williams on Real Property*, 24th Ed., pp. 293-294.

(q) *In re Butler's Trust* (1888) 38 Ch. D. 286.

(r) *Thomason v. Frere* (1809) 10 East 418, 103 E. R. 834; *Morgan v. Marquis* (1853) 9 Ex. 145, 156 E. R. 62.

(s) *Williams on Real Property*, 24th Ed., p. 294.

(t) (1866) 11 M. I. A. 75.

S. 7 them as what they would be if anyone claimed a partition. Even if for common conveniences they took the rents and profits of the estate in certain defined shares yet, in face of this distinct declaration that the community of interest remained unbroken, it would be no evidence of separation (u). A passage in Dart (v) shows that joint tenants are sometimes made to covenant both jointly and severally and it seems that where they contract without disclosing their separate interests the vendor will be entitled to such covenants: though it appears more reasonable to restrict their covenants to the extent of such shares as they would be entitled to on a severance, leading one to infer that a joint tenancy can be held in unequal shares. A joint tenant may alienate his interest in his lifetime but this, subject to that right, devolves on the survivor. Where one of two joint tenants agreed to sell his moiety and died, the purchaser could enforce specific performance of the contract against the survivor (w). If two persons being joint tenants perish by one blow, the estate will remain in joint tenancy in their respective heirs (x). When there are three joint tenants and one of them disposes of his interest to a stranger the latter is a tenant in common with the other two who continue as joint tenants of the two-thirds with the chance of survivorship (y). Effect of demise by joint tenants to one of them is a severance during the term (z). A corporation and a natural person may be tenants in common but not joint tenants for two reasons, -first, -a corporation has perpetual succession and, second, the legal ownership of a natural person which passes to his heirs and representatives is so essentially different from that of a corporation that the law regards them as incapable of coalescing in the manner necessary for the creation of a joint tenancy (a). An undivided share in immoveable property cannot by contract be held in joint tenancy nor is it possible for the owner of such share to create one by way of trust. In Mahomedan Law an undivided interest in property is known as *Mushaa*. As to making a *wakf* of a *Mushaa*, the Courts in India are divided in opinion. According to the follower of Imam Abu Yusuf (b), such a *wakf* may be created by mere declaration whilst according to the follower of Imam Muhammad it cannot unless the *wakif* should actually divest himself of possession (c). Hence where parties are subject to the latter school of thought no joint tenancy by the creation of trust or contract is possible.

Tenants in common.—Tenants in common are such as have a unity of possession but distinct and several titles to their shares which are by no means necessarily equal so that one tenant in common may have but a life or other limited interest in his share, another may be seized in fee of his. A tenant in common is as to his own undivided share, precisely in the position of the owner of an entire and separate estate (d). On the death of a Mahomedan his heirs take their share in severalty (e). Tenants in common, when severing, must take mutual conveyances. It cannot be transferred by mere agreement. With regard to covenants by tenants in

(u) *In the matter of the petition of Mussamat, Phuljhari Koer* (1872) 8 Beng. L. R. 385.
 (v) *On Vendors and Purchasers*, 7th Ed., p. 573.
 (w) *Specific Relief Act*, 1 of 1887, sec. 27 (c).
 (x) *Bradshaw v. Toulmin* (1784) 2 Dick 633, 21 E. R. 417.
 (y) *Williams on Real Property*, 24th Ed., p. 294.
 (z) *Napier v. Williams* (1911) 1 Ch. 361; *Cowper v. Fletcher* (1865) 6 B. & S. 464, 122 E. R. 1267.
 (a) *Law Guarantee and Trust Society v. Governor and Company of Bank of England* (1890) 24 Q. B. D. 406; see *In re Thompson's Settlement Trusts*, *Thompson v. Alexander* (1905) 1 Ch. 229.
 (b) *Huseinbhai v. The Advocate General of Bombay*

(1920) 22 Bom. L. R. 846 (deed); *Abdul Rajak v. Jai Jimabai* (1912) 14 Bom. L. R. 295 (deed); *Janjira v. Mahammad Fakirulla* (1922) 49 Cal. 477 (deed); *Ma E. Khin v. Maung Sein*, A. I. R. (1925) Rang. 71 (oral declaration).
 (c) *Muhammad Shafi v. Muhammad Abdul Aziz* (1927) 49 All. 391; *Muhammad Yunus v. Muhammad Ishaq* (1921) 43 All. 391; *Muhammad v. The Legal Remembrancer* (1893) 15 All. 321.
 (d) *Williams on Real Property*, 24th Ed., p. 295.
 (e) *Abdul Khader v. Chidambaram* (1909) 32 Mad. 276; *Abdul Majeeth Khan v. Krishnama-chariar* (1917) 40 Mad. 243; *Rajeswar Prosad v. Anil Komar* (1928) 55 Cal. 35.

common, each one of them enters into usual covenants for title as to his own share or interest in the property (f). Acts, circumstances and dealings may rebut the presumption of joint tenancy. The Court is at liberty to receive evidence of the acts of joint tenants shewing that they considered themselves entitled as tenants in common.

S. 7

1. A joint letter written to trustees of a will signifies acceptance of privilege given by a testator to purchase a warehouse (g).

2. When a purchase is made out of moneys standing in joint account in a bank it is not necessarily joint tenancy. The origin of the money and the acts and intention of the parties must be looked to and a conclusion in favour of the tenancy in common drawn from the circumstances (h).

3. Notwithstanding insertion of the joint account clause the mortgagees were entitled to the mortgage-moneys as tenants in common (i).

An estate conveyed to persons in form as joint tenants has been adjudged to have been held by them as tenants in common when the purchase was for a joint speculation (j). There is no fiduciary relationship between tenants in common nor can one co-tenant impose upon another an obligation of a fiduciary character by leaving the management of the property in his hands (k). A purchaser from a coparcener is not a tenant in common with the other members (l). The subject is dealt with in sections 44 to 47 of the Act.

Coparcener.—As to alienation of undivided interest in coparcenary property, in Bombay, according to the Mitakshara Law, it is now well established that a coparcener can alienate his own interest in joint family property provided there is valuable consideration for it (m). The same rule applies in Madras (n) which has gone so far as to recognize an alienation by way of gift. The view adopted under the same text in Calcutta and Allahabad is to the contrary. The Privy Council in a case from Bengal held that as to ancestral estate under the Mitakshara Law so long as the estate is undivided and the share of a member of the family is indefinite it is not competent to a coparcener to alienate his share without the consent of the other coparceners (o). The same tribunal, in a case from Allahabad where father and son constituted a joint family holding ancestral estate, held that under the Mitakshara Law as administered by the High Courts of the United Provinces and Bengal, an undivided share in ancestral estate held by a son as a member of the joint family in coparcenary cannot be alienated by him without the consent of

(f) *Rajeswar Prosad v. Anil Komar* (1928) 55 Cal 35.

(g) *Harrison v. Barton* (1869) 30 L. J. Ch. 213.

(h) *Robinson v. Preston* (1858) 27 L. J. Ch. 395.

(i) *In re Jackson, Smith v. Sibthorpe* (1887) 34 Ch D. 732.

(j) *Lake v. Braddock* (1732) 3 P. Wms. 158, 24 E. R. 1011; *Stuart v. Blakeway* (1869) 4 Ch. 603; *Re. Hulton, Hulton v. Lister* (1890) 62 L. T. 200.

(k) *Kennedy v. De Trafford* (1897) A. C. 180.

(l) *Deen Dayal v. Judgeep Narain* (1876) 3 Cal. 198; 4 I. A. 247; *Suraj Bansi Koer v. Sjeoprasad Singh* (1878) 5 Cal. 148, 6 I. A. 88; *Hardi Narain Sahu v. Ruder Perakash* (1883) 10 Cal. 626, 11 I. A. 26; *Manjaya v. Shanmuga* (1915) 38 Mad. 684; *Pandu v. Goma* (1919) 43 Bom. 472.

(m) *Pandoo Vithoji v. Goma Ramji* (1919) 43 Bom. 472; *Pandurang v. Bhagvandas* (1920) 44 Bom. 341; *Lakshman v. Ram Chandra* (1880) 5 Bom. 48, 7 I. A. 181.

(n) *Vadivelam v. Natesam* (1914) 37 Mad. 435; *Marappa Goundan v. Rangasami Goundan* (1900) 23 Mad. 89; *Subba v. Venkatrami* (1915) 38 Mad. 1187; *J. Rajacharu v. J. V. Venkataramaniam* (1869) 4 Mad. H. C. R. 60; *Palanivelappa Kaundan v. Mannaru Naikar* (1865) 2 Mad. H. C. R. 416; *Peddamthulaty v. N. Timma Reddy* (1865) 2 Mad. H. C. R. 270; *Nanjunda v. Kanagaraju* (1919) 42 Mad. 154.

(o) *Mahdho Parshad v. Mehrban Singh* (1891) 18 Cal. 157, 17 I. A. 194; *Sadabart Prasad v. Foolhart Koer* (1869) 3 Beng. L. R. 31.

- S. 7 those who share the joint estate (*p*). The same rule was extended to father's alienation which was neither for legal necessity nor for an antecedent debt (*q*). As to Berar, the Judicial Committee accepted the view that Mitakshara is to be interpreted there in the same manner as in Bombay (*r*). A similar view is prevalent in the Central Provinces (*s*). The above rules do not extend to a surviving coparcener whether the alienation be for or without consideration (*t*). Again, no coparcener can make a gift of his undivided interest (*u*) except with the consent of the others (*v*).

Severance of joint family.—Marriage under the Special Marriage Act (III of 1872) of any member of an undivided family affects a severance from such family (*w*).

Hindu widow.—The power of disposition which the law denies to a Hindu widow who has inherited property of her husband may be exercised when supported on the ground either of legal necessity or the performance of religious acts. The Hindu system recognizes two sets of religious acts. One in connection with actual obsequies of the deceased and the periodical performance of the obsequial rites described in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. With regard to the first set her powers are wider than in respect of the acts which are simply pious, and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In the first case, if the income of the property or the property itself be not sufficient to cover the expenses, she would be entitled to sell the whole of it. In the other case she can alienate only a small portion for pious or charitable purposes as she may have in view (*x*). In the first set would be included payment of husband's debts though barred (*y*) unless her deceased husband had repudiated the debts before his death (*z*), or she had discharged the debt in his lifetime (*a*). Pilgrimage for the benefit of the husband's soul (*b*) or to Pandarpur (*c*) or Gaya (*d*) but not to Benares (*e*), the digging of tanks (*f*), building of temples (*g*), performance of father's *shraddha* ceremony (*h*).

- (*p*) *Balgobind Das v. Narain Lal* (1893) 15 All. 339, 20 I. A. 116; *Chandra Kishore v. Dampat Kishore* (1894) 16 All. 369; *Rama Nand Singh v. Govind Singh* (1883) 5 All. 384.
 (*q*) *Kali Shankar v. Nawab Singh* (1909) 31 All. 508; *Chandraleo v. Mata Prasad* (1909) 31 All. 176; see also *Muhammad Muzmil-ullah Khan v. Mithu Lal* (1911) 33 All. 783; *Mahraj Singh v. Sarup Kuar* (1886) 8 All. 205; *Bhagirathi Misr v. Sheobhik* (1898) 20 All. 325.
 (*r*) *Syed Kasam v. Jorawar Singh* (1923) 50 Cal. 84, 49 I. A. 358.
 (*s*) *Bhojraj v. Nathuram* (1917) 12 Nag. L. R. 161; *Hiraram v. Uderam* (1914) 9 Nag. L. R. 74; *Nathu v. Gulabchand*, A. I. R. (1934) Nag. L. R. 13.
 (*t*) *Suraj Prasad v. Makhan Lal* (1922) 44 All. 382; *Partab Singh v. Bohra Nathu* (1923) 45 All. 49; *Lal Bahadur v. Ambika Prasad* (1925) 47 All. 795, 52 I. A. 443; *Hitendra v. Sakhdeb* (1929) 8 Pat. 558; *Bholanath v. Kartick Kissen* (1907) 34 Cal. 372.
 (*u*) *Kalu v. Barsu* (1895) 19 Bom. 803; *Vrandavandas v. Yamunabai* (1875) 12 Bom. H. C. 229; *Gangubdi v. Ramanna* (1863) 3 Bom. H. C. 66; *Rottala v. Pulicat* (1904) 27 Mad. 162 (166); *Ponnusami v. Thata* (1886) 9 Mad. 273.
 (*v*) *Tagore v. Tagore* (1872) 9 Beng. L. R. 377 (396).
 (*w*) Sec. 22.

- (*x*) *Sardar Singh v. Kunj Bihari Lal* (1922) 44 All. 503 (511), 49 I. A. 383 (391); *Raj Lukhee Dabea v. Gokool Chunder Chowdry* (1869) 13 M.I.A. 209; *Collector of Masulipatam v. Cavalry Vencata* (1861) 8 M. I. A. 529; *Rama v. Ranga* (1885) 8 Mad. 552; *Vuppuluri Tatayya v. Garimilla Ramakrishnamma* (1910) 34 Mad. 288; *Khub Lal Singh v. Ajodhya Misser* (1915) 43 Cal. 574.
 (*y*) *Ashutosh Sikdar v. Chidam Mandal* (1930) 57 Cal. 904; *Tulshi Prasad v. Jahmohan Lal* (1935) 57 All. 422; *Udai Chunder v. Ashutosh Das* (1893) 21 Cal. 190; *Tarini Prasad v. Bhola Nath* (1891) 21 Cal. 190.
 (*z*) *Bhagwat v. Nivratti* (1915) 39 Bom. 113.
 (*a*) *Bhawani v. Himmat* (1911) 33 All. 342 P. C.
 (*b*) *Darbari Lal v. Gobind Saran* (1924) 46 All. 822.
 (*c*) *Bai Chanchal v. Chimanlal* (1928) 30 Bom. L. R. 685; *Ganpat v. Tulsiram* (1912) 36 Bom. 88.
 (*d*) *Muteeram v. Gopal* (1873) 11 Beng. L. R. 416; *Collector of Masulipatam v. Cavalry Vencata* (1861) 8 M. I. A. 529.
 (*e*) *Hari Kissen v. Bagrang Sopai* (1909) 13 C. W. N. 544.
 (*f*) *Khub Lal v. Ajodhya* (1916) 43 Cal. 574; *Ram Surat v. Hitanandan* (1931) 10 Pat. 474.
 (*g*) *Indar Bux v. Sheo Naresh* (1927) 2 Luck. 713.
 (*h*) *Bai Chanchal v. Chimanlal* (1928) 30 Bom. L. R. 685; *Tatyya v. Ramakrishnamma* (1910) 34 Mad. 288.

Gifts for the observance of *bhog* (food offerings) to a deity and for the maintenance of priests for the salvation of her deceased husband, his family and widow (i), or by way of *suphal sankalp* to a priest of Gaya (j), or in favour of a family deity when also the test is the proportion of the property and not the necessity of the deity (k), fall in the second set of religious acts. In *Lachmi Kunwar v. Durga Kunwar* (l), a gift made by a Hindu widow for the spiritual benefit of her husband, after she had returned from a pilgrimage, was upheld, and in *Gobind Upadhyaya v. Lakhrani* (m), a similar gift made by a widow on her return from a pilgrimage to Gaya was treated as valid and binding on the reversionary heirs of her husband. In drawing the above distinction their Lordships sounded a note of warning that the distinction was in no small degree embarrassing and care should be taken to avoid the confusion which arose by mixing up an indispensable or obligatory duty with a pious purpose which, although optional, was spiritually beneficial to the deceased (n). The texts of almost all *Rishis* were quoted in *Ram Sumaran Prasad v. Gobind Das* (o), and received the interpretation of Turner, L. J., who stated thus:—"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must shew necessity" (p). But a widow whose right is only confined to maintenance and is not in possession of the property has no such power as aforesaid (q). This was the case of a mother who had not inherited the property and whose authority to act for the spiritual benefit of her deceased son was not on the same footing as a similar act would have been by the widow or by the minor sons as in *Bai Chanchal v. Chimanlal* (r) where also the widow was not in possession. As to moveables inherited by a widow, her power of disposal depends upon the law by which she is governed. In that part of the Presidency of Bombay where Mayukha prevails she has an absolute power of disposal (s). In the other provinces, including that part of the Presidency of Bombay where the Mitakshara prevails, her power over moveables inherited by her is analogous to that over immoveable property (t). This does not include testamentary power over inherited property (u). Again, a widow's power according to Mayukha over moveables acquired on partition with her sons is absolute (v).

With consent of reversioner.—Alienation by a Hindu widow with consent of the reversioners may be :—

- (a) for legal necessity, actual or presumed ;
- (b) without legal necessity.

As to (a), their Lordships of the Privy Council stated that where the alienation of the whole or part of the estate is to be supported on the ground of necessity (then,

- (i) *Sardar Singh v. Kunj Bihari Lal* (1922) 44 All. 503.
- (j) *Baldeo Prasad v. Fateh Singh* (1924) 46 All. 533.
- (k) *Madan Mohan v. Rakhalchandra* (1930) 57 Cal. 570.
- (l) (1918) 40 All. 619.
- (m) (1921) 43 All. 515.
- (n) *Sardar Singh v. Kunj Bihari Lal* (1922) 44 All. 503 (511), 49 I. A. 383 (391).
- (o) (1926) 5 Pat. 646.
- (p) *Collector of Masulipatam v. Cavalry Vencata* (1861) 8 M. I. A. 529; *Ram Surat v. Hitanandan* (1931) 10 Pat. 474.
- (q) *Ramabai v. Dattatraya* (1931) 33 Bom. L. R. 1244 (confirmed on second appeal and also under Letters Patent Appeal). See last

lines of the same report.

- (r) (1928) 30 Bom. L. R. 685.
- (s) *Bhagirathibai v. Khanujirav* (1887) 11 Bom. 285 (297).
- (t) *Pandarinath v. Govind* (1908) 32 Bom. 59; *Durga Nath v. Chintamani* (1904) 31 Cal. 214; *Buchi v. Jagapathi* (1885) 8 Mad. 304; *Bhugwande v. Myna Bacc* (1867) 11 M. I. A. 487.
- (u) *Sarat Chandra v. Charusile* (1928) 55 Cal. 918; *Tirath Ram v. Kahan Devi* (1920) 1 Lah. 588; *Jagdeo Singh v. Mt. Raja Kuer* (1927) 6 Pat. 788; *Thakoor Deyhee v. Rai Baluk Ram* (1866) 11 M. I. A. 139; *Gadadhar Bhat v. Chandrabhagabai* (1892) 17 Bom. 690.
- (v) *Chamanlal v. Bai Parvati* (1934) 58 Bom. 246.

S. 7 if such necessity is not proved *aliunde*, and the alienee does not prove inquiry on his part, and honest belief in the necessity) the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one (*w*). That is to say, the consent is not conclusive proof of the existence of legal necessity but raises a presumption of the existence of such necessity (*x*). The operation of the above rule must ordinarily be limited to transfers for consideration and cannot appropriately be extended to voluntary transfers by way of gift where there is no question of legal necessity (*y*). Further, the alienation must be to a stranger and not to a sole reversioner or to one of the reversioners with the consent of the others (*z*). Where part of the consideration for a transfer by a widow is found to have been applied to the payment of the husband's debts, the transaction should be set aside on terms that the reversioners pay to the transferee the sum so applied (*a*). As to (*b*), when she alienates without legal necessity with the consent of the reversioner, the latter cannot dispute its validity (*b*), and herein the existence or otherwise of consideration is immaterial (*c*).

Without the consent of the reversioner.—An alienation by a Hindu widow without the consent of the reversioner may be :—

- (a) for legal necessity,
- (b) without a legal necessity.

As to (*a*) her powers are no less than those of a manager of an infant's estate (*d*). She may not alienate in order to improve the husband's estate but she can make a permanent alienation if justified on the ground of necessity. The "necessity" involves some notion of pressure from outside and not merely a desire to better or develop the estate (*e*). Section 38 of the present Act permits an alienation by a Hindu widow where the property is insufficient for her maintenance if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith. In case (*b*) the transfer is not valid beyond her lifetime (*f*).

(w) *Rangasami Gounden v. Nachiappa Gounden* (1919) 42 Mad. 523.

(x) *Annada Kumar v. Indra Bhusan* (1907) 12 C. W. N. 49; *Hem Chander v. Sarnamoyi* (1894) 22 Cal. 354; *Nobokishore v. Harinath* (1880) 10 Cal. 1102; *Pulin Chandra v. Bolai Mandal* (1908) 35 Cal. 939; *Debi Prasad v. Gholap Bhagat* (1913) 40 Cal. 721; *Tangasami Goundan v. Nachiappa Goundan* (1919) 42 Mad. 523, 46 I. A. 72; *Mahomed Said v. Kunwar Darshan* (1928) 50 All. 75; *Darlari Lal v. Gobind Saran* (1924) 46 All. 822; *Bhup Singh v. Jhamman Singh* (1922) 44 All. 95; *Ghisiawan v. Mt. Raj Kumari* (1921) 43 All. 534; *Bajrangi Singh v. Manokarnika* (1908) 30 All. 1, 35 I. A. 1; *Moti v. Laldas* (1917) 41 Bom. 93; *Ramakrishna v. Tripurabai* (1911) 13 Bom. L. R. 940; *Pilu v. Babaji* (1910) 34 Bom. 165; *Vinayak v. Govind* (1901) 25 Bom. 129.

(y) *Pilu v. Babaji* (1910) 34 Bom. 165; *Bajrangi Singh v. Manokarnika* (1907) 30 All. 1, 35 I. A. 1; *Vinayak v. Govind* (1900) 25 Bom. 129; *Harihar v. Udainath* (1923) 45 All. 260; *Bindeshwari v. Harnarain Singh* (1929) 4 Luck. 622.

(z) *Santi Kumar Pal v. Mukunda Lal Mandal* (1934) 39 C. W. N. 226.

(a) *Santi Kumar Pal v. Mukunda Lal Mandal* (1934) 39 C. W. N. 226.

(b) *Rangasami Goundan v. Nachiappa Goundan* (1919) 42 Mad. 523, 46 I. A. 72; *Rup Narain v. Gopal Devi* (1909) 36 Cal. 780; 36 I. A. 103; *Fateh Singh v. Thakur Rukmini* (1923) 45 All. 339; *Babu Singh v. Rameshwar* (1932) 7 Luck. 360; *Baburao v. Tukaram* (1931) 33 Bom. L. R. 235; *Akkawa v. Sayad Khan* (1927) 51 Bom. 475; *Rangaunda v. Bhausahab* (1928) 52 Bom. 1, 54 I. A. 396; *Basappa v. Fakirappa* (1922) 46 Bom. 292; *Jai Narain v. Munna Lal* (1927) 50 All. 489.

(c) *Fateh Singh v. Thakur Rukmini* (1923) 45 All. 339; *Akkawa v. Sayad Khan* (1927) 51 Bom. 475; *Basappa v. Fakirappa* (1922) 46 Bom. 292; *Babu Singh v. Rameshwar* (1932) 7 Luck. 360.

(d) *Dayamani Debi v. Srinibash Kundu* (1906) 33 Cal. 842; *Hunooman Persaud v. Mussamat Babooee* (1856) 6 M. I. A. 393; *Kameswar Pershad v. Run Bahadur Singh* (1881) 6 Cal. 843.

(e) *Ganap v. Subbi* (1908) 32 Bom. 577; *Ramsunran Prasad v. Shyam Kumari* (1922) 1 Pat. 741, 49 I. A. 342.

(f) *Dhanji v. Dhuma* (1924) 26 Bom. L. R. 277; *Chidambaramma v. Husainamma* (1916) 39 Mad. 565; *Gowardhandas v. Vira Mal* (1920) 1 Lah. 48.

and the reversioners are not bound (g). It is settled law that an alienation by a widow in excess of her power is not altogether void but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding (h).

Necessity.—Necessity to justify alienation by a Hindu widow includes the right to mortgage for her own maintenance and support of dependent relatives of her husband and those of persons for the maintenance of whom the deceased would have been liable if alive (i), and a sale of the estate for debts contracted for the thread and marriage ceremonies of one of her daughter's sons (j). So also an alienation for expenses of marriage of the deceased owner's uncle's son's daughter (k) and those of daughters (l) and son's daughter (m) or the betrothal of her daughter (n). An alienation to provide for dowry for the widow's daughter provided it is reasonable cannot be questioned, it being immaterial whether the deed was executed before or after the marriage ceremony (o), and so also a gift upon the occasion of her daughter's *gowna* ceremony (p). And a mother who has acquired the estate of her deceased son could make a valid gift to her son-in-law on the occasion of his marriage with her daughter provided it was found to be otherwise reasonable in extent (q). The execution of a mortgage to pay for *shraddha* ceremony of her mother, Government revenue, costs of succession certificate and a rent decree was held to have been made for legal necessity (r).

But payment of money to recover property sold for arrears of road-cess is not a legal necessity but a personal debt (s). Family debts not incurred by the widow and costs of defending law suits are also cases of legal necessity (t). Where there was an actual existing necessity the circumstances that the widow's mismanagement contributed towards it will not affect the alienation unless it be shown that the lender acted *mala fide* (u).

Benefit of the estate.—Yet a third ground on which her power of alienation has been upheld is where it is for "the benefit of the estate," a phrase as to the interpretation of which the Courts in India are not unanimous, as will appear from the undermentioned cases (v).

- (g) *Ramgouda v. Bhausahab* (1927) 52 Bom. 1, 54 I. A. 396; *Kondama Naicker v. Kandasamy Goundar* (1924) 47 Mad. 181, 51 I. A. 145.
- (h) *Ramgouda v. Bhausahab* (1928) 52 Bom. 1, 54 I. A. 396.
- (i) *Sadashiv v. Dhakoobai* (1881) 5 Bom. 450; *Dharbari Lal v. Gobind Saran* (1924) 46 All. 822; *Bajinath v. Mangla* (1926) 5 Pat. 350.
- (j) *Venkatashubba Rao v. Ananda Rao* (1934) 57 Mad. 772.
- (k) *Bajinath v. Mangla* (1926) 5 Pat. 350.
- (l) *Makhan v. Gayan* (1911) 33 All. 255; *Bhagavati v. Ram Jatan* (1923) 45 All. 297; *Mahadev Prasad v. Mt. Dhanraj* (1926) 1 Luck. 477.
- (m) *Ramkumar v. Ichamoyi* (1880) 6 Cal. 36.
- (n) *Ganpat v. Tulsiram* (1912) 36 Bom. 88.
- (o) *Udai Dat v. Ambika Prasad* (1927) 2 Luck. 412; *Jowala Ram v. Hari Kishen*, A. I. R. (1924) Lah. 429.
- (p) *Jowala Ram v. Hari Kishen*, A. I. R. (1924) Lah. 429; *Churaman Sahu v. Gopi Sahu* (1909) 37 Cal. 1.

- (q) *Ramasami Ayyar v. Vengidusami Ayyar* (1899) 22 Mad. 113.
- (r) *Srimohan v. Brijbehary* (1909) 36 Cal. 753; *Raj Chandra v. Sheeshoo Ram* (1867) 7 W. R. 146.
- (s) *Srimohan v. Brijbehary* (1909) 36 Cal. 753; *Shekaat Hosain v. Sasi Kar* (1892) 19 Cal. 783; *Mahanund v. Banimadhub* (1896) 24 Cal. 27; *Rupram v. Iswar* (1902) 6 C. W. N. 302.
- (t) *Debi Dayal v. Bhau Pertap* (1904) 31 Cal. 433.
- (u) *Rajeshar v. Har Kishen* (1933) 8 Luck. 538.
- (v) *Ragho v. Zaga Ekoba* (1929) 53 Bom. 419; *Nagindas v. Mahomed Yusuf* (1922) 46 Bom. 312; *Jagat Narain v. Mathura Das* (1928) 50 All. 969; *Inspector Singh v. Kharak Singh* (1928) 50 All. 776; *Rattan Chand v. Sri Thakur Ram* (1928) 26 A. L. J. 777; *Jado Singh v. Nathu Singh* (1926) 48 All. 592; *Shankar Sahai v. Bechu Ram* (1925) 47 All. 381; *Mahabir Prasad v. Awla Prasad* (1924) 46 All. 364; *Bhagwan Das v. Mahdeo Prasad* (1923) 45 All. 390; *Tula Ram v. Tulshi Ram* (1920) 42 All. 559.

S. 7

Reversioner how far bound.—Attestation is not evidence of consent (*w*). A reversioner who is a party to an instrument and takes benefit under the transaction evidenced thereby is precluded from questioning any part of it (*x*). But a reversioner who has not by any act or omission debarred himself from insisting on this contention may, notwithstanding the reversion is an expectancy, sue for a declaration, for an expectant reversioner's right to sue for a declaration has statutory recognition (*y*). Lapse of time raises a presumption that the parties to the document included all persons who had an actual or possible interest in the properties (*z*), but not that it was justified by legal necessity (*a*). A reversioner who has not consented may ratify the transaction or impeach it by treating it as a nullity without the intervention of the Court after the death of the alienating widow (*b*). This right in a Bombay case has been described as "election" (*c*). Where the reversioner is a female the consent must be of the male reversioner, for if the next reversioner be a female her concurrence would be of no avail. In order to render alienation indefeasible the consent of the reversioner immediately next to such female reversioner must also be obtained, and this is the law even where a female, as in Bombay, takes an absolute estate (*d*). A reversioner who joins in a widow's mortgage of her husband's estate is not liable to satisfy the debt (*e*).

Indian Succession Act.—A fourth mode of alienation open to a widow on the ground of legal necessity is with leave of the Court first had and obtained under section 307 of the Indian Succession Act. Where a Hindu widow has obtained a grant of Letters of Administration and subsequently adopted a son, her estate is divested and she cannot obtain an order under this section. Her proper course is to have the grant revoked under section 262 of the Indian Succession Act and apply for the appointment of a guardian for the adopted son and obtain an order to alienate under the Guardian and Wards Act.

Borrowing on personal credit.—Ordinarily, a Hindu widow raises money for necessity either by sale or mortgage. The Courts in India differ on the question whether property in the hands of a reversioner is liable to satisfy a personal debt not secured, or such debt which a widow, while enjoying a widow's estate, has properly incurred in the course of management of the property. The Calcutta High Court (*f*) admitted her right to borrow moneys on her personal credit rendering the estate liable. This view was recently adopted by a Full Bench of the Bombay High Court (*g*), overruling its previous decisions (*h*) and dissenting from the Allahabad (*i*) and Madras (*j*) High Courts.

Joint widows.—The settled law is that if a Hindu dies leaving two widows they succeed as joint tenants with a right of survivorship. They may partition the

(*w*) *Ramgowda v. Bhausahab* (1928) 52 Bom 1; 54 I. A. 396; *Thakur Prasad v. Mt. Dipa Kuer* (1931) 10 Pat. 352; *Har Mitra v. Raghubar* (1928) 3 Luck. 645; *Banga Chandra v. Jagat Kishore* (1916) 44 Cal. 186, 43 I. A. 249; *Raja Lukhee v. Gokul Chunder* (1869) 13 M. I. A. 209; *Hari Kishen v. Kashi Prasad* (1914) 42 Cal. 876, 42 I. A. 64.
 (*x*) *Ramgowda v. Bhausahab* (1928) 52 Bom. 1, 54 I. A. 396.
 (*y*) *Kondama Naicker v. Kondasami Gounden* (1924) 47 Mad. 181, 51 I. A. 145.
 (*z*) *Ramgowda v. Bhausahab* (1928) 52 Bom. 1, 54 I. A. 396.
 (*a*) *Bhojraj v. Sitaram* (1936) 40 C. W. N. 257 P. C.
 (*b*) *Kondama Naicker v. Kondasami Goundan* (1924) 47 Mad. 181, 51 I. A. 145.; *Bijoy Gopal v. Kishna Mahishi* (1907) 34 Cal.

329, 34 I. A. 87.
 (*c*) *Akkawa v. Sayad Khan* (1927) 51 Bom. 475.
 (*d*) *Vinayak v. Gobind* (1901) 25 Bom. 129; *Varjwan v. Ghelji* (1881) 5 Bom. 563; *Pilu v. Babaji* (1909) 34 Bom. 165.
 (*e*) *Sm. Annamoyi v. Umesh Chandra* (1936) 40 C. W. N. 339.
 (*f*) *Hurry Mohun v. Ganesh Chunder* (1884) 10 Cal. 823; *Ramcoomar Mitter v. Ichamoyi Dasi* (1880) 6 Cal. 36.
 (*g*) *Dhondo v. Mishrilal* (1936) 38 Bom. L. R. 6.
 (*h*) *Bhagwantrao v. Ramnath* (1928) 52 Bom. 542; *Gadgappa Desai v. Apaji Jivanrao* (1879) 3 Bom. 237.
 (*i*) *Kallu v. Faiyaz Ali Khan* (1908) 30 All. 394; *Dhiraj Singh v. Manga Ram* (1897) 19 All. 300.
 (*j*) *Ramasami v. Sellattammal* (1881) 4 Mad. 375.

estate between themselves and each may enjoy the income of her share. Each can deal with her life-interest but she cannot alienate the corpus as to prejudice the survivor or future reversioner. Together they can burden the reversion for a legal necessity but one of them acting without authority of the other cannot prejudice the right of survivorship by burdening or alienating any part of, the estate. It has, however, been observed, although the case has not arisen, that if the concurrence of the co-widow was asked for borrowing, and unreasonably refused, a mortgage under those circumstances would bind the estate (*k*). Further, each of them may also relinquish her right of survivorship in that portion of the estate which is held by the other. The effect of such an arrangement would be that on the death of one the estate in her possession will not revert to the other who has relinquished her right but will go to her heirs as if it was her *stridhan* and the heirs, or, if she makes an alienation of any portion of the estate, the alienee will continue in possession of the estate till the death of the last survivor (*l*). The two cases (*m*) mentioned below form an exception to the general current of authority on the ground that the senior widow has power to alienate without concurrence of the junior for necessary purpose—a proposition not supported by the actual decision. It is explained in a recent case that the Judges there were of opinion that the senior widow was recognized as manager or agent of the other, an inference which could be made only in a case where there was no known hostility between the widows (*n*). It has been observed that a mortgage by one for legal necessity where concurrence of the other has been withheld unreasonably would bind the estate (*o*).

Duty of purchaser or mortgagee.—It is the duty of the purchaser or mortgagee from the manager of a joint Hindu family to satisfy himself of the existence of necessity as would entitle him to enter into the transaction binding the minor members. This obligation cannot be cast on the Court and he cannot insist that unless the Court sanctions the transaction he will not enter into it. If, however, on proper and reasonable inquiries he is satisfied as to necessity, he is justified in entering into the transaction (*p*). This was commented on by a Division Bench of the same Court (*q*).

Surrender by a Hindu widow.—This doctrine of surrender and consequent acceleration of the reversionary estate has not been incorporated by judicial decisions but is to be found in original texts of Hindu Law (*r*). Surrender is the effacement of the widow by renunciation of her interest to the nearest reversioner if one or to all reversioners nearest in degree, if more than one at the moment of alienation, thereby accelerating their interest. If there be more than one widow all of them must efface themselves (*s*). It may be accomplished by a single act or by a series of alienations the cumulative effect of which is the total effacement of the widow (*t*). In such circumstances the question of necessity (*u*) does not arise. But it must be *bona fide* and not a device to enlarge her own estate with the rever-

(*k*) *Gauri Nath v. Gaya Kuar* (1928) 55 I. A. 399; *Gajapati v. Pusapati* (1892) 16 Mad. 1, 19 I. A. 184.

(*l*) *Dulhin Parbati Kuer v. Baijnath Prasad* (1935) 15 Pat. 518.

(*m*) *Kalliyansundaram Pillai v. Subba Mooppanar* (1904) 14 Mad. L. J. 139; *Jai Narain Singh v. Muna Lal* (1928) 50 All. 489.

(*n*) *Valluru Appalasuri v. Sasapu Kannamma* (1925) 49 Mad. L. J. 479.

(*o*) *Gauri Nath v. Gaya Kuar* (1928) 55 I. A. 399.

(*p*) *In re Dattatraya Govind Haldankar* (1932) 34 Bom. L. R. 1156.

(*q*) *Mahadeo Krishna Rupji, in re* (1936) 38 Bom. L. R. 1286.

(*r*) *Ram Krishna v. Sm. Kousalaya* (1935) 40 C. W. N. 208.

(*s*) *Dulhin v. Baijnath* (1935) 14 Pat. 518.

(*t*) *Behari Lal v. Madho Lal* (1892) 19 Cal. 236, 19 I. A. 30; *Raj Kishore v. Durga Charan* (1906) 28 All. 71.

(*u*) *Maru v. Hanso* (1926) 48 All. 485.

S. 7 sioner (v). The validity of the surrender does not depend upon the widow's motive (w). It must be of the entire estate so that the widow's estate is completely destroyed and extinguished (x). Being an effacement of the widow there cannot be a widow partly effaced and partly not so. Next reversioners cannot confer an unrestricted prospective power of alienation on the widow. The power of accelerating the reversioner's estate cannot be used by the widow as a means of enlarging her own estate or effecting alienations to strangers as it will be an abuse on the limited power vested in her. The reversioner's right to validate alienations is not derived from the power to surrender. The former is analogous to the power of *sapindas* to consent to an adoption: the latter is based upon the application of the English doctrine of merger (y). There is a distinction when a surrender is made to a female reversioner who takes, as in Bombay, an absolute estate and who, as in Benares and other provinces, takes a limited estate. In the former case the surrender is indefeasible (z) whilst in the latter case the effect is merely to accelerate her succession and put her by anticipation in possession of her life estate so that on the death of the widow it reverts to the nearest male reversioner (a). The validity of the renunciation is independent of the validity of the agreement as to the subsequent disposal of the property by the alienee (b). A widow cannot by the device of surrender enlarge her estate and therefore with the consent of the presumptive reversioner she cannot convert her life estate in any portion of her husband's estate which she retains for herself into an absolute estate freed from the shackles on alienation (c).

To the general principle established in *Goundan's* case (d), that the surrender must be total, a somewhat anomalous sanction was accorded by *Bhagwat Koer's* case (e) and *Misser's* case (f). Both these cases imposed on the general principle a qualification that on a surrender the widow may retain a small part of the estate for her maintenance. These cases were results of compromise. The Bombay High Court, not being able to reconcile the qualification with the principle held, in a case where the widow reserved 42 acres and 31 gunthas inherited from her husband for her maintenance, that it was a device on her part to divide the estate with the reversioner (g). The same Court has, however, held valid a surrender of a life estate by a widow to the next reversioner who agreed to maintain the widow for her life (h). *Misser's* case was explained and distinguished in *Mansingh's* case (i) where their Lordships declared the surrender which reserved maintenance allowance to the widow as invalid being not only in contravention of section 60 of the Court of Wards Act, the widows being wards of the Court, but also void under

(v) *Rangasami Goundan v. Nachiappa Goundan* (1919) 42 Mad. 523, 46 I. A. 72; *Shanti Kumar Pal v. Mukundalal Mandal* (1935) 62 Cal. 204; *Bhagwat Koer v. Dhanukhdhari* (1919) 47 Cal. 466, 46 I. A. 259; *Sureshwar Misser v. Maheshwari* (1920) 48 Cal. 100, 47 I. A. 233; *Thakur Prasad v. Mt. Dipa Kuer* (1931) 10 Pat. 352; *Santi Kumar Pal v. Mukunda Lal Mandal* (1934) 39 C. W. N. 226; *Moti v. Lal Das* (1917) 41 Bom. 92.
 (w) *Subbalakshmi v. Narayana* (1935) 58 Mad. 150; *Challa v. Subbiah v. Palury* (1908) 31 Mad. 446.
 (x) *Santi Kumar Pal v. Mukunda Lal Mandal* (1934) 39 C. W. N. 226; *Rangappa v. Kamti Naik* (1908) 31 Mad. 366; *Naru Hari v. Tai Kom Devji* (1923) 47 Bom. 431; *Sakharam v. Thama* (1927) 51 Bom. 1019; *Sartaji v. Ramjas* (1923) 46 All. 59.

(y) Per Wallis, J., in *Rangappa v. Kamti Naik* (1908) 31 Mad. 366; see *Naru Hari v. Tai* (1923) 47 Bom. 431.
 (z) *Naru Hari v. Tai Kom Devji* (1923) 47 Bom. 431.
 (a) *Bhupal Ram v. Lachma Kuar* (1888) 11 All. 253; *Rup Ram v. Musammal Rewati* (1909) 32 All. 582; *Sitanna v. Viranna* (1934) 57 Mad. 749; *Sartaji v. Ramjas* (1923) 46 All. 59.
 (b) *Challa Subbiah v. Palury* (1908) 31 Mad. 447.
 (c) *Hem Chunder v. Sarnamoyi Debi* (1894) 22 Cal. 354.
 (d) (1918) 42 Mad. 523, 46 I. A. 72.
 (e) (1919) 47 Cal. 466, 46 I. A. 259.
 (f) (1920) 48 Cal. 100, 47 I. A. 233.
 (g) *Gangadhar v. Parbhudha* (1932) 56 Bom. 410.
 (h) *Rama Nana v. Dhondi* (1923) 47 Bom. 678.
 (i) (1926) 5 Pat. 290, 53 I. A. 11.

Hindu Law. Where a Hindu widow gave up all her rights in her husband's estate in favour of her co-widow and the latter predeceased the former, the reversioner's estate is not accelerated (*j*). On a surrender by a Hindu widow all prior alienations in excess of her powers are liable to be challenged by the reversioner immediately just as they could be impeached on her death. He has not to wait till the widow's death (*k*).

Manager of a Hindu family.—The principle laid down by the Privy Council in *Hanuman Prasad v. Musammatt Babooee* (*l*) as to the power of a manager for an infant heir to charge an estate not his own, was adopted by that tribunal in case of a sale (*m*) by a manager of a joint family consisting of a father and sons who constituted the coparcenery. In a coparcenery the manager, known as *karta*, is naturally the father (*n*), and in his absence the senior members of the family. A younger member when put forward to the outside world by the elder members as a manager may also alienate (*o*). The power is a limited and qualified one which can only be exercised rightly by the manager in case of need (*p*) or for the benefit of the estate (*q*). The actual pressure on the estate, the danger to be averted or the benefit to be conferred in the particular instance are the criteria to be regarded (*r*). In the case above referred to, their Lordships held that a sale of joint property should not be set aside merely because part of the proceeds, which is not a small part, is not proved to have been applied for purposes of necessity. The real question to be considered is whether the sale itself was justified by necessity; if the purchaser has acted honestly and made due inquiry as to existence of necessity he is not bound to account for the application of the price (*s*). The rights of the coparceners in a joint Hindu family consisting of a father and his sons, grandsons and great grandsons, do not differ from those of the coparceners in a like family consisting of undivided brethren, except in so far as the sons are affected by the obligation of the Hindu Law to pay their father's debts, and by the fact that he is naturally the manager of the joint family estate (*t*). All schools are agreed that a father can alienate coparcenery property in case of legal necessity or for the benefit of the estate or to discharge an antecedent debt of his own provided the debt was not contracted by the father for an illegal or an immoral purpose. Equally agreed are they that where the share of a coparcener has passed out of the joint family by sale in execution of a decree such sale cannot be impeached (*u*), but if the coparcener dies before attachment in his lifetime, then the right by survivorship is in conflict with the right in execution and being prior in point of time, defeats the rights of the execution creditor (*v*). It has been

(*j*) *Chengappa v. Buradagunta* (1920) 43 Mad. 855.

(*k*) *Ram Krishna v. Sm. Kousakaya* (1935) 40 C. W. N. 208; *Prafulla v. Bhabani* (1925) 52 Cal. 1018.

(*l*) (1856) 6 M. I. A. 393.

(*m*) *Sri Kishan Das v. Nathu Ram* (1927) 49 All. 149, 54 I. A. 79.

(*n*) *Suraj Bansi Koer v. Sheo Persad Singh* (1878) 5 Cal. 148, 6 I. A. 88.

(*o*) *Mudit Narayan Singh v. Ranglal Singh* (1902) 29 Cal. 797.

(*p*) *Sham Sunder v. Achan Kunwar* (1899) 21 All. 71, 25 I. A. 183; *Gharibullah v. Khalak Singh* (1903) 25 All. 407, 30 I. A. 165; *Lal Bahdur Lal v. Kamleshwar Nath* (1926) 48 All. 183; *Ganap v. Subbi* (1908) 32 Bom. 577; *Biswanath v. Jagdip* (1913) 40 Cal. 342.

(*q*) *Jagmohan v. Prag Ahir* (1925) 47 All. 452

Jado Singh v. Nathu Singh (1926) 48 All. 592; *Nagindas Manehlal v. Mahomed Yusuf* (1922) 46 Bom. 312.

(*r*) *Hunooman Persaud v. Musammatt Babooee* (1856) 6 M. I. A. 393.

(*s*) *Sri Kishan Das v. Nathu Ram* (1927) 49 All. 149, 54 I. A. 79.

(*t*) *Suraj Bansi Koer v. Sheo Persad Singh* (1878) 5 Cal. 148, 6 I. A. 88.

(*u*) *Suraj Bansi Koer v. Sheo Pershad Singh* (1878) 5 Cal. 148, 6 I. A. 88; *Lachmi Narain v. Kunji Lal* (1894) 16 All. 449, 6 I. A. 88; *Madho Pershad v. Mehrban Singh* (1891) 18 Cal. 157, 17 I. A. 194; *Bittal Das v. Nand Kishore* (1901) 23 All. 106; *Faqir Chand v. Sant Lal* (1926) 48 All. 4.

(*v*) *Suraj Bansi Koer v. Sheo Pershad Singh* (1878) 5 Cal. 148, 6 I. A. 88; *Madho Prasad v. Mehrban Singh* (1891) 18 Cal. 157, 17 I. A. 194.

S. 7 observed that the term "necessity" must not be strictly construed. The benefit to the family may under certain circumstances mean a necessity for the transaction (*w*), nor is a sale to be set aside because a portion of the consideration unsupported by legal necessity is only an insignificant proportion of the whole. The father of a joint Hindu family governed by the Mitakshara can only sell or mortgage the joint family property so as to bind his sons in two cases—namely, (1) where the alienation is for family necessity; (2) where the alienation is made to discharge a debt which was antecedent to the alienation (*x*).

Further, during the father's lifetime an alienation by him is effective only in the first case, since its validity in the second case rests upon the pious duty of the sons to discharge their father's debt and that duty arises only upon his death (*y*). Dealing with an alienation by a father as manager of a joint family consisting of himself and his two minor sons, the Judicial Committee exhaustively reviewed the authorities and as a result of which summed up the following propositions (*z*):—

- (1) The managing coparcener (which expression includes the father of a joint undivided estate) cannot alienate or burden the estate *qua* manager except for purpose of necessity (*a*).
- (2) If he is the father, which expression includes the grandfather and great-grandfather, and the reversioners are the sons (which expression includes the grandsons and great grandsons) he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt (*b*). The burden of proving the nature of the debt is on the sons, proof of general extravagance or profligacy on the part of the father is sufficient (*c*).
- (3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate (*d*).

(*w*) *Nagindas Manecklal v. Mahomed Yusuf* (1922) 46 Bom. 312.

(*x*) *Lal Bahadur Lal v. Kamleshwar Nath* (1926) 48 All. 183.

(*y*) *Sahu Ram Chandra v. Bhup Singh* (1917) 39 All. 427, 44 I. A. 126.

(*z*) *Brij Narain v. Mangal Prasad* (1924) 46 All. 95, 51 I. A. 129; *Sahu Ram Chandra v. Bhup Singh* (1917) 39 All. 437, 44 I. A. 126 explained and observations therein not followed; *Armugham Chetty v. Muthu Kundan* (1919) 42 Mad. 711 as to "antecedent debt" approved; *Badri Prasad v. Madan Lal* (1893) 15 All. 75; *Govind Krishna Gujar v. Sakharan Narayan* (1894) 18 Bom. 383; *Ramasami Nadan v. Ulaganatha Goundan* (1899) 22 Mad. 49, as to the pious obligation upon sons during their father's lifetime, approved.

(*a*) *Hanuman Persad v. Musammal Babooze* (1856) 6 M. I. A. 393; *Doulatram v. Meherchand* (1888) 15 Cal. 70, 14 I. A. 187; *Shamsunder v. Achhan Kunwar* (1899) 21 All. 71, 25 I. A. 183; *Gharibullah v. Kalah Singh* (1903) 25 All. 407, 30 I. A. 165; *Biswanath v. Jagdip* (1913) 40 Cal. 342.

(*b*) *Muddun Thakoor v. Kantoo Lall* (1874) 14

Beng. L. R. 187, 1 I. A. 333; *Suraj Bansi Keer v. Sheo Pershad Singh* (1878) 5 Cal. 148, 6 I. A. 88; *Nanomi Babuasin v. Modhun Mohun* (1886) 13 Cal. 21, 13 I. A. 1; *Masit Ullah v. Danodhar Prasad* (1926) 48 All. 518, 53 I. A. 204; *Chet Ram v. Ram Singh* (1922) 44 All. 368, 49 I. A. 228, deemed to be overruled.

(*c*) *Baghut Pershad Singh v. Girja Koer* (1888) 15 Cal. 717, 15 I. A. 99; *Chintamanrav v. Kasinath* (1890) 14 Bom. 320; *Vasudev v. Krishnaji* (1896) 20 Bom. 534; *Dhullipallia v. Kuppa Venkatakrishnayya* (1919) 36 M. L. J. 296; *Babu Singh v. Bihari Lal* (1908) 30 All. 156; *Debi Dat v. Jodu Rai* (1902) 24 All. 459; *Karan Singh v. Bhup Singh* (1905) 27 All. 16; *Mahraj Singh v. Balwant Singh* (1906) 28 All. 508; *Tulshi Ram v. Bishnath Prasad* (1928) 50 All. 1; *Chandra-deo v. Mata Prasad* (1909) 31 All. 176.

(*d*) *Jogi Das v. Gangaram* (1917) 21 C. W. N. 857; *Narain Prasad v. Sarnamsingh* (1917) 39 All. 500, 44 I. A. 163; *Sahu Ram v. Bhup Singh* (1917) 39 All. 437, 44 I. A. 126; *Chetram v. Ram Singh* (1922) 44 All. 368, 49 I. A. 228; *Ram Reka Singh v. Ganga Prasad* (1927) 49 All. 123.

- (4) An antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached (e).
- (5) There is no rule that this result is affected by the question whether the father who contracted the debt or burdened the estate, is alive or dead (f). Instances of sale being permitted when the father for whose debt the sale was made was still alive may be found in the below mentioned cases (g).

The touchstone of a manager's alienation is the existence of a legal necessity (h). If this be established the alienation is valid in spite of absence of consent among the members of the family (i). He cannot bind the estate at his own free will and without any compelling cause so as to bind the repudiating reversioners. He may, however, alienate with the consent of some or all the coparceners. In the latter case the alienation cannot be questioned though there be no legal or justifying necessity. In the former case, in Bombay and Madras and Berars, it would bind such as have consented (j), but in the other provinces it would not bind the share of any member of the family, not even the manager (k). An alienation of family property made by the manager of a joint Hindu family without legal necessity is not absolutely void. It is voidable at the instance of persons whose interests are affected by it, viz., the coparceners in the property. The repudiating coparceners may uphold the sale or seek to repudiate it (l). A sale was effected by a grandfather as manager of a joint family to discharge encumbrances upon the interest which the plaintiffs acquired upon their birth. They not being for an immoral consideration were held as antecedent debts incurred before birth of the plaintiffs to discharge which the joint family property could validly be sold (m). Again, a manager of a joint Hindu family of traders has power to sell for the benefit of the family. In a case where in return for balance due from a customer the joint Hindu family of traders consisting of two brothers, of whom one had a major and two minor sons, had to purchase the land from the said customer at some loss, and in order to reduce the loss the father and manager of the family agreed to sell the land to the plaintiff at a certain price, it was held that the plaintiff was entitled to enforce specific performance of the contract to sell against the minor members also (n). It has been held also that such a contract on the death of the manager can be enforced against the survivors when they are majors (o).

- (e) *Venkataramanaya v. Venkataramana Doss* (1906) 29 Mad. 200; *Chidambara v. Koothaperumal* (1904) 27 Mad. 326, dissented from; *Sami Ayyangar v. Ponnammal* (1898) 21 Mad. 28, approved; *Khalilul Rahman v. Govind Persad* (1893) 20 Cal. 328; *Chandradeo v. Mata Prasad* (1909) 31 All. 176; *Armugham Chetty v. Muthu Koundan* (1919) 42 Mad. 711; *Badagala Jogi v. Bendalam Papiiah* (1918) 35 M. L. J. 382, overruled.
- (f) *Govind v. Sakharan* (1904) 28 Bom. 383.
- (g) *Girdharee Lall v. Kantoo Lall* (1874) 14 Beng. L. R. 187, 1 I. A. 321; *Deendyal Lal v. Jugdeep Narain Singh* (1877) 3 Cal. 198, 4 I. A. 247; *Nanomi Babuasin v. Modhun Mohun* (1886) 13 Cal. 21, 13 I. A. 1; *Bhagbut Pershad v. Girja Koer* (1888) 15 Cal. 717, 15 I. A. 99; *Minakshi Nayudu v. Immudi Kanaka Ramaya Gounden* (1889) 12 Mad. 142, 16 I. A. 1; *Mahabir Pershad v. Moheswar Nath Sahai* (1894) 17 Cal. 584, 17 I. A. 11; *Sripat Singh v. Tagore* (1917) 44 Cal. 524; 44 I. A. 1.
- (h) *Thandavaroya v. Shunmugam* (1909) 32 Mad.

- 162.
- (i) *Sham Sunder Lal v. Achan Kunwar* (1899) 21 All. 71, 25 I. A. 183.
- (j) *Marappa Goundan v. Rangasami Goundan* (1900) 23 Mad. 89.
- (k) *Madho Pershad v. Mahrban Singh* (1891) 18 Cal. 157, 17 I. A. 194; *Balgobind Das v. Narain Lal* (1893) 15 All. 339, 20 I. A. 116; *Ram Sahai v. Parbhu Dayal* (1921) 43 All. 655; *Daya Ram v. Harcharan Das, A. I. R.* (1928), Lah. 111; *Kali Shankar v. Nawab Singh* (1909) 31 All. 507; *Chandradeo Singh v. Mata Prasad* (1909) 31 All. 176.
- (l) *Jagesar v. Deo Dat Pande* (1923) 45 All. 654; *Subba Goundan v. Krishnamachari* (1922) 45 Mad. 449; *Sankara v. Ummer* (1923) 46 Mad. 40.
- (m) *Lal Bahadur v. Ambika Prasad* (1925) 47 All. 795, 52 I. A. 443; *Bholanath v. Kartick Kirsan Das* (1907) 34 Cal. 372; *Naro Gopal v. Paragowda* (1917) 19 Bom. L. R. 69.
- (n) *Narayanan Chetty v. Muthiah Chetty* (1924) 47 Mad. 692.
- (o) *Venkateswara v. Raman* 3 L. W. 435.

S. 7

But in the absence of proof of an antecedent debt or of necessity an alienation of the joint family property of a Mitakshara family by its *karta* is void ; the transaction itself gives to the alienee no rights against the *karta's* interest in the joint family property (*p*). It must be observed that a purchaser cannot sue for partition and obtain an allotment by metes and bounds of his vendor's share but he must file a suit for general partition (*q*) though it has now been settled by decision of a Full Bench that there is no fluctuation in the share to which an alienee is entitled, his share being the share of the vendor at the date of the alienation (*r*).

Enforceability of contract of sale against minors.—A contract for the sale of joint ancestral property for legal necessity or benefit of the family entered into by the manager of a joint Hindu family where some coparceners are minors can be specifically enforced against the joint family including the minor coparceners. To such a case the rule in *Mir Sarwarjan v. Fakhruddin* (*s*) does not apply. Such a contract stands on a different footing from contracts made by the guardian of a minor or manager of a minor's estate. In the former case the manager represents the whole family as one unit, in the latter case the contracting party is the minor alone who acts through his guardian. In the former case no question of want of mutuality on the ground of minority can arise (*t*).

Property passing out of the joint family.—A distinction subsists between a private alienation and an auction sale. As soon as the joint family property has passed to the auction purchaser by virtue of the sale and its confirmation and whether delivery has taken place or not, the property has "passed out of the joint family under a sale in execution of a decree" within the scope of the rule in *Suraj Bansi's* case (*u*) and the auction purchaser is entitled to protect himself against a suit by the son unless the latter establishes that the debt was contracted for an illegal or immoral purpose and when the auction purchaser is a stranger it must further be established that he had notice of the nature of the debt (*v*).

Purdanashin lady.—It is not necessary nor desirable in such a case to insist upon a clear understanding of each detail of a matter which may be much involved in legal technicalities. It is sufficient that the general result is understood by the lady and that she had people disinterested and competent to give advice with a fair understanding of the whole matter who advised her that she should execute the deed (*w*). Where both a *purdanashin* and illiterate lady put her thumb impression by remaining behind the *purdah* not having seen the attesting witness and where the deed was designed for payment of debts of her husband, a man of violent temper and addicted to drinks and prostitutes, it was held that there was no intelligent execution of the deed by her (*x*). Although the extent and character of the explanation required must depend upon circumstances, the disposition made must be substantially understood by her. It must really be her mental act as the execution is her physical act (*y*). To entitle her to protection it is not enough to prove that she lives in some degree of seclusion. So where a lady who had stood

(*p*) *Narain Prasad v. Sarnam Singh* (1917) 39 All. 500, 44 I. A. 163; *Madho Parshad v. Meherban Singh* (1891) 18 Cal. 157, 17 I. A. 194.
 (*q*) *Palani v. Masakonan* (1897) 20 Mad. 243.
 (*r*) *Chinnu Pillai v. Kalimuthu* (1912) 35 Mad. 47.
 (*s*) (1911) 39 Cal. 232, 39 I. A. 1.
 (*t*) *Dhapo v. Ramchandra* (1935) 57 All. 374.
 (*u*) (1879) 5 Cal. 148, 6 I. A. 88.
 (*v*) *Jahan Singh v. Hardat Singh* (1935) 57 All. 357; *Gajadhar Pande v. Jadubir Pande* (1924) 47 All. 122.

(*w*) *Sunitabala Debi v. Dhara Sundari* (1920) 47 Cal. 175 P. C.; *Sumsuddin v. Abdul Husein* (1907) 31 Bom. 165; *Sudisht Lal v. Mt. Sheobarat Koer* (1881) 7 Cal. 245, 8 I. A. 39; *Shambati Koeri v. Jago Bibi* (1902) 29 Cal. 749.
 (*x*) *Mt. Mushrafi Begum v. Kundan Lal*, A. I. R. (1933) Oudh 365.
 (*y*) *Farid-un-nissa v. Mukhtiar Ahmad* (1925) 47 All. 703, 52 I. A. 342; *Laxmi Narain v. Mohmdí Begam* (1932) 7 Luck. 454.

in the witness-box, put in tenants, fixed and recovered rent from them, paid municipal rates and taxes, was not regarded as *purdanashin* lady (z). In *Farid-un-nissa v. Mukhtar Ahmad* (a), the Privy Council considered the nature and extent of the onus of proof in such cases as appearing from the decisions of the Judicial Committee. In the case of a document executed by a *purdanashin* woman it is not sufficient to shew that the document was read out to her; it must further be proved that it was explained to her, and that she really understood its nature and effect. The onus of proof in such a case is on the party seeking to uphold the transaction effected by the document and the quantum of evidence required depends upon the circumstances of each case. The mere fact that the woman lives in seclusion or sits behind a *pardah* does not necessarily show that she is weak-minded, ignorant or incapable of understanding her affairs (b). An admission will not be binding and conclusive in the case of a *purdanashin* lady (c).

Mahant.—A *math* is a distinct entity endowed with juristic personality and as such competent to acquire and become possessed of property by gifts or by endowments (d). An *asthal*, commonly known in Northern India as a *math*, is an institution of a monastic nature established for the service of a particular cult. The *mahant* is the head, he manages the property, administers its affairs, and the whole assets are vested in him as the owner thereof in trust for the institution itself. The nature of the ownership is an ownership in trust and although large administrative powers are vested in him this trust does exist and must be respected (e). Any property that stands in the name of an idol or an institution represents a dedication to the Almighty and is debuttar property. The *shebait* or *mahant* is only a custodian of the property. To exempt such property from attachment and sale in execution, the onus is on the *mahant* to prove that the ownership rests with the idol. A *mahant*, even though an ascetic, is capable of holding personal property. The test to determine whether the property is dedicated to a *math* or is the absolute property of the *mahant* is whether the *math* is subservient to the *mahant* or *vice versa*, and whether the *mahant* is under a legal obligation to apply the income of the property in his possession solely to the purpose of the institution, or whether, in order to justify his profession as an ascetic, he devotes at his discretion a fraction of the income to the purposes of the *math* (f). The power of a *mahant* to alienate debuttar property being, like the power of a manager for an infant heir, limited to cases of unavoidable necessity, a permanent lease at a fixed rent, though adequate at the time, is a breach of duty in the *mahant*, and on the most favourable construction could only enure for the life of the grantor and was not binding on his successor (g). If the lender acts honestly and makes proper inquiries he is protected though there be no real

(x) *Shaik Ismail v. Amirbibi* (1902) 4 Bom. L. R. 146; *Ismail Mussajee v. Hafiz Boo* (1906) 33 Cal. 773.

(a) (1925) 47 All. 703, 52 I. A. 342.

(b) *Lala Kalyan Mal v. Ahmad Uddin Khan* (1934) 36 Bom. L. R. 981.

(c) *Bholanath v. Mrityunjoy* (1934) 59 C. L. J. 532.

(d) *Mahant Ganeshgir v. Fatechand Bani* (1935) 31 Nag. 282; *Vidya Varuthi v. Balusami Ayyar* (1921) 44 Mad. 831, 48 I. A. 302; *Ram Parkash v. Anand Das* (1916) 43 Cal. 707, 43 I. A. 71; *Vidyapurna Tirtha Swami v. Vidyaniidhi Tirtha Swami* (1903) 27 Mad. 435; *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiram* (1886)

10 Mad. 375; *Samnantha Pandara v. Sellappa Chetti* (1879) 2 Mad. 175.

(e) *Ram Parkash v. Anand Das* (1916) 43 Cal. 707, 43 I. A. 73; *Gobinda v. Mohunt Ram* (1935) 62 C. L. J. 153.

(f) *Mahant Ganeshgir v. Fatechand Bani* (1935) 31 Nag. 282.

(g) *Palaniappa v. Sreemath Devasikamony* (1917) 40 Mad. 709, 44 I. A. 147; *Abhiram Goswami v. Shyami Charan* (1909) 36 Cal. 1003; *Prosunno Kumari v. Golab Chand* (1875) 14 Beng. L. R. 450, 2 I. A. 145; *Shiessourcee Debia v. Mothooranath* (1869) 13 M. I. A. 270 (275); *Sri Chidambara v. Manickam Pillai* (1933) 64 M. L. J. 577.

S. 7 necessity (h). Loan for daily worship is a necessity (i). An idol cannot be regarded perpetually as a minor (j). The head of a *math* is not a trustee in the sense in which that term is understood in English Law. The conception of a trust in the English legal sense is unknown in the Hindu system pure and simple. He is nevertheless, in view of the obligations and duties resting on him, answerable as a trustee in the general sense for proper administration (k). Alienation not justified by legal necessity, is void (l). In case of a mortgage, the immediate cause of borrowing should be considered (m). He may mortgage or sell for *sradh* of a deceased *mahant* (n). When a loan is applied for discharging duties for which he is responsible as head it can be recovered from the succeeding head of the *math* and in the event of his default by the appointment of a receiver of the income of the *math* so that his beneficial interest may be applied to discharge the decree (o).

A decree may be made charging temple funds where moneys are borrowed for temple purposes under a promise to pay out of temple funds but not creating a charge thereon (p). To recover moneys due on a mortgage of debuttar property the decree may be passed against the property (q). Although an assignment or disposition of a *math* and its properties by the *mahant* is void, either a sale or permanent lease by him of an item of property appertaining to the *math*, even if not for necessity, is valid during the tenure of office of the *mahant* (r). A consent decree in a suit, in which the debuttar estate is not properly impleaded, cannot terminate the debuttar character of the endowed property (s). And where the ultimate benefit is for persons other than the family deity, it is not an absolute debuttar.

Where it appeared that the existing property was the property of the idol and the idol was duly worshipped, a proper dedication could be presumed. A debuttar property can be transferred under certain circumstances, viz., (i) where such transfer was allowed by custom, (ii) where such transfer was made by one of the *shebait*s to a co-*shebait*, and (iii) where all the *shebait*s combined to make the transfer to a stranger (t). The duties of a hereditary office and the emoluments appertaining thereto remain within the family of the original grantee. A member of the family could alienate his share in favour of the remaining members of the family but he could not endeavour to alienate either to a person outside the family or to the original grantor or a descendant from him (u). A *pujari* has no right of beneficial enjoyment (v). In the Madras Presidency, where private temples are practically unknown, the presumption is that temples are public, but in case of Malabar temples there is no presumption one way or the other (w).

- (h) *Venkataraman v. Sivagurunatha*, A. I. R. (1933) Mad. 639.
 (i) *Venkataraman v. Sivagurunatha*, A. I. R. (1933) Mad. 639.
 (j) *Surendrakrishna v. Shree Shree Ishwar* (1933) 60 Cal. 54; *Periyanan v. Govind Rao* (1931) 62 M. L. J. 496; *Damodar Das v. Lakhan Das* (1910) 37 Cal. 885, 37 I. A. 147.
 (k) *Mahant Kesho Das v. Amar Dasji* (1935) 14 Pat. 379; *Ram Parkash Das v. Anand Das* (1916) 43 Cal. 707, 43 I. A. 73; *Vidya Varuthi v. Balusami Ayyar* (1921) 44 Mad. 831, 48 I. A. 302; *Nelliappa v. Punnavan* (1926) 50 Mad. 567; *Beharilal v. Murlidhar*, A. I. R. (1926) Cal. 287.
 (l) *Sivaswami Iyer v. Thirunudi Cheltiar*, A. I. R. (1930) Mad. 405; *Thirtha Swamiar v. Thirtha Swamiar*, A. I. R. (1923) Mad. 288.
 (m) *Niladhri Sahu v. Mahant Chaturbhuj Das* (1927) 6 Pat. 139, 53 I. A. 253.
 (n) *Ram Narayan v. Mahant Gopal Das*, A. I. R. (1924) Pat. 611.

- (o) *Vibhudapriya v. Lakshmindra* (1927) 50 Mad. 497, 54 I. A. 228; *Niladhri Sahu v. Mahant Chaturbhuj Das* (1927) 6 Pat. 139, 53 I. A. 253.
 (p) *Sundarasan v. Viswanada* (1922) 45 Mad. 703; *Lakshmindrathirtha v. Raghavendra* (1920) 43 Mad. 795.
 (q) *Premdas v. Sheoprasad*, A. I. R. (1934) Nag. 222.
 (r) *Mahant Ram Charan v. Naurangi Lal* (1933) 12 Pat. 251, 60 I. A. 124.
 (s) *Surendrakrishna Ray v. Shree Shree Ishwar Bhuvaneshwari Thakurani* (1933) 60 Cal. 54.
 (t) *Annadaprosad Adak v. Mihilal Adak* (1934) 59 C. L. J. 514.
 (u) *Raghunath v. Purnanand* (1923) 47 Bom. 529.
 (v) *Vellachami v. Alagarsami* (1934) M. W. N. 1205.
 (w) *Mundancheri v. Achutan* (1934) 60 C. L. J. 344, 61 I. A. 405; *Koman Nair v. Achutan Nair* (1935) 58 Mad. 91.

The manager of a temple is known as the *shebait* who is by virtue of his office the administrator of the property. As regards the service of the temple and the duties appertaining to it, he is in the position of the holder of an office or dignity (x). The word *uralan* means the guardian or manager of a temple and *uraima* the office of *uralan* (y). Both idols and *maths* are juristic persons whilst a temple is not (z).

Judgment debtor.—So long as the Collector has been authorized to exercise the powers or duties conferred or imposed on him by paragraphs 1 to 10 of Schedule 3 of the Code of Civil Procedure, 1908, the judgment debtor or his representative in interest shall be incompetent to mortgage, charge, lease, or alienate such property except with the written permission of the Collector and this restriction is absolute and no implied limitation can be read into it: hence a mortgage of such property is void (a) so also a gift (b). With this may be compared the bar of section 64 of the Civil Procedure Code, 1908, and section 52 of the Transfer of Property Act.

Crown.—The Crown has power to buy and sell property. On the sale of property by the Crown no covenants for title can be demanded.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and, where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

(x) *Ramanathan Chetti v. Murugappa Chetti* (1906) 29 Mad. 283, 33 I. A. 139.

(y) *Koman Nair v. Achutan Nair* (1935) 58 Mad. 91 P. C.

(z) *Narasimha v. Venkatalingam* (1927) 50 Mad. 687 ; *Chhotalal v. Manohar* (1900) 24 Bom. 50, 26 I. A. 199 ; *Thakardwara v. Ishar Das* (1928) 9 Lah. 588.

(a) *Gaurishankar v. Chinnumiya* (1919) 46 Cal.

183 ; 45 I. A. 219 ; *Salu Bai v. Rajat Khan* (1917) 13 Nag. L. R. 130 ; *Murray v. Mural Singh* (1912) 36 Bom. 510, dissented from ; *Ramkisan Singh v. Mahomed* (1928) 32 C. W. N. 1149 ; *Sarjoo Prasad v. Ramsaran Lal*, A. I. R. (1931) All. 541.

(b) *Abdul Rahman v. Gaya Prasad* (1929) 5 Luck. 384.

S. 8 and, where property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Feeders to a transfer.—According to this section, when a transfer of property flows from the transferor to the transferee it carries along with it two feeders, viz., the entire estate of the transferee in the property and what is legally appurtenant to such property.

Law of Property Act, 1925, section 63.—This section re-enacts section 63 of the Act of 1881 (c).

(1) Every conveyance is effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one.

Operation of transfer.—This enactment, like section 63 of the Act of 1881, was intended to curtail general words used in a conveyance. Neither, however, in England nor in this country were these enactments heeded. The practical use of the doctrine enunciated in the section is to be found in that part of the deed of alienation which follows the statement of the consideration and the receipt. In instruments of alienation in the case of freeholds the general words used are "grant, convey and assure" followed by the description of the property technically known as "the parcels." To the description are added "general words," descriptive not only of every kind of easements, privileges and appurtenances belonging to the property but also fixtures, trees and timber. These general words are followed by what is commonly known as "all the estate clause" which conveys or purports to convey all the estate, right, title, interest, claim and demand whatsoever of the executing party. The all-estate clause transfers, under section 8, all the interest which the transferor is then capable of passing in the property while the general words which precede this clause transfers the legal incidents in the property. Exceptions and reservations, if any, intended by the parties, expressly follow the estate clause unless the law presumes a reservation of such rights and easements as are specified in sections 13, 14, and 15 of the Easements Act. The legal expression "all other estate, right, title, interest, claim and demand" is understood to mean the quality of interest which the transferor has in a particular given property. Where in a deed of composition the words "and all the other estate, if any," of the debtor following the estate clause came up for construction, it was contended that these words included an estate not specified in the Schedule to the deed of composition. The Court of Appeal held that the general words of the assignment were controlled by the recital that the deed included property in the Schedule and that the life-interest of the settlor in the settlement not referred to

(c) Conveyancing and Law of Property Act, 1881 (44 and 45 Vict. c. 41).

in the Schedule did not pass to the trustee of the deed of composition (*d*) the words "and all other estate, if any," being treated as surplusage. Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred. Where plaintiff purported to convey the fee to the defendant, an equitable estate to the extent of a leasehold interest, was held to have passed to the defendant (*e*).

Unless a different intention.—These words indicate that unless there is an exception or reservation in a transfer everything passes by a transfer where the transferor conveys as owner. To that extent the rule is a rule of construction. On a construction of a mortgage, a sale and certificate of sale of shares in a zamindari where the documents contained no words of exception or reservation that they conveyed all interest of the mortgagor, vendor and judgment-debtor respectively in the zemindari, their interests in the houses on the land and in the profits and rents derived from them passed in the absence of any words showing an intention to retain or exclude them (*f*). A gift which enjoined the performance of religious ceremonies and celebration of festivals, including a provision for the support of the donee, was held to confer on the latter a life-interest only (*g*). A maintenance grant by a Raja to a member of the family was held not to carry with it the right to open mines and raise minerals (*h*). It has been held that an estate for the life of A. and afterwards to the heirs of his body was recognized by the Act as creating an absolute estate (*h*¹).

All the interest which the transferor is then capable of passing.—As a general principle, where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must be taken to be conveying the highest estate he has, that is to say, if an executor having a one-third personal beneficial interest in the estate purports to convey the whole of it, without qualification or limitation, he must be taken to be conveying in his character as executor and not in that of one having a beneficial interest only in a fraction of the whole estate purported to be conveyed (*i*). The same construction was adopted where a Hindu widow who obtained probate of the will of her husband executed a conveyance which did not expressly mention in what particular capacity she sold but who purported to convey "all the estate, right, title, interest, etc." she had in the property (*j*). A somewhat curious case arose before the Full Bench of the Allahabad High Court. There one M. executed a sale deed of a certain property to his mother, one of his heirs, who was authorized to spend the purchase-moneys on certain charities to be determined by her. He died three days after. The mother instead of expending the moneys in charities, dedicated the property by way of *wakf*, constituting herself, and after her, one of the four heirs of the deceased, *mutawali*. Later the heirs of M. other than the mother and the *mutawali* successfully asserted their right of inheritance and repudiated the

(*d*) *Ex-parte Dawes, in re Moon* (1886) 17 Q. B. D. 275.

(*e*) *Thellusson v. Liddard* (1900) 2 Ch. 635.

(*f*) *Asghar Reza Khan v. Mahomed Mehdi Hoosein Khan* (1903) 30 Cal. 556, 30 I. A. 71.

(*g*) *Kalidas Mullick v. Kanhaya Lal* (1885) 11 Cal. 121, 11 I. A. 218.

(*h*) *Tituram v. Cohen* (1906) 33 Cal. 203, 32 I. A. 185.

(*h*¹) *Raja Deo v. Brahmdo Rai*, A. I. R. (1937) All. 235.

(*i*) *Gangabai v. Sonabai* (1916) 40 Bom. 69, 73 (n); *In re Venn & Furze's Contract* (1894) 2 Ch. 101.

(*j*) *Mithibai v. Meherbai* (1922) 46 Bom. 162; *Bijraj Nopani v. Pura Sundary Dasee* (1915) 42 Cal. 56, 41 I. A. 189.

S. 8 deed of sale as being a gift in disguise to an heir not sanctioned by Mahomedan Law. The sale deed was set aside but a majority of the Full Bench held that the *wakf* was valid to the extent of the share of the mother, if not being expressly or impliedly excluded. The dissenting judgment, which their Lordships of the Judicial Committee held to be correct, was that the sale deed being void, the *wakf* was inoperative and fell with it (*k*).

Legal incidents thereof.—On a transfer not only does the whole interest of the transferor pass in the property but also whatever is appurtenant to the estate or the property passes forthwith to the transferee. These incidents are enumerated in the section. This list is by no means exhaustive and must be considered only as illustrative.

Easements annexed thereto.—There is no definition of the word “annexed” either in this Act or in the Easements Act, V of 1882. The latter Act defines what an easement is and their sub-divisions. Section 7 of the said Act enacts what easements are. Section 13 deals with easements of necessity and quasi-easements. Two properties which had remained united in one owner became ultimately vested, one in the plaintiff and the other in the defendant. The former was entitled to use a particular right of way but refused to put in evidence the deed under which he became the owner, and a presumption was raised against him from refusal to produce the title-deeds. The Court decided that no easement passed by section 8 to the plaintiff as a legal incident of the property, as plaintiff by refusing to produce the title-deeds prevented the Court from ascertaining whether a different intention was expressed or necessarily implied in the conveyance to him, and it is only when a different intention is not expressed or necessarily implied in the transfer of property that “easements annexed thereto” pass by virtue of this section (*l*). These are included in the legal incidents on a transfer of property, whether it be “land” or “house.” They must be existing at or before the transfer (*l*¹).

Rents.—Both on a transfer of “land” as well as “house” rents accruing after the transfer pass to the transferee but not rents accrued due before the transfer (*m*) unless there is a different intention expressed or necessarily implied. A purchaser could, however, recover arrears of rent by contract. Such a contract must fulfil the requirements of section 130 of this Act (*n*). How rents should be apportioned is enacted in section 36 while section 55 in sub-clause (a) of clauses (4) and (6) states when the relative right of the vendor determines and that of the purchaser commences to the rents and profits.

Profits.—These are legal incidents on a transfer of land and not of a house.

House.—On a transfer of a house the easements annexed thereto and rents accruing after the transfer are legal incidents in common with a transfer of land. It also passes with it the locks, doors, bars, windows and other things provided for permanent use with the house. The doors and window shutters have no separate existence (*o*). They cannot be removed in execution on a warrant of distress (*p*),

(*k*) *Sahu Har Prasad v. Fazal Ahmad* (1933) 55 All. 83m. 61 I. A. 116.
 (*l*) *Wutzler v. Sharpe* (1893) 15 All. 270.
 (*l*¹) *Ahmad Ali v. Dhondba* (1937) Nag. L. R. 204.
 (*m*) *Bhogilal v. Jethalal* (1928) 30 Bom. L. R. 1588.

(*n*) *Sheo Gobind v. Gouri Prasad*, A. I. R. (1925) Pat. 310.
 (*o*) *Peru Bepari v. Ronuo Maifarash* (1885) 11 Cal. 164.
 (*p*) *Purushottama v. Municipal Council of Bellary* (1891) 14 Mad. 467.

nor attached as moveable property (*q*). On a sale of distillery buildings the vats and pipes do not go with them (*r*). The English Law of fixtures does not apply to India. When a house or immoveable property is sold all rights and privileges concomitant to it and previously enjoyed by the owner go with it, specially when there is no provision to the contrary in the deed of sale, and it is of no use to the seller to reserve them (*s*). When a share in a village is transferred the house and *kotha* are incidental to it (*t*) so also a house or grove situate in a village (*u*). A lease for cultivation carries with it trees and shrubs standing on it (*v*). An auction purchaser at a Court sale acquires bamboo clumps standing on the land (*w*). The word "tenement" is obviously used synonymously with "dwelling house" (*x*). Although being part of the house it means a house (*y*). The word "hereditament" in its settled sense is used to denote such things as may be the subject-matter of inheritance but not the inheritance itself (*z*). The word is applied to things which are the subject of occupation (*a*).

Machinery.—On a transfer of machinery attached to the earth the moveable parts are the legal incidents. It does not pass with a transfer of the land unless attached to it for the permanent beneficial enjoyment thereof (*b*).

Other property yielding income.—These would include such properties as Government securities, shares and stocks. On transfer of such property income accruing after the transfer would pass to the transferee while that which had accrued up to the date of the transfer would belong to the transferor. This too is subject to a different intention being expressed by the parties, for it often happens that shares are sold with the dividends annexed, in which case the dividends belong to the transferee, they being included in the price paid by the transferee to the transferor.

Title-deeds.—Title-deeds are not mentioned amongst the incidents but the transferor would nevertheless be entitled to them as title-deeds are incident to the possession under a freehold title (*c*). L. conveyed to plaintiff, by way of mortgage, certain land and deposited with him an indenture conveying the land from G. to T. and also a document purporting to be an indenture by which the land was conveyed by T. to L. This document was in fact a forgery. L. afterwards deposited with defendants, by way of equitable mortgage, a document purporting to be the conveyance from G. to T. but which was in fact a forgery, and also the genuine indenture of conveyance from T. to L. Held that the plaintiff might maintain detinue against defendant for the recovery of the latter indenture. The operation of the mortgage was to give to plaintiff property in all the deeds (*d*).

Transfer by operation of law.—The applicability of this section is confined to transfers by act of parties. Section 2, sub-section (d) excludes the operation of this section to any transfer by operation of law or by or in execution of a decree or order

(*q*) *Queen-Empress v. Shaik Ibrahim* (1890) 13 Mad. 518.

(*r*) *Narayana v. Balaguruswami*, A. I. R. (1924) Mad. 187.

(*s*) *Prabhu Mal v. Banwari Lal*, A. I. R. (1927) Lah. 351.

(*t*) *Narayan v. Vithoba* (1927) Nag. L. R. 177.

(*u*) *Krishna Kumari v. Rajendra*, A. I. R. (1927) Oudh 240.

(*v*) *Ganpati v. Sonaji* (1924) Nag. L. R. 96; *Hiria v. Mahomed* (1908) 4 Nag. L. R. 104.

(*w*) *Jagmohan Singh v. Emperor*, A. I. R. (1932) Pat. 344.

(*x*) *Cornish v. Cleife* (1864) 34 L. J. Ex. 19, 159 E. R. 605.

(*y*) *Yorkshire Insurance Co. v. Clayton* (1881) 8 Q. B. D. 421.

(*z*) *Moor v. Denn* (1800) as reported in 2 Bos. & P. 247, 126 E. R. 1263.

(*a*) *Colebrooke v. Tickell* (1836) 4 Ad. & El. 916, 111 E. R. 1028.

(*b*) *Veerappa v. Ma Tin*, A. I. R. (1925) Rang. 250; *Narayana v. Balaguruswami*, A. I. R. (1924) Mad. 187.

(*c*) *Strode v. Blackburne* (1796) 3 Ves. 222, 30 E. R. 979; *Harrington v. Price* (1832) 3 B. & Ad. 170, 110 E. R. 63; *Shri Bhavani v. Devrao* (1887) 11 Bom. 485.

(*d*) *Newton v. Beck* (1858) 27 L. J. Ex. 272, 157 E. R. 452.

- S. 8 of a Court of competent jurisdiction. A sale in execution of a decree is a sale not of the property but of such right, title and interest which the judgment-debtor has in the property (e). The section was held to be no bar to the vendor's lien for unpaid purchase-money passing to the purchaser in execution (f).

A change of law, however, is not retrospective. In execution of a decree against the holder (by custom of primogeniture) of an impartible zemindari who was a member of a joint family, his right and title and interest was sold. By the law as then interpreted it was a limited interest subject to alienation in special justifiable causes. Subsequently the interpretation of law was reversed by the Judicial Committee which held that such a holder had an absolute estate. In a purchaser's suit it was held that the reversal of the previous accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale, the parties were bound by the law as then understood and that only the life-interest of the then holder passed by the sale (g). All that passes at the auction is the right, title and interest of the judgment-debtor. The purchaser is placed exactly in the shoes of the judgment-debtor as regards the land sold. As agricultural rents are not apportionable for they accrue once and for all at the time the crops are reaped and do not accrue day to day, there could be no question of apportionment and the purchaser is entitled to the rent, apart from section 8, and entirely on first principles (h). Neither section 8 nor section 36 of the Transfer of Property Act applies to agricultural rents. Both under this section and under section 65 of the Civil Procedure Code the purchaser in a Court sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof (i).

Revenue sales.—Section 8 has no application to such sales. The rights of a purchaser at a revenue sale are entirely and radically different from those of a purchaser at a voluntary sale. In a sale under Act XI of 1859 (Land Revenue Sales Act), the estate is sold in the condition in which it stood at the time of the settlement; the purchaser does not derive his title from the defaulting proprietor, but takes the estate from the Crown in the state in which it was at the inception (j). The franchise of a ferry is not necessarily appurtenant to land (k). There is no statute law in India defining the mode of acquisition of ferry right. Where ferry rights across the river are settled by Government with one person he has a right to restrain another from running his ferry over the same spot unless he used it exclusively for the conveyance of his own servants and ryots (l).

Mines.—There is no definition of land in the Act, but ownership of land carries with it everything from the centre of the earth to the heaven above (m). The maxim is "*Cujus est solum ejus est usque ad cælum ad inferos.*" Under the Settled Land Act, 1925 (n), land includes mines and minerals, whether or not held apart from the surface, buildings or parts of buildings. Hence a transfer includes all

(e) *Subbaraju v. Seetharamaraju* (1916) 39 Mad. 283.
 (f) *Sambasiva Iyer v. Venkatarama*, A. I. R. (1926) Mad. 903.
 (g) *Abdul Aziz Khan v. Appayasami Naicker* (1904) 27 Mad. 131, 31 I. A. 1.
 (h) *Ma Hwa Bi v. Sein Kho*, A. I. R. (1928) Rang. 67.
 (i) *Hariharan v. Narayan*, A. I. R. (1933) Mad. 482.
 (j) *Jatindra Nath v. Narayan Das* (1925) 52 Cal.

862; *Maharaja Surja Kanta v. Sarat Chandra* (1914) 18 C. W. N. 1281.
 (k) *Nityahari Roy v. Dunne* (1891) 18 Cal. 652.
 (l) *Dhanpat v. Pasput* (1931) 53 All. 764; *Luchmessur Singh v. Leclanund Singh* (1878) 4 Cal. 599.
 (m) *Metropolitan District Ry. Co. v. Cosh* (1880) 13 Ch. D. 607.
 (n) 15 Geo. 5, C. 18, sec. 117, clause (1) sub-clause (19).

mines and minerals below the surface (o). But they do not include royal mines such as gold and silver. In such cases the ancient prerogative of the Crown remains unaffected, and the mine cannot be worked by a subject even on his own land, without the licence of the Crown (p). By statute (q), searching and boring hole and getting petroleum is prohibited to persons other than a person acting on behalf of or holding a licence from the Crown. In India as in England land includes on a transfer mines and minerals below the surface. What it includes is stated in the Land Acquisition Act (r) but that definition is restricted to that particular enactment and cannot be imported in this Act. But a "grant" in India has not the special and technical meaning attached to the same word in English Law. Minerals will not be held to have formed part of the grant in the absence of express evidence to that effect (s). Sub-soil rights in land forming part of a permanently settled zemindari are to be presumed at all events when they are not claimed by the Crown to belong to the zemindar. Proof of possession of the surface rights would not include sub-soil rights (t). The essential characteristics of a *mokarari* lease are occupation and enjoyment and unless there be, by the terms of the lease, an express or implied grant of mineral rights they remain reserved to the zemindar (u). In case of *patni* taluks the Calcutta High Court, following *Ali Quadar Hossain v. Jogendra Narain Roy* (v), which the Privy Council pointed out (w) was not overruled by that Board, held that where there was no express grant of underground rights, in the absence of any explicit reservation the grant of *patni* conveys all rights including underground rights which belong to the zemindar (x). Where the terms of the grant showed that there was no transfer of property in the soil, the intention being that the *patnidar* should be a leaseholder only, it was held that the *patnidar* and those claiming under him were not entitled to excavate the soil for the purpose of making bricks (y). *Patni* tenures generally are on the same footing as to sub-soil rights as other permanent heritable and transferable tenures created by a zemindar—that is to say, the sub-soil rights pass to the *patnidar* only when granted in express terms; general vernacular words signifying "with all rights" are insufficient for that purpose (z).

Land in a zemindari is to be presumed to be the property of the zemindar and held from him. It is well settled that as between a zemindar and a jaghirdar holding from him the zemindar is entitled to the minerals (a). It is well recognized that there can be separate ownership of different strata of the sub-soil, at all events where minerals are involved (b). In England almost every kind of clay of commercial use has been recognized as a mineral. Where title is founded on adverse possession the extent of possession enjoyed may be an inference of fact and in

(o) *Newton Chambers & Co., Ltd., v. Hall* (1907) 2 K. B. 446; *Mitchell v. Moseley* (1914) 1 Ch. 438.

(p) *Attorney-General v. Morgan* (1891) 1 Ch. D. 432; *The Case of Mines* (1568) 1 Plowd 310.

(q) 8 & 9 Geo. 5, C. 52.

(r) 1 of 1894, sec. 3 (a).

(s) *Shashi Bhusan v. Jyoti Prasad* (1917) 44 Cal. 585, 44 I. A. 46; *Hari Narayan v. Sriram Chakravarti* (1910) 37 Cal. 723, 37 I. A. 136; *Durga Prasad v. Brojo Nath* (1912) 39 Cal. 696, 39 I. A. 133; *Tituram Mukerji v. Cohen* (1906) 33 Cal. 202, 32 I. A. 185.

(t) *Gobindanarayan v. Shyamlal Singh* (1931) 58 Cal. 1187, 58 I. A. 125.

(u) *Raj Kumar Thakur v. Megh Lal* (1918) 45 Cal. 97, 44 I. A. 246; *Hari Narayan v. Sri Ram Chakravarti* (1910) 37 Cal. 723, 37 I. A. 136; *Durga Prasad v. Brojo Nath* (1912)

39 Cal. 696, 39 I. A. 133; *Shashi Bhusan v. Jyoti Prasad* (1916) 44 Cal. 585, 44 I. A. 46.

(v) (1889) 16 C. L. J. 7.

(w) *Satya Niranjana v. Ram Lal* (1924) 4 Pat. 244, 52 I. A. 109.

(x) *Rajeswar Prasad v. Anil Kumar Roy* (1928) 55 Cal. 35.

(y) *Bejoy Singh v. Surendra Narayan Singh* (1929) 56 Cal. 1, 55 I. A. 320.

(z) *Bhupendra Narayan v. Rajeswar Prasad* (1932) 59 Cal. 80, 58 I. A. 228; *Bejoy Singh v. Surendra Narayan* (1929) 56 Cal. 1, 55 I. A. 320; *Giridhari Singh v. Megh Lal Pandey* (1918) 45 Cal. 87, 44 I. A. 246.

(a) *Bageswari Charan v. Kumar Kamakhya Narain* (1931) 10 Pat. 296, 58 I. A. 9.

(b) *Cox v. Glue* (1848) 5 C. B. 533; *Rowbotham v. Wilson* (1857) 8 E. & B. 123.

- S. 8 applying the rule to the case of a mineral field regard is to be had to the nature of the subject and the possession to which it is susceptible. A coal company which held a *mukarari* lease of a village believed itself entitled to the subjacent minerals and carried on mining operations for twelve years. A suit by the zemindar claiming minerals under the village, was held barred by limitation as the company had been in adverse possession of the minerals for more than twelve years (c).

Right to dig shells.—Though a tenant of lands for the cultivation of paddy may, possibly, be justified in digging up shells from the land for the cultivation of the land in a proper and husband-like manner, the property in the shells so dug up is (in the absence of a local custom) not in the tenant but in the landlord, and the tenant has no right to convert them to his own use (d).

All things attached to the earth.—Used in connection with a transfer of land the phrase is defined in section 3. It occurs in section 108 (h) also. The English Law of fixtures has limited application in this country (e). And the English maxim "*omne quod inædificatur solo cedit*" has no application in this country (f). According to the definition of the words "attached to the earth," on a transfer of land, buildings would pass therewith unless the deed contains words shewing an intention to retain or exclude them (g).

The property in trees growing on land is by the general law vested in the proprietor of the land subject to any custom to the contrary. Under section 23 of the Bengal Tenancy Act (VIII of 1885) the onus is on the landlord to shew that a tenant with occupancy right is debarred from cutting down the trees on the land and not on the tenant to prove a custom giving him the right to do so. The right to appropriate them when cut down is a different question and the onus is on the tenant to prove the custom giving him the right to sell the trees (h). The Allahabad Court has held that when a tenant, either occupancy or a tenant at will, plants trees on his holding the property in those trees, in the absence of custom or contract to the contrary, attaches to the land and the tenant has no power of selling or otherwise transferring those trees (i). Trees being attached to the earth, are included in the legal incidents of the land and pass to the transferee under a deed of sale of the land on which they stand, unless a different intention is expressed or necessarily implied. No such intention is necessarily implied because the trees are mortgaged prior to the sale and no mention of the mortgage is made in the sale deed (j). The word "fixture" is of common use in English Law but it is not so familiar in India. The maxim "*quid quid plantateur solo solo cedit*" has never received so wide an application as in England, for anything to be a fixture it must be attached to the earth as that expression is defined in section 3 of the Transfer of Property Act. So where a shed consisting of pillars which supported a roof of tiles but was not fixed to the ground and merely rested by its own weight, was held to be a chattel and not a fixture (k). In the absence of a special agreement a

(c) *Nageshwar Bux Roy v. Bengal Coal Co., Ltd.* (1931) 10 Pat. 407, 58 I. A. 29.

(d) *Chaladom Tholan v. Kakkath Kunhambu* (1902) 25 Mad. 669.

(e) *Jatindra Nath Roy v. Narayan Das* (1925) 52 Cal. 862.

(f) *Jatindra Nath Roy v. Narayan Das* (1925) 52 Cal. 862; *Takoor Chunder Poramanich v. Ramdhone Bhattacharjee* (1866) 6 W. R. 228; *Shib Dass Banerjee v. Bomun Doss Mookerjee* (1871) 15 W. R. 360.

(g) *Asghar Reza Khan v. Mahomed Mehdi Hoosein Khan* (1903) 30 Cal. 556; *Macleod v. Kissan* (1906) 30 Bom. 250.

(h) *Nafar Chandra v. Ram Lal* (1895) 22 Cal. 742.

(i) *Janki v. Sheoadhar* (1901) 23 All. 211; *Kausalia v. Gula Kuntwar* (1899) 21 All. 297; *Imdad Khatun v. Bhagirath* (1888) 10 All. 159; *Ajudhia Nath v. Sital* (1881) 3 All. 567.

(j) *Pandurang v. Bhimray* (1898) 22 Bom. 610.

(k) *Chaturbhuj v. Bennett* (1905) 29 Bom. 323.

tenant has as against his landlord a right to insist that so long as his tenancy continues the landlord shall not cut down trees standing on the tenant's holding (l).

S. 8

Freehold and leasehold property.—The Act makes no distinction between freehold and leasehold for the purpose of the rule of law embodied in this section (m).

Debt.—The word “debt” in clause 5 of section 8 should be confined to such debts as fall within the general category of actionable claims (n). Prior to Act 2 of 1900 which amended Chapter VIII of the present Act, there was a conflict of decisions as to whether a mortgage debt was within the rule in section 8. To set the conflict at rest Act 2 of 1900 was passed by substituting a new chapter dealing with the transfer of actionable claims and inserting in section 3 a definition of “actionable claim” which excluded any “debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property.” Still controversy ranged around mortgages by deposit of title-deeds. In *Perumal Ammal v. Perumal Naicker* (o), Wallis, C. J., held that where the law still admits of the separate transfer of the mortgage debt as by the endorsement of promissory notes secured by a deposit of title-deeds or by attachment and sale in execution of a mortgage debt under the Civil Procedure Code, section 8 of the Transfer of Property Act still operates to carry the security with it. This view was, however, dissented from by the same Court which held that the endorsee for value of a negotiable instrument the amount of which had been secured by a mortgage by deposit of title-deeds cannot claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage right to him (p). It may, however, be mentioned that Court sales of mortgage debts are governed by the special provisions of the Code of Civil Procedure, and where a mortgage by deposit of title-deeds is accompanied by a promissory-note the deposit is merely a collateral security for the debt and a transfer of such a mortgage can be by endorsement of the promissory-note accompanied by re-deposit of title-deeds. The transfer of a debt without transfer of security came up for consideration before the Privy Council where their Lordships observed that the view, that as a secured debt was not within the definition of actionable claim a debt without security could not be made the subject of transfer at all, appeared to be creating disabilities not expressed in the Act and indeed were inconsistent with it for by section 6 of the Act of 1882 “property of any kind may be transferred except as otherwise provided by this Act or by any other law, for the time being in force.” The effect of the amendment in 1900 is to restrict the statutory rights on transfer such as the right to sue in the transferee's name, etc., to such transfers as are transfers of actionable claims as defined. There appears to be no difficulty in a transfer of a debt without the security; as the original debtor can always redeem, the relations between him and his original creditor are not altered. The transferee takes no further interest than the transferor was able to give him (q). A pledge is governed by section 176 of the Indian Contract Act (1872); there a creditor has two rights which are concurrent and the right to proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally on the promissory-note. For the pledgee may have a right to sue for the property even in the absence of a right to sue for a personal decree. The same principles would apply to the case of hypothecation mortgages of move-

(l) *Badam v. Ganga Dei* (1907) 29 All. 484.

(m) *Macleod v. Kissan* (1906) 30 Bom. 250.

(n) *Arunachellam Chetti v. Cubramanian Chetti* (1907) 30 Mad. 235.

(o) (1921) 44 Mad. 196.

(p) *Elumalai Chetty v. Balakrishna Mudaliar* (1921) 44 Mad. 965.

(q) *Imperial Bank of India v. Bengal National Bank* (1931) 58 Cal. 136, 58 I. A. 323

Ss. 8-9 able property (*r*). A charge under section 55, sub-section (4), clause (b) may be transferred together with its security (*s*).

Interest on a debt.—On a transfer of a debt arrears of interest accrued due before the transfer do not pass to the transferee.

Joint right.—A joint right in the *sehdaries* and a gateway, in the absence of reliable evidence to the contrary, raises a presumption that it passes on a transfer (*t*).

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Generally.—A transfer of property may be made orally unless expressly required by law to be in writing. Prior to the passing of the Transfer of Property Act no writing was necessary for such transfers (*u*). After the passing of the Act certain specified transactions are required to be in writing (*v*). Title to the land cannot pass by mere admission when a statute requires a deed (*w*).

Exception.—The English doctrine of part-performance extended by the Privy Council to this country in *Mahomed Musa's* case (*x*) which subsequently found its way into section 53A of the Amending Act, 20 of 1929, violates the rule in this section under circumstances mentioned therein.

Writing necessary.—The Act requires transactions specified in sections 54, 58 (except mortgage by deposit of title-deeds), 105, 118, 122, 130 to be in writing. So also under section 5 of the Trust Act, II of 1882, transfers which parties desire to register must be in writing.

Writing not necessary.—An alienation needs no written instrument. It is sufficient if the person entitled to the property does an act which necessarily results in its transfer (*y*). All that the Act provides for is that certain specified transfers shall only be made in writing duly registered. An award relating to immoveable property need not be in writing (*z*). A compromise of disputes resulting in transfer of immoveable property (*a*), a partition of immoveable property (*b*), a transfer by possession followed by a deed of gift incomplete owing to absence of registration (*c*), and a transfer of land by husband to his wife during her lifetime in discharge of future maintenance may be made without writing (*d*), and so a surrender of lease(*e*).

- (*r*) *Gulamhuseein v. Clara D'Souza* (1929) 53 Bom. 819; *Nim Chand v. Jagabundhu* (1894) 22 Cal. 21; *Mahalinga v. Ganapathi* (1902) 27 Mad. 528.
 (*s*) *Sehonandan Lal v. Zainal Abdil* (1915) 42 Cal. 849; *Sambasiva Iyer v. Venkatarama Iyer*, A. I. R. (1926) Mad. 903.
 (*t*) *Ram Sarup v. Girdhari Lal*, A. I. R. (1929) All. 371.
 (*u*) *Mahomed Musa v. Aghore Kumar Ganguli* (1915) 42 Cal. 801, 42 I. A. 1.
 (*v*) *Immudipattam v. Periya Dorasami* (1901) 24 Mad. 377; *Bishan Dial v. Ghazi-ud-din* (1901) 23 All. 175.
 (*w*) *Keshri Mull v. Sukan Ram*, A. I. R. (1933) Pat. 264; *Jadu Nath v. Rup Lal* (1906) 33 Cal. 967; *Bhupendra Narayan v. Rajeswar Prosad* (1927) 55 Cal. 35.
 (*x*) *Gobind Prasad v. Jagdeep Sahai*, A. I. R. (1924) Pat. 185 (1915) 42 Cal. 801, 42 I. A. 1.
 (*y*) *Bhula Singh v. Mangu*, A. I. R. (1930) Lah. 9; *Ram Sarup v. Ram Dei* (1907) 29 All.

- 239; *Sheo Singh v. Jeoni* (1897) 19 All. 524.
 (*z*) *Bhagwatihai v. Bhagwandas*, A. I. R. (1927) Sind 206.
 (*a*) *Thiru Vengidachariar v. Ranganatha Aiyanger* (1903) 13 M. L. J. 500; *Krishna v. Aba Shetti* (1909) 34 Bom. 139.
 (*b*) *Madam Pillai v. Badrakali* (1922) 45 Mad. 612; *Imperial Bank of India v. Bengal National Bank, Ltd.* (1931) 58 Cal. 136; *Gyannessa v. Mobarakannessa* (1898) 25 Cal. 210; *Satya Kumar v. Satya Kripal* (1909) 10 C. L. J. 503.
 (*c*) *Hiralal v. Gaurishanker* (1928) 30 Bom. L. R. 451.
 (*d*) *Madam Pillai v. Badrakali* (1922) 45 Mad. 612.
 (*e*) *Brojonath v. Maheswar* (1918) 28 C. L. J. 220; *Elias Meyer v. Manoranjan* (1918) 22 C. W. N. 441; *Fowler v. The Secretary of State*, A. I. R. (1921) Mad. 363; *Imperial Bank of India v. Bengal National Bank, Ltd.* (1931) 58 Cal. 136.

Registration.—Transfers which are not expressly required by law to be in writing, if made in writing, are subject to the requirement of registration if they purport or operate to declare, assign, limit or extinguish a right, title or interest to or in immoveable property of the value of Rs. 100 and upwards (*f*).

Ss. 9-10

10. Where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of, his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him; Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist) so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition restraining alienation.

Sections 10, 11 and 12.—These sections grouped together forbid fetters on freedom of ownership.

Restraint against alienation.—The section answers the question whether a general restraint could be annexed to the alienation of property. In all cases absolute restraints are void even in the excepted instances of leases and married women. What the section exempts are transfers to married women (excluding those mentioned in the section) during marriage and conditions in leases for the benefit of the lessor. There is no objection to a transfer of property subject to a condition or limitation, only the condition or limitation must not be in absolute restraint of alienation. The right of voluntary alienation and liability to involuntary alienation are the natural incidents of an estate; with the free right of enjoyment co-exists the free and exclusive power of disposition (*g*). Equally inherent to this right is the liability to involuntary alienation. As long as the power of disposition subsists so long also is the property liable to attachment and sale to meet the demands of creditors (*h*). An incident of an estate which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. Bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator after giving an estate in fee simple to A, were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. This is the test.

(*f*) *Imperial Bank of India v. Bengal National Bank, Ltd.* (1931) 58 Cal. 136.

(*g*) *Bradley v. Piexoto* (1797) 3 Ves. Jun. 324, 30 E. R. 1034; *Ross v. Ross* (1819) 1 Jac.

& W. 154, 37 E. R. 334; *Ware v. Carr* (1830) 10 B. & C. 433, 109 E. R. 511.

(*h*) *Brandon v. Robinson* (1811) 18 Ves. 429, 34 E. R. 379.

S. 10

The principle of the section is that the power of alienation which is necessarily incident to an estate in fee cannot be fettered by a subsequent condition. The two things are repugnant and cannot stand together and the original gift must prevail.

Persons affected by the section.—The restraint is on the transferee or lessee and not on the transferor or lessor. It must be for the benefit of the lessor but the section is silent as to whether it may be for the benefit of the transferor and presumably every such restraint must be so. A restraint for the benefit of the transferee or lessee is not within the scope of the section.

What is it which is void.—Under the section it is not the transfer which is void, it is the condition or limitation which is void as repugnant to the principle of the transaction upon which it is sought to engraft it.

Absolute restraint.—Just as general restraint of marriage was held to be bad but a partial restraint good, so in the same way although an absolute restraint was decided to be bad a restraint on alienation to one individual or his issue was thought not to be bad. In *Muschamp v. Bluet* (i) an attempt was made to introduce a converse condition, viz., that the devisee should alienate only to one individual named and that was held to be bad. Yet the principle of this decision was departed from in later times in *Daniel v. Ubley* (j) and *Doe v. Pearson* (k) followed by *Attwater v. Attwater* (l) before Lord Romilly, M. R., and finally in *In re Macleay* (m). These cases were of restraint of alienation except to a particular class of persons. In *Daniel v. Ubley* (j) the widow was to alienate to one of her sons. . . In *Doe v. Pearson* (k) the discretionary power of alienation was limited “to her sister or sisters or their children.” In *Attwater v. Attwater* (l) the injunction was never to sell the property out of the family but if sold at all “it must be sold to one of his brothers.” In *Attwater v. Attwater* (n) Lord Romilly, M. R., challenged the correctness of the decision in *Doe v. Pearson* (o) but Sir George Jessel refused to go contrary to it as it was decided as far back as 1805 and in *In re Macleay* (p) he followed the rule in that case and decided that the condition was a valid condition. There the devise was “to my brother J. on the condition that he never sells out of the family,” followed by gifts to other relatives. *In re Macleay* (p) was dissented from by Pearson, J., in *re. Rosher, Rosher v. Rosher* (q). There the learned Judge held that an absolute restraint against sale during the life of the widow though its operation was limited to a particular time was repugnant to the nature of an estate in fee. The same case was considered in *re. Dugdale, Dugdale v. Dugdale* (r), where the trust created for the benefit of a son was to cease and determine if by his own act or by operation of law he was deprived of the personal beneficial enjoyment of the premises in his lifetime with a gift over in trust for his wife or if no wife then living for his children equally. It was held that the son took an absolute interest under the gift and that the attempted executory gift over was void for repugnancy. In a recent case in *Cockerill, Mackaness v. Percival* (s) it was observed that *Doe v. Pearson* (t) and *In re Macleay* (u) were cases where partial restrictions have been held not to avoid the condition operating as a restriction on alienation. There the devisee was not restrained from selling to a particular person but from selling it to anybody except a particular person, creating a state of facts not found in any reported case in which a condition imposing partial

(i) (1617) J. Bridg. 132, 123 E. R. 1253.
 (j) (1626) Benl. 178, 73 E. R. 1038.
 (k) (1805) 6 East 173, 102 E. R. 1253.
 (l) (1853) 18 Beav. 330, 52 E. R. 131.
 (m) (1875) L. R. 20 Eq. 186.
 (n) (1853) 18 Beav. 330, 52 E. R. 131.
 (o) (1805) 6 East 173, 102 E. R. 1253.

(p) (1875) L. R. 20 Eq. 186.
 (q) (1884) 26 Ch. D. 801.
 (r) (1888) 38 Ch. D. 176.
 (s) (1929) 2 Ch. 131.
 (t) (1805) 6 East 173, 102 E. R. 1253.
 (u) (1875) L. R. 20 Eq. 186.

restraint was treated as an exception to the general rule. Accordingly, the condition was held to be repugnant in accordance with the decision in *Muschamp v. Bluet* (v) and in *Rosher, Rosher v. Rosher* (w), on the ground of repugnancy. The following alienation were held void:—A devise with an earnest hope that the devisee would not sell except by way of exchange or for reinvesting in other estates (x). Absolute devise to A to cease if B or his wife or their children should become entitled to any part of the estate by gift, sale, etc. from A (y). The share of a nephew or niece in the testator's residuary estate to cease if he or she should alienate (z). A bequest of a stock to be laid in the purchase of an annuity for A to cease if he should sell (a). A gift to a son of real estate and shares to be held by trustees on the express condition that the son should not during his life have power to mortgage, sell, alien, charge or encumber any part of the same and in the event of his so doing the trustee should stand possession of his share upon trust for other persons (b). A testator left real estate to trustees with a direction that "the same shall not be disposed of or mortgaged or encumbered in any way whatsoever but shall remain for the benefit of my wife and children free from the control of their respective husbands and wives so that the same shall remain in my family from time to time for ever hereafter." (c).

Various modes of restricting alienation.—Every restriction, however limited in character, upon the right of alienation is not invalid in law (d). One has to say whether the case falls in any of the exceptions which have been allowed, such, for instance, as those admitted by Sir George Jessel in the much discussed case in *re. Macleay* (e), where a devise was "to my brother J. on condition that he never sells out of the family" followed by gifts to other relatives and the Master of the Rolls said, "Now you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore, it is a mere limited restriction on alienation in that way. Then again, it is limited as regards class; he is never to sell it out of the family but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. There it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled, or is not good law, this is a good condition." Restrictions as to time and individuals are also recognized in this country.

(v) (1617) J. Bridg. 132, 123 E. R. 1253.

(w) (1884) 26 Ch. D. 801.

(x) *Hood v. Oglander* (1865) 34 Beav. 513, 55 E. R. 733.

(y) *Ludlow v. Bunbury* (1865) 35 Beav. 36, 55 E. R. 807.

(z) *Re. Jones' will* (1870) 23 L. T. 211; *Re. Smith, Smith v. Smith* (1916) 85 L. J.

Ch. 473.

(a) *Hunt, Foulston v. Furber* (1876) 3 Ch. D. 285.

(b) *Corbett v. Corbett* (1888) P. D. 7.

(c) *Gardiner (W) & Co. v. Dessaix* (1915) A. C. 1096.

(d) *Mahananda Roy v. Saratmani Debi* (1911) 14 C. L. J. 585.

(e) (1875) L. R. 20 Eq. 186.

S. 10

This exposition, perhaps, tends to support the view that a restraint on alienation qualified as to time may be valid. These were the observations of Mookerjee, J. where a clause for restraint upon alienation by the reversioners in a deed of family settlement between two Hindu widows and the reversionary heirs, although held to be bad in view of section 11, was held to be binding on the alienees from the reversioners who had accepted a mortgage contrary to the provisions of the family settlement on the ground that the object of the restraint on alienation by the reversioners was for the protection of the widows to receive maintenance from what had been the estate of their husbands (*f*). A contract between two Shiah Mahomedans in compromise of a litigation provided that the female party thereto should be the absolute owner and free to make any transfer she pleased within the ambit of the family but not to a stranger. It was held that this was a partial restraint on alienation and was not repugnant (*g*).

On the same day as the deed of gift the donee executed a registered deed not to alienate the property without the knowledge, consent and permission of the donor and that if he did so he would return the property to the donor. It was held that the effect of the two documents was that on the happening of a specified event which did not depend on the will of the donor the gift should be suspended or revoked under section 126 of the Transfer of Property Act and that in this view the agreement did not contravene the provisions of section 10, there being no absolute restraint on the transferee (*h*). The same principle was applied to a Mahomedan gift prior to the passing of the Act (*i*). But a condition restraining the grantee from transferring the property to any person other than the grantor has been held to amount to an absolute restriction on the right of transfer and void (*j*). So also where alienation was permitted only on the ground of necessity (*k*). So also a right of alienation to be exercised only in favour of a certain class of persons and no others is a restraint and therefore void (*l*). Again, an absolute restraint limited to a period of uncertain duration is void (*m*).

As to leases, unless there is a restriction against alienation of a portion, a restraint upon alienation of the demised premises does not prevent an alienation of a portion (*n*).

Increase of rents.—A restriction against increase of rents is void (*o*).

Limitation.—In English Law the word defines the interest which a grantee is intended to take, that is “the extent of the feoffee’s interest should be ascertained by proper technical words. Thus if it were intended to convey an estate of inheritance to the feoffee it was essential that the gift should be made to him and his heirs,” This necessity of using the word heirs to mark out or limit an estate in fee seems to have been derived from the times before the alienation of land was freely permitted . . . and though tenants in fee simple were afterwards enabled to dispose of their lands so as to defeat the expectation of their heirs, the liberty so gained was treated as an incident to their estates so that what remained essential on the gift of a fee simple was to use apt words to confer an hereditary estate, to which the law

(*f*) *Chamaru Sahu v. Sona Koer* (1911) 14 C. L. J. 303.
 (*g*) *Muhammad Raza v. Abbas Bandi* (1932) 7 Luck. 257, 59 I. A. 236.
 (*h*) *Ma Yin Hu v. Ma Chit May*, A. I. R. (1929) Rang. 226 (228).
 (*i*) *Hussain Khan v. Naleri* (1871) 6 M. H. C. 356.
 (*j*) *Asghari Begam v. Moula Baksh*, A. I. R. (1929) All. 381.
 (*k*) *Rai Deo v. Brahmdeo Rai*, A. I. R. (1937)

All. 235.
 (*l*) *Teja Singh v. Moti Singh*, A. I. R. (1925) Oudh 125.
 (*m*) *Nageshar v. Mata Prasad*, A. I. R. (1922) Oudh 236.
 (*n*) *David Cutinha v. Salvadora* (1927) 50 Mad. 331; *Chatterton v. Terrell* (1923) A. C. 578.
 (*o*) *Attorney General v. The Master & Fellows of Catherine Hall, Cambridge* (1820) Jac. 381, 37 E. R. 894.

would annex the power of alienation " (p). In *re. Machu* (q) it was said that the word "limitation" is ordinarily used to express a more general idea, viz., the definition or circumscription in any conveyance of the interest which the grantee is intended to take. The Indian Succession Act, while laying down rules of construction, mentions in sections 93 and 94 certain instances of limitations. The limitation of a remainder in tail or in fee simple to a person who had already an estate of freehold, as for life, was governed until 1926 by a rule of law known by the name of the "Rule in *Shelley's case*". This rule is abolished as regards instruments coming into operation on or after 1st January 1926. (r). The rule of *Shelley's case* is of feudal growth and not one applicable to India where deeds would be construed independently of the English rules of tenure.

Limitation of descent.—Lease was granted by a *patta* and an *ekrarnama* the latter deed providing that the lessee's daughter or daughter's son should not be entitled to succeed as heirs. It was held that a subject has no right to impose on land or other property any limitation of descent at variance with the ordinary law and that the proviso was void (s).

Creation of future interest.—The rule in the section affects the creation of future interest in property. It has no application to a charge where a present interest is created and there is no transfer of an interest in property which is merely made security for payment of money (t).

Family settlement.—Such a deed is not a transfer within the meaning of the section and restraint on alienation would be valid and enforceable when forming part of family settlement (u).

Hindus.—The principle underlying the section has been applied in the case of Hindus including married women (v).

Mahomedan Law.—The rule in this section has been applied to Mahomedans including married women (w). A settlement by a Mahomedan in favour of his sons "with all rights absolute" prohibiting alienations but giving to their descendants the right of alienation was held to confer an absolute estate (x).

Exemption.—Where an absolute interest is transferred the covenant in restraint of alienation is void (y) even though embodied in a separate instrument (z). The section makes two exceptions, one in the case of a married woman not being a Hindu, Mahomedan or Buddhist, the section permitting restraint on her power of alienation during marriage. The other exception is in the case of the lessor where

(p) Williams on Real Property, 24th Ed., pp. 426, 427.

(q) (1882) 21 Ch. D. 838.

(r) Williams on Real Property, 24th Ed., p. 211; Statute 15 Geo. 5, Ch. 20, sec. 131.

(s) *Panchubala Deby v. Jatindra Nath* (1926) 53 Cal. 816; *Rajindra Bahadur v. Raghubans Kunwar* (1918) 40 All. 470.

(t) *Kanai Lal v. Basanta Behari*, A. I. R. (1926) Cal. 451.

(u) *Hanuman Sahu v. Abbas Bandi*, A. I. R. (1929) Oudh 193; *Ahmad Azim v. Safi Jan*, A. I. R. (1926) Oudh 561; *Mata Prasad v. Nageshar Sahai* (1925) 47 All. 883, 52 I. A. 398.

(v) *Asulosh Dutt v. Doorga Churn* (1879) 5 Cal. 438, 6 I. A. 182; *Chandi Churn v. Sideshwari* (1888) 16 Cal. 71, 15 I. A. 149; *Anantha Tirtha v. Nagamuthu Ambalagaren* (1882) 4 Mad. 200; *Lalit Mohan v. Chukkun Lal* (1897) 24 Cal. 834, 24 I. A. 76; *Lala*

Ram v. Dal Koer (1897) 24 Cal. 406; *Mahram Das v. Ajudhia* (1886) 8 All. 452; *Bhairo v. Parmeshri* (1885) 7 All. 516; *Rukminibai v. Laxmibai* (1920) 44 Bom. 304; *D'Cruz v. Nagiah Naidu*, A. I. R. (1929) Mad. 64; *Muthukumara Chetty v. Anthony Udayan* (1914) 38 Mad. 867, 24 I. A. 120; *Kristna v. Mudaliar* (1871) 6 M. H. C. 248.

(w) *Muhammad Raza v. Abbas Bandi* (1932) 59 I. A. 236; *Hanuman Sahu v. Abbas Bandi*, A. I. R. (1929) Oudh 193; *Hussain Khan v. Nateri Srinivasa* (1871) 6 M. H. C. 356; *Lali Jan v. Muhammad Shafi Khan* (1912) 34 All. 478; *Allibhai v. Dada* (1931) 33 Bom. L. R. 1296.

(x) *Abdul Rahiman v. Uthumansa*, A. I. R. (1925) Mad. 997.

(y) *D'Cruz v. Nagiah Naidu*, A. I. R. (1929) Mad. 64.

(z) *Allibhai v. Dada* (1931) 33 Bom. L. R. 1296.

S. 10 the condition is for his benefit or those claiming under him. Restraints imposed by statute are not within the rule.

Annuity.—Annuity made payable personally to the judgment-debtor and charged on property may be attached and sold in execution. A clause making the allowance inalienable and payable only to the vendor is an illegal restraint on alienation. Such an annuity is not a mere right to receive future maintenance within clause (n) of the proviso to section 60 of the Code of Civil Procedure, 1908 (a).

Agreement by donee not to alienate.—On the same day as the deed of gift the donee executed a registered deed not to make a gift or transfer or sell or mortgage the property without the knowledge, consent and permission of the donor, and if he did so the property was to go to the donor. The two deeds forming part of the same transaction, were construed as not contravening the provisions of section 10 and that the case was covered by section 126 of the Transfer of Property Act (b).

Gift.—The incidents of a gift between Mahomedans are governed by their law and not by the Act. A provision in a deed of gift purporting to take away the donee's power of transfer being invalid under Mahomedan Law the donee takes an absolute estate (c), but a condition in a gift that the land was liable to be taken back if the donee transferred it, was held not to be repugnant on the ground that the gift was subject to a power of revocation (d).

Married woman.—Section 8 of the Married Woman's Property Act, III of 1872, deals with a wife's liability for post-nuptial debts. Section 10 of the Transfer of Property Act recognizes and renders enforceable conditions in restraint of anticipation and is not affected by section 8 of the Married Woman's Property Act. The income of property belonging to a married woman subject to a restraint on anticipation, accruing due after the date of a decree against such married woman's separate property under section 8 of the Married Woman's Property Act is not liable to attachment in execution of such decree (e). The exemption is, however, during the marriage and in favour of a woman not being a Hindu, Mahomedan or Buddhist. The Married Woman's Property Act extends to Sikhs and Jains as well. To section 8 of the Married Woman's Property Act a proviso has been added by section 2 of Act XXI of 1929 exempting from attachment and sale property transferred to a woman or for her benefit on condition that she shall have no power during her marriage to transfer or charge her beneficial interest therein. In interpreting section 8 of that Act the Calcutta High Court, in *Hippolite v. Stuart* (f), held that the terms of the section authorized judgment to be given even against separate property which was subject to a restraint upon anticipation. The Bombay High Court (g) though doubting, followed this decision. A dictum to the contrary of Farran, J., in the Bombay case was followed by the Madras High Court (h) which on a full consideration of the whole question declined to follow the Calcutta decision. However this may be, the question is now settled by the terms of section 10 of the Transfer of Property Act, 1882, and the proviso to section 8 of the Married Woman's Property Act. As explained by Sir George Jessel in *In re Ridley Buckton v. Hay* (i), restraint

(a) *Padmanund Singh v. Rama Proshad Mohi* (1912) 17 C. W. N. 662.

(b) *Ma Yin Hu v. Ma Chit May*, A. I. R. (1929) Rang. 226.

(c) *Balu Lal v. Ganesham Das* (1922) 44 All. 633; *Lali Jan v. Muhammad Shafi Khan* (1912) 34 All. 478.

(d) *Makund Prasad v. Rajrup Singh* 1907) 4

All. L. J. 708.

(e) *Goudoin v. Venkatesa Moodally* (1907) 30 Mad. 378.

(f) (1886) 12 Cal. 522.

(g) *Cursetji v. Rustomji* (1887) 11 Bom. 348.

(h) *Mantel v. Mantel* (1895) 18 Mad. 19; *Goudoin v. Venkatesa Moodally* (1907) 30 Mad. 378.

(i) (1879) 11 Ch. D. 645.

on anticipation is only a restraint on alienation and is an exception established by equity in favour of married women to the general rule of law which regards conditions in transfers of property restraining alienation as null and void. Whether the words are without any power of "alienation" or of "anticipation" the effect is the same (j).

Partition.—A right to partition is one of the incidents of ownership in property. A covenant making it impartible at all times to come is a restraint on alienation, it being settled law that as against parties not actually covenanting a restriction against partition is void (k). A clause in a deed of partition prohibiting alienation except with the consent of the other sharer is void as opposed to public policy (l).

Distinction between a contract for purchase or an option to purchase and a conditional limitation.—In *London and South-Western Railway Co. v. Gomm* (m) Jessel, M.R., observed, that between these two there was in a Court of Equity no distinction. In each case there was the same fetter on the estate and on the owners of the estate for all time and the rules as to remoteness applied to one case as much as to the other. By way of example, he said: "Is there any difference in substance between the case of a limitation to A in fee with a proviso whenever a notice in writing is sent and £100 paid by B or his heirs to A or his heirs the estate shall vest in B and his heirs and a contract that whenever such notice is given and such payment made by B or his heirs to A or his heirs, A shall convey to B and his heirs?" The same rules applied where the option was given for charitable purposes, inasmuch as the interest of the charity did not become effective till the happening of the future event (n).

Pre-emption.—A clause in a deed of sale that if either party to the deed should wish to transfer the whole or part of his share to a third person the other party should have the right to pre-empt, is common in India having for its object the desire to keep out third persons. Such a clause, although not amounting to an interest in the land, entitles the parties to it to the benefit of the obligation arising out of the contract. It is not a restraint on alienation (o).

Premium.—A condition against transfer is often inserted merely as a foundation for a claim to *nazar* or premium when a transfer is made and if it is not void it does not render an assignment or transfer of the lease inoperative when there is no clause for re-entry (p).

Bequests.—Section 10 of the Transfer of Property Act applies to transfers *inter vivos* and not to testamentary dispositions (q). Restrictions imposing conditions repugnant to an absolute estate are void (r).

Compromise not a transfer.—The section is to be construed strictly and must not be used to defeat well recognized provisions. By a family settlement an estate contrary to law cannot be created but conditions may be introduced which though not valid in the case of other transfers would be enforceable when forming

(j) *Re. Brown, O'Halloran v. King* (1883) 27 Ch. D. 411.

(k) *Murid Hussain v. Jowala Sahai*, A. I. R. (1929) Lah. 648.

(l) *Mudara v. Muthu* (1934) M. W. N. 942.

(m) (1882) 20 Ch. D. 562.

(n) *Worthing Corporation v. Heather* (1906) 2 Ch. 532.

(o) *Aulad Ali v. Ali Athar* (1927) 49 All. 527; *Basdeo Rai v. Jhagru Rai* (1924) 46 All.

333.

(p) *Jogesh Chandra Roy v. Mokbul Ali Chowdhury* (1920) 25 C. W. N. 857.

(q) *Makhrana v. Bindeshri Prasad*, A. I. R. (1922) Oudh 1682.

(r) *Ragunath Prasad v. Deputy Commissioner, Pratabgarh* (1929) 4 Luck. 483, 56 I. A. 372; *Bhaidas Shivdas v. Bai Gulab* (1921) 46 Bom. 153, 49 I. A. 1.

S. 10 part of family settlements. A family settlement is not a transfer within the meaning of the section but is a recognition of pre-existing title or of conflicting claims (s).

A compromise or family arrangement is not a transfer of property as defined in section 5 of the Act. The distinction is pointed out by Lord Moulton in *Musamm-
mat Hiran Bibi v. Musamm-
mat Sohan Bibi* (t), where the compromise was held not to be an alienation but a family settlement in which each party took a share of the family property by virtue of an independent title which was to that extent and by way of compromise admitted by other parties. A clause in a compromise decree that a party thereto and his heirs shall have no power to alienate or encumber the property by gift, mortgage or sale, is no bar to the property being attached and sold (u). In a Lahore case it was held that a restriction contained in a compromise on the power of alienation is a derogation from the full proprietary rights and is consequently void (v). A Hindu executed three documents, described as *mirash talukdari pattas* and *patni talukdari pattas*, the former implying a permanent and heritable estate, the latter importing a permanent heritable estate subject to a fixed rent. By the said three leases he granted immovable property to his daughter, her sons and their sons successively and her daughters subject to a fixed rent with the right to transfer by sale or gift, according to conditions, namely, (1) that the properties were not to pass to the heirs of the grantee's daughters, (2) that they were not to be transferred by gift except to a limited extent for religious purposes, and (3) that the grantor and his heirs were to have a right of pre-emption in certain events; there was also a defeasance clause whereby the properties were to revert, upon a failure of the designated heirs of the grantee. The appellants contended that the leases conferred a series of life-interests, but that if the grantee took absolutely, the property passed to them, as heirs of the grantor, the grantee having died without heirs as designated.

Held, that as the words of gift in the second and third leases constituted the grantee *malik* and in the first equivalent words were used, the grantee took an absolute estate with power to transfer by deed or will, unless the context indicated an intention to the contrary, and that the conditions had not that effect. Conditions (1) and (2) appeared rather to be intended as conditions upon an absolute estate—so regarded (1) was void under *Tagore v. Tagore* (w), as an attempt to alter the legal course of succession, and (2) was void under *Lalit Mohun Singh Roy v. Chuk-kun Lal Roy* (x), as a repugnant restriction. The defeasance clause was void as it was not a valid executory gift, the event referred to being an indefinite failure of male issue; *Soorjeemoney Dossee v. Denobundoo Mullick* (y) distinguished. The condition as to pre-emption was disposed of by their Lordships as being inconsistent with the notice of an estate for life (z).

Punjab.—The section embodies an equitable principle which applies to the Punjab (a).

(s) *Kuldip Singh v. Khetrani Koer* (1898) 25 Cal. 869; *Khunni Lal v. Gobind Krishna* (1911) 33 All. 356, 38 I. A. 87; *Abubekar v. Maibibi* (1869) 6 Bom. H. C. (A. C. J.) 77; *Diwali v. Apaji* (1886) 10 Bom. 342; *Basangowda v. Irgowdatti* (1923) 47 Bom. 597; *Hanuman Sahu v. Abbas Bandi*, A. I. R. (1929) Oudh 193; *Nageshar v. Mata Prasad*, A. I. R. (1922) Oudh 236.
(t) (1914) 18 C. W. N. 9
(u) *Bachumal v. Vessimal*, A. I. R. (1926) Sind

143.
(v) *Pratap Das v. Nand Singh*, A. I. R. (1924) Lah. 729.
(w) (1872) 9 B. L. R. 377, I. A. Sup. Vol. 47.
(x) (1897) 24 Cal. 834, 24 I. A. 76.
(y) (1862) 9 M. I. A. 123 distinguished.
(z) *Sarajubala Debi v. Jyotirmayee Debi* (1932) 59 Cal. 142, 58 I. A. 270.
(a) *Nand Singh v. Mahant Pratap Das*, A. I. R. (1924) Lah. 674.

Crown.—Grant made by the Crown with a restraint on alienation is valid. The Crown Grants Act (XV of 1895) enacts that grants by the Crown of estates unknown to the law are not invalid (b).

Conditions in a lease for the benefit of the lessor.—Another exception to the rule enunciated in the section is made in the case of a lease provided the condition restricting alienation is for the benefit of the lessor or those claiming under him. The usual form of restraining a lessee is that he shall not assign, sub-let or under-let without the written consent of the lessor, followed by the phrase "such consent not to be unreasonably withheld." Unless on a breach of condition a right of re-entry is reserved to the lessor, a condition cannot be for his benefit, hence a condition in a lease restraining alienation not reserving to the lessor a right of re-entry would be void, and this is rendered clear by the amendment of section 111 (g) and the addition of section 114A by the Amending Act, 20 of 1929, wherein the word "condition" and not "covenant" is used.

In a lease, permanent or otherwise, when no right of re-entry is reserved a covenant against alienation is not operative. The principle is that the covenant is inconsistent with the interest sought to be created by the instrument and the assignment is operative notwithstanding the covenant (c), and on that footing the lessor is entitled to damages (d) and not to injunction or forfeiture of the lease. In dealing with clauses in restraint of alienation in leases, the Courts have construed them not as conditions but as covenants following *Shaw v. Coffin* (e), approved in *Crawley v. Price* (f), and distinguished from *Doe v. Watt* (g), where well-known words of condition are used. A power of re-entry reserved only to the lessor is wide enough to admit his "heirs, successors or assigns" (h). Where a lease was made before the Transfer of Property Act, the principles of law enunciated in sections 10 and 111 (g) were applied (i). A covenant in a lease provided that if the lessee sold any portion of the land or the trees one-fourth share of the proper value should be paid to the lessor otherwise the latter should not be bound and the sale should not be valid. It was held that this was a covenant running with the land and the purchaser was bound to pay the one-fourth share (j).

A similar principle was reiterated where the plaintiffs claimed to have acquired proprietary interest as well as several subordinate rights in certain lands. The defendants set up a title to the disputed land under a lease of 27th July 1901, granted by one N. D. In 1901 the sons of G.D. were the darpatnidars under a lease of 6th September 1886 by one J. M., who was a patnidar of a half share. The purport of the lease was to the effect that the darpatnidars should have full rights to grant leases and create encumbrances subject only to the restriction that if the *darpatni* was sold for arrears of rents the subordinate title created by the darpatnidar should

(b) *The Secretary of State v. Raja Parthasarathy* (1926) 49 Mad. 349.

(c) *Subbaraya v. Krishna* (1883) 6 Mad. 159; *Tamaya v. Timapa* (1883) 7 Bom. 262; *Khetra Nath v. Baharali*, A. I. R. (1929) Cal. 228; *Mahananda Roy v. Saratmani Debi* (1911) 14 C. L. J. 585; *Goluk Nath Roy v. Mathura Nath Roy* (1891) 20 Cal. 213; *Kesar Lal v. Harasit Ghose* (1910) 12 C. L. J. 126; *Sital Prasad v. Dildar Ali Khan* (1916) 1 Pat. L. J. 1; *Subbaraya v. Krishna* (1882) 6 Mad. 159; *Narayan Dasappa v. Ali Saiba* (1894) 18 Bom. 603; *Madar Saheb v. Sawanabawa* (1897) 21 Bom. 195; *Udipi Seshagiri v. Seshamma* (1920) 43 Mad. 503; *Akram Ali v. Durga Prasanna* (1911) 14 C. L. J. 614; *Basrat*

Ali Khan v. Manirulla (1909) 36 Cal. 745; *Nil Madab v. Narattam* (1890) 17 Cal. 826; *Parmeshri v. Vittappa* (1902) 26 Mad. 157; *Netropal Singh v. Kalyan Das* (1906) 28 All. 400.

(d) *Williams v. Earle* (1868) 3 Q. B. 739.

(e) (1863) 14 C. B. N. S. 372, 143 E. R. 490.

(f) (1875) 10 Q. B. 302.

(g) (1828) 8 B. & C. 308, 108 E. R. 1057.

(h) *Kristo Nath v. Brown* (1887) 14 Cal. 176.

(i) *Parameshri v. Vittappa* (1903) 26 Mad. 157; *Tamaya v. Timapa* (1888) 7 Bom. 262; *Nil Madhab v. Narattam* (1890) 17 Cal. 826.

(j) *Kumarchandra v. Narendranath* (1930) 57 Cal. 953; *Saradakripa v. Bepinchandra* (1922) 37 C. L. J. 538; *Parthu Narain Singh v. Ramzan* (1919) 41 All. 417.

Ss. 10-11

at the same time come to an end. N. D., one of the sons of Gangaram, was appointed common manager of the estate, and as such granted, on the 27th July 1901, to the defendant's predecessors in title a permanent under-tenure. The darpatnidars having defaulted to pay rent, J. M. obtained a decree and in execution purchased the *darpatni* interest and such sale was confirmed on the 20th March 1905. The receiver of the estate of J. M. appointed by decree in an administration suit in respect of a half share without the permission of the District Judge, granted a *darpatni* to the plaintiff in 1906; it was held that the condition in the lease not being an absolute restraint on alienation and being for the benefit of the lessor, section 10 applied; that the restriction was one of the incidents of the under term and ran with the land so as to be operative not only between grantors and grantees but also their representatives in interest and the holders of derivative titles from them (k).

The mere existence of a condition in general terms against sub-letting is not of itself sufficient to prove that the condition is for the benefit of the lessor within the meaning of section 10. There must be something else either in the circumstances of the case or in the nature of the property or the wording of the lease from which it might be inferred that it was for the benefit of the lessor (l). A condition in a permanent lease restraining alienation is not void (m).

Involuntary alienation.—An assignment by operation of law is not *per se* a breach of a covenant against alienation. *Weatherall v. Geering* (n) may be quoted as an authority; also *Doe v. Carter* (o). In the same case the distinction is made between an alienation effected involuntarily by process of execution and a voluntary procuring of execution by the defaulting tenant against himself, in order to bring about the alienation desired. In this latter case it was held that an alienation so procured was a breach of the covenant. The restriction imposed by section 10 has no application to an involuntary alienation or alienation by operation of law such as an attachment and sale in execution of a decree (p). Sections 10 and 12 of the Act relate only to transfers by act of parties (q).

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing

(k) *Madhusudan v. Midnapore Zemindari Co.* (1918) 45 Cal. 940.

(l) *Sital Prasad v. Dildar Ali Khan* (1916) 1 Pat. L. J. 1.

(m) *Keshav Lal v. Haraut Ghose* (1910) 12 C. L. J. 126.

(n) (1806) 12 Ves. 504, 33 E. R. 191.

(o) (1799) 18 L. J. Q. B. 305, 115 E. R. 1505.

(p) *Padmanund Singh v. Rama Proshad Mohi* (1912) 17 C. W. N. 662; *Bachumal v. Mulchand*, A. I. R. (1926) Sind 143; *Tamaya v. Timapa* (1883) 7 Bom. 262;

Golaknath v. Mathura Nath (1893) 20 Cal. 273; *Mt. Kasturi v. Baliram*, A. I. R. (1924) Nag. 222; *Mohendra Kumar v. Gagan Chandra*, A. I. R. (1925) Cal. 471; *Nilamadhab v. Narattam* (1890) 17 Cal. 826; *Promode Ranjan v. Aswini Kumar* (1914) 18 C. W. N. 1138; *Vyankatraya v. Shivrambhat* (1883) 7 Bom. 256.

(q) *In the matter of the West Hopetown Tea Co., Ltd.*, (1890) 12 All. 192; *Subbaraya v. Krishna Kamti* (1883) 6 Mad. 159.

the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

S. 11

Where Act does not apply.—The rule laid down in the section is not peculiar to those provinces only in which the statute is in force (r).

Restriction repugnant to interest created.—The rule in the section applies to absolute and not to limited transfers though it has been observed by the Allahabad High Court that the principle of section 11 applies as much to mortgages or leases as to gifts or sales (s). It is an extension of section 10. According to section 10, on an absolute transfer no restriction can be imposed. This section further provides that the terms of the transfer shall not even direct that the interest of the transferee shall be applied or enjoyed by him in a particular manner. Hence, not only is an absolute restraint void under section 10 but on a transfer made absolutely you cannot direct the application or enjoyment of that interest in a particular manner. The section recognizes the elementary principle that a transferee of property who takes an absolute interest as, for instance, a donee or a purchaser cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer. Such a condition deprives the property of its legal incidents and is inconsistent or repugnant to the main purpose of the transfer. It is consequently arbitrary and not enforceable in a Court of Law (t). The effect of the section is that when a man relinquishes his entire interest in the property reserving no right over it for himself or any other person, he cannot at the same time impose upon his transferee any condition restraining his enjoyment or disposition of the property. Such a condition is repugnant to law and will be disregarded; but where for the beneficial enjoyment of one piece of immovable property the vendor stipulates that the vendee should enjoy another piece of property in a particular manner, the case stands on a different footing (u).

By an agreement not to divide, a Hindu family could not tie up their family estate so as to deprive a purchaser of one of the shares of a right to enforce partition, as the law gives to a member of a Hindu joint family a right to demand partition from his co-members (v). But the members can bind themselves for their own lifetime and a similar agreement can be entered into by the remaining members of the family after one has demanded a partition and separated his share (w). As regards gifts, the rule in Mahomedan Law is that where a gift is made subject to a condition restricting alienation the condition is void and the gift takes effect as if no condition were attached to it (x). The incidents of a gift as between two Mahomedans are governed by the Mahomedan Law and not the Transfer of Property Act, 1882. A provision purporting to take away the donee's power of transfer being under the Mahomedan Law invalid, the donee will despite thereof take an absolute

(r) *Murid Hussain v. Jowala Sahai*, A. I. R. (1929) Lah. 648.

(s) *Mahram Das v. Ajudhia* (1886) 8 All. 452 (459).

(t) *Chamaru Sahu v. Sona Koer* (1911) 14 C. L. J. 303; *Mahram Das v. Ajudhia* (1886) 8 All. 452.

(u) *Dhannu Lal v. Bansidhar*, A. I. R. (1929) Pat. 349.

(v) *Ramlinga v. Virupakshi* (1883) 7 Bom. 538; *Anand Chandra Ghose v. Prankisto Dutt*

(1886) 3 Beng. L. R. 14 O. C. J.; *Mokonda Rajendur Dutt v. Sham Chunder Mitter*, (1881) 6 Cal. 106.

(w) *Rup Singh v. Bhabhuti Singh* (1920) 42 All. 30.

(x) *Murid Hussain v. Jowala Sahai*, A. I. R. (1929) Lah. 648. *Lali Jan v. Muhammad Shafi Khan* (1912) 34 All. 478; *Muhammad Abdul Majid v. Fatima Bibi* (1886) 8 All. 39, 12 I. A. 159.

5. 11-12 estate (y). According to Hindu Law a restriction against alienation in a gift of land to Brahmins is inoperative as being a condition repugnant to the nature of the grant (z). Similarly, the Bombay High Court held that a condition necessitating residence was only recommendatory and not enforceable at law. There was a gift imposing on the donee and his descendants in perpetuity the obligation not to lease the village without forfeiting the gift (a). And the Privy Council in a Calcutta case held void a restriction upon an absolute estate which attempted to alter the legal course of succession (b).

Amendment of the section.—The second paragraph of section 11 has been amended by section 8 of the Transfer of Property Act, 20 of 1929. Prior to the amendment the second paragraph was as follows :—“ Nothing in this section shall be deemed to effect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.” The amendment was necessitated owing to the words “ to compel its enjoyment ” which found their way both in paragraph 2 of this section and in the first part of section 40 indicating that an affirmative covenant for the beneficial enjoyment of one piece of property of which the other piece has been transferred, can in all cases be enforced. The amendment was necessitated as the above paragraphs of the two sections were presumably based on the observations of Lord Cottenham in *Tulk v. Moxhay* (c), a case of an affirmative covenant disapproved in later English decisions such as *Haywood v. Brunswick Building Society* (d), an instance of a negative covenant and it is now settled that except in certain cases affirmative covenants cannot be specifically enforced. In *Austerbury v. Corporation of Oldham* (e), a covenant to spend money on land was held not binding on the purchaser who had notice thereof. The same principle had been followed in India (f). These principles do not apply to leases.

Affirmative and negative covenants.—Section 11 applies to affirmative covenants between transferor and transferee while section 40 to negative or restrictive covenants enforceable against third parties.

Indian Succession Act.—Section 138 of this Act is similar to section 11. It enacts that where an absolute bequest of a fund is followed by a direction that it shall be applied or enjoyed in a particular manner the legatee shall be entitled to receive the fund as if the will contained no such direction. The word “ fund ” includes legacies, both moveable and immoveable.

12. Where property is transferred subject to a condition or limitation, making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

(y) *Babu Lal v. Ghansham Das* (1922) 44 All. 633; *Abdul Karim Khan v. Abdul Qayum Khan* (1906) 28 All. 342; *Nizam-ud-din v. Abdul Ghafar* (1888) 13 Bom. 264.
(z) *Anantha Tirtha v. Nagamuthu* (1882) 4 Mad. 200.
(a) *Rukminibai v. Laxmibai* (1920) 44 Bom. 304.
(b) *Surajubala Debi v. Jyotirmoyee Debi* (1932)

59 Cal. 142, 58 I. A. 270.
(c) (1848) 18 L. J. Ch. 83, 47 E. R. 1345.
(d) 9 Q. B. D. 403.
(e) (1885) 29 Ch. D. 750; *Smith v. Colbourne* (1914) 2 Ch. 533.
(f) *Chaturbhuj v. Mansukhram* (1925) 27 B. L. R. 73.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

S. 12

Condition or limitation.—Section 12 is an exception to section 10. Under section 10 a partial restraint is not forbidden, but section 12 enacts that restraints of the nature enumerated in this section, though partial, will not be permitted and that a condition of a transfer that the interest thereby created shall determine on bankruptcy of, or attempted alienation by, the transferee is void. The rule in section 12 forbids conditions as to determination of an estate on a transfer of property on bankruptcy or attempted alienation. The law is different as to wills (g), for although a condition in a transfer *inter vivos* which determines it on bankruptcy or attempted alienation is void, it is not so under a will, provided there is a gift over in the absence of which the legatee or devisee takes an absolute estate so that such a clause in a will will have a similar effect as in a deed. The distinction pointed out by the Calcutta High Court (h) is not complete and falls short of the distinction as shown above.

Insolvency.—A condition in a deed of settlement that the interest of the beneficiary shall cease on his insolvency is void as it affects his creditors. In English Law a distinction is made, for the interest of the settlor himself cannot be qualified by a condition determining his interest on his own bankruptcy to the disappointment of his creditors, although on a transfer to a third party he may qualify the interest of the transferee with a similar condition (i). In settlements in English forms where a protected life-interest is given such a clause is permissible. But in India such a clause is void under this section. Further, under section 53 of this Act every transfer made with intent to defeat or delay creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed and under section 9 (b) of the Presidency Towns Insolvency Act, III of 1929, it is an act of insolvency to make a transfer of property or any part thereof with intent to defeat or delay creditors.

Petition to be adjudicated insolvent.—Such a petition is in effect a voluntary transfer of interest in property to the Official Assignee and amounts to an alienation (j).

Effect of withdrawal of petition in insolvency.—A deed of settlement provided that in case any beneficiary should become insolvent, "or do or suffer anything whereby his share or any part thereof would through his act or default or by operation of law" become vested in or payable to other persons, then the share or interest of such person should cease and the income should be paid for the remainder of his life for the maintenance and support of the family of such person. In July 1894 plaintiff, a son of the settlor, filed his petition in insolvency and withdrew it on 8th December 1894. Held that the forfeiture clause did not take effect and the plaintiff was entitled to be paid by the trustees his share of the income of the trust property (k). Here the settlement was prior to the passing of the Transfer of Property Act and the Court regarded that the insolvency was not as contemplated by the settlor, for the withdrawal was within less than five months of the filing of the petition without the fund being in any way claimed or interrupted by the Official Assignee.

(g) See sec. 120, illus. (vii).

(h) *In re Ernest Clarence O'Brien* (1933) 60 Cal. 926 (931).

(i) *Whitmore v. Mason* (1861) 2 Jo. & H. 209, 70 E. R. 1031, Encyclopædia of Forms, 2nd

Ed., Vol. 16, p. 87.

(j) *In re Ernest Clarence O'Brien* (1933) 60 Cal. 926.

(k) *Hormasji Nowroji Davar v. Dadabhoy Nowroji Davar* (1896) 20 Bom. 310.

S. 12

Endeavouring to transfer or dispose of.—According to this section a provision against an attempted alienation is void. A cesser clause of this nature is to be found in settlements created by deed or will. We are here concerned with settlements created by deed. The clause against which the section aims is a clause which in English Law gives a protected life-interest to an improvident child. The usual form of the clause is “Upon trust to pay the said income to my son (name) during his life unless and until either during my lifetime or after my death he shall have committed or suffered any act, default or process of law whereby such income or any part thereof if belonging absolutely to him would become vested in or payable to any other person or persons (and from and after the determination or failure of this trust in the lifetime of my said son)”(l). In India, an assignment of his life-interest by any person by act *inter vivos* or in execution is not void and the assignee, whether a creditor or purchaser, is entitled to the income thereof for the rest of the life of the tenant for life.

Membership of a voluntary association.—Membership in a voluntary association involves no transfer of property and the section does not apply. It was so held where a member of the Bombay Native Share and Stock Brokers' Association who having been declared defaulter was adjudged insolvent under the Presidency Towns Insolvency Act, 1909. His card was claimed by the Official Assignee which claim was resisted on the ground that he had no interest which could pass to the Assignee as according to the rules a defaulter was expelled from the Association and whether the expulsion was before or after the commencement of the insolvency (m).

Provident fund.—The rule of the provident fund of a company provided that a member's claim to a fund arose only upon his discharge from service but that if during the service he attempted to transfer his interest his claim to the fund would be forfeited to the company. A member was adjudged insolvent on his own petition and subsequently discharged from the service. It was held that the above rule which determined the member's interest on an attempted alienation was void under the section and that his claim to the fund vested in the Official Assignee on the termination of his service (n).

Exemption.—The rule in the section excludes leases from its operation so far as it contains a condition for the benefit of the lessor or those claiming under him. A covenant in a lease to pay to the landlord one-fourth of the purchase money on a transfer is valid (o).

By the Amending Act, 20 of 1929, in section 111 (g) a new clause has been added whereby a lease of immoveable property is made to determine by forfeiture if a lessee is adjudged insolvent and the lease provides that on the happening of such event the lessor may re-enter. Both prohibitions referred to in this section are not only permissible in a lease but are usually inserted in a lease. A lessor may therefore provide that the lease shall be forfeited on the bankruptcy of the lessee or on an assignment, the latter condition is usually qualified by a clause that the assignment shall not be without the consent of the lessor, such consent not to be unreasonably withheld.

(l) Encyclopædia of Forms, 2nd Ed., Vol. 18, p. 543.

(m) *Official Assignee v. Shroff* (1932) 56 Bom. 374, 59 I. A. 318.

(n) *In re Ernest Clarence O'Brien* (1933) 60 Cal.

926.
(o) *Saradakripa Lala v. Bepin Chandra Pal*, A. I. R. (1923) Cal. 679; *Abhiram v. Skyama Charan* (1909) 38 Cal. 1003, 36 I. A. 148.

Evasion of the section.—The rule in the section can be evaded. For instance, where a settlor by deed has settled the income of, say, a sum of Rs. 10,000 on a child, he may make a gift to that child by will of a similar sum or larger sum and provide that in the event of the child assigning his or her right under the deed of settlement the gift under the will shall become void and go over to a person named. In that case the child is put to an election and if he elects under the will he imposes a self-restraint which does not trench upon the rule in the section.

Ss. 12-1

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Settlement.—The rule in this section has been enacted to regulate settlements created by non-testamentary instruments as the illustration to the section shows.

Wills.—In the Indian Succession Act, XXXIX of 1925, a rule similar to the one enacted in this section as to non-testamentary instruments has been enacted in section 113 for regulating testamentary dispositions.

Child "in gremio matris."—By a rule now generally adopted in jurisprudence, a child in embryo at the date of the instrument who afterwards comes into existence is in contemplation of law in existence at the date of the transfer (*p*). Accordingly, the prior instrument may be for the benefit of such child (*q*).

Adoption.—Another exception to the rule that the subsequent transferee must be capable of taking at the time when the transfer takes effect on the determination of the prior interest is the case of an adopted son. A boy adopted on a man's death is in contemplation of law begotten by that man. Cases are frequently met with where an adoption is made on the day following the execution of a settlement whereby the adopted son takes the property on the determination of a prior interest (*r*).

Moveables.—Forming part of Chapter II, the section applies to both moveable and immoveable properties.

Remoteness.—The provisions of this section are enacted to prevent an attempt to create an interest in favour of future generations by declaring such a transfer,

(*p*) *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) 9 Beng. L. R. 377; *In re Wilmer's Trusts*, *Moore v. Wingfield* (1903) 2 Ch. 411.

(*q*) *Long v. Blackall* (1797) 7 Term. Rep. 100, 101 E. R. 875.

(*r*) *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) 9 Beng. L. R. 377.

- S. 13 if attempted, to be void for remoteness and such has been the law whether the case is governed by general principles or by the present section or by Hindu or Mahomedan Law if the operation of the section is excluded by section 2 (d) of the Act in their case.

When a transfer under the section is void.—On the ground of remoteness of limitation a transfer is void when (1) it is made in favour of a living person as required by section 5 of this Act, or (2) in favour of one not in existence at the date of the transfer subject to a prior interest, provided the latter interest extends to the whole of the remaining interest of the transferor in the property. By reason of the rule enacted in this section the words “living person” in section 5 includes a person not in existence at the date of the transfer.

Prior interest.—A prior interest is not effected by reason of the subsequent interest being rendered void by this rule (s). It is neither extinguished nor enlarged.

Subsequent interest.—The latest date when the subsequent transferee should come into existence is the date when the prior interest determines, for if at the date the prior interest comes to an end the subsequent transferee is a person not in existence on that date there would be a resulting trust. The period of gestation would be allowed.

Resulting trust.—Where a transfer offends the rule enacted in this section on the determination of the prior interest the estate reverts back to the settlor or his estate as the case may be, and there is a resulting trust in favour of the settlor under section 83 of the Indian Trust Act, II of 1882.

Absence of present interest in an agreement to grant land at request.—In compromise of litigation the proprietor of a hill agreed with a society of Jains that if the society should require a site thereon for the erection of a temple, he and his heirs would grant a site free of cost. The proprietor afterwards alienated the whole hill. The society by their representative sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site, and that they had taken possession but had been dispossessed. Held that the action failed because the agreement conferred on the society no present estate or interest in the site and was unenforceable as a covenant since it did not run with the land and infringed the rule against perpetuities (t).

Hindu Law.—Under Hindu Law a gift or bequest to a person unborn is void. A donee must be a person in fact or in contemplation of law in existence and capable of taking at the time when the gift takes effect (u). The same rule has been enacted for transfers in section 13. But section 2 (d) excluded the operation of this section so far as it applied to Hindus prior to the amendment by Act XX of 1929. The amendment has not been given a retrospective effect. In consequence of the amendment, section 2 (d) does not exclude the operation of section 14 to Hindus. The Hindu Disposition of Property Act, XV of 1916, was enacted to remove certain then existing disabilities in respect of the power of disposition of property of Hindus for the benefit of unborn persons within certain prescribed limits. According to Hindu Law as then administered in British India, a gift or transfer in favour of a person not in existence was void. This Act enacted that within certain limits prescribed in Chapter II of the Transfer of Property Act, 1882, no disposition of

(s) *Mahomed Shah v. Official Trustee of Bengal* (1909) 36 Cal. 431.

(t) *Maharaj Bahadur Singh v. Bhalchand* (1920) 25 W. N. 770, 48 I. A. 376.

(u) *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) 9 Beng. L. R. 377; *Sri Raja Venkata v. Sri Rajah Suraneni* (1908) 31 Mad. 310.

property by a Hindu by transfer *inter vivos* shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition. The Act is not retrospective. It extends to the whole of British India except the province of Madras. The Madras Act, VIII of 1921, applies to the town of Madras and Madras Act I of 1914 to the Presidency of Madras.

Mahomedan Law.—A gift or transfer of property to an unborn person is void under Mahomedan Law (*v*). The operation of section 13 in the case of Mahomedans is excluded by section 2 (d) of this Act. Moreover, the Mussalman Wakf Validating Act, 1913, enables persons professing the Mussalman faith to create *wakfs* which are in all respects in accordance with the provisions of Mahomedan Law, for themselves, their families, children and descendants for generation after generation, provided the ultimate benefits are reserved for the poor or other religious, pious or charitable purposes of a permanent character recognized as such by Mussalman Law. Prior to the Act (*w*) giving it a retrospective effect, the Courts in India held that the Act was not retrospective (*x*). What the law requires is that the properties must be substantially dedicated to charity and not that the gift to charity should be substantial.

Limited estate.—A limited estate cannot be created for the benefit of an unborn person even though it be subject to a prior interest in favour of a living person.

Maintenance and marriage expenses.—Provisions are met with in settlements wherein the interest created for persons not in existence is made subject to the maintenance of widows and marriage expenses of daughters of the family. Such provisions are valid under this rule provided they do not infringe the rule in the next section.

Trust how extinguished.—A trust which is void under this section may be extinguished with the consent of the person beneficially entitled. In the illustration A could extinguish the trust with the consent of his wife under section 77 of the Indian Trusts Act, II of 1882.

Time for ascertainment of facts.—The unborn person is determined on the termination of the prior interest, particularly when described in general terms as heirs, for until the prior interest determines the heirs of the settlor cannot be determined and it may be that such heir or heirs may be a person or persons living at the date of the transfer. Trusts as in the illustration would receive a different construction for in such cases the person taking the subsequent interest is determined at the date of the instrument.

The English rule of double possibility.—Though by rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life or as an inheritance, yet a remainder to the issue of such contingent remainderman as a purchaser, is a limitation unheard of in law nor ever attempted (*y*). This rule of law forbids raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child (*z*). It applies to equitable (*a*) as well as legal

(v) *Mahomed Shah v. Official Trustee of Bengal* (1909) 36 Cal. 431; *Abdul Fata Mahomed v. Rasamaya* (1895) 22 Cal. 619.

(w) The Mussalman Wakf Act, XXXII of 1930.

(x) *Rukya Banu v. Najira Banu* (1928) 55 Cal. 448; *Balla Mal v. Ata Ullah* (1927) 9 Lah. 203, 54 I. A. 372; *Khajeh Solehman v. Salimullah* (1922) 49 Cal. 820, 49 I. A. 153. *Naim-ul-haq v. Muhammad* (1919) 41 All.

1; *Mutu Ramanandan v. Vava Levvai* (1917) 40 Mad. 116, 44 I. A. 21; *Amir Bibi v. Aziazabibi* (1915) 39 Bom. 563.

(y) *Marlborough (Duke) v. Godolphin (Earl)* (1759) 1 Eden 404, 28 E. R. 741.

(z) *Monypenny v. Dering* (1852) 22 L. J. Ch. 313, 42 E. R. 826.

(a) *In re Nash, Cook v. Frederick* (1910) 1 Ch. 1; *In re Oliver's Settlement* (1905) 1 Ch. 191.

Ss. 13-14 estates (b). It was antecedent to and independent of the modern rule of perpetuities in respect of legal estates (c). This rule of law prohibiting the limitation after a life-interest to an unborn person of an interest in land to the unborn child or other issue of an unborn person is abolished (d).

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against
perpetuity.

Construction.—The Court struggles against a construction leading to the application of the rule and will avoid a construction leading to a perpetuity (e). The words “as near as the rules of law and equity will permit” would not by their own force have controlled the construction. B. devised freeholds upon trust for the use of E., his nephew, for life with remainders to the use of his first and other sons of the successive tenants for life in tail male and he bequeathed his residuary personal estate upon such trusts, etc., as were thereby declared concerning the devised freehold hereditaments “or as near thereto as the rules of law and equity would permit,” provided nevertheless that such residuary personal estate should not vest absolutely in any tenant in tail unless such person should attain the age of 21 years. Held the words that “as near as the rules of law and equity will permit” would not by their own force have controlled construction (f).

A Hindu settlor after distributing a portion of his estate settled the remainder in trust for himself for life and on his death one-fourth of the income was settled on his son R. for life and after his death to “all the male heirs of” R. share and share alike. A similar provision was made in favour of his daughter K. and her “male heirs” as well as his daughter P. and her “children.” The settlor died in 1894, K. died in 1897 leaving six sons who were in existence at the date of the settlement, R. died in 1908 leaving five sons existing at the same time and P. died in 1898 leaving a daughter also in existence at the date of the deed. The sons of R. filed a suit for construction of the trust deed which was held as intended to create a perpetuity as regards the properties (g).

For the longest period allowed by law.—Such an expression does not save a limitation but the instrument is void not on the ground of perpetuity but uncertainty as it is impossible to ascertain when the last life would be extinguished and it is therefore impossible to say when the period of 21 years would commence. A testatrix bequeathed a sum of £500 New Consols to trustees upon trust to apply the dividends thereof in maintaining and keeping in repair the tomb of her brother in Africa, “for the longest period allowed by law, that is to say, until the period of 21 years from the death of the last survivor of all persons who shall be living at my death.” Held that such a gift was void for uncertainty (h). The language of all the

(b) *Whitby v. Mitchell* (1890) 44 Ch. D. 85.
(c) *Whitby v. Mitchell* (1890) 44 Ch. D. 85.
(d) Law of Property Act (1925) C. 20, s. 161.
(e) *Boughton v. James* (1848) 1 H. L. Cas. 406,
9 E. R. 815; *Exel v. Wallace* (1751) 2 Ves.

Sen. 117, 28 E. R. 77.
(f) *Christie v. Gosling* (1886) 35 L. J. Ch. 667.
(g) *Balabhai v. Motabhai* (1925) 27 Bom. L. R.
906.
(h) *In re Moore, Prior v. Moore* (1901) 1 Ch. 936.

cases is that property may be so limited as to make it unalienable during any number of lives not exceeding that, to which testimony can be applied, to determine when the survivor of them drops.

Presumption against child-bearing.—It has been laid down on many occasions that it is not permissible in determining rights in law to inquire into the capacity of a woman to bear children (i).

Uncertainty not perpetuity.—When a transfer is void for uncertainty it is unnecessary to consider whether it transgresses the rule against perpetuity (j).

Moveable property.—The section applies to moveable property being part of Chapter II rendered applicable by the Act to transfer of properties whether moveable or immoveable (k).

Wills.—A similar rule (l) prevails in case of wills with this difference, that in case of a non-testamentary instrument the validity of the interest created by the transfer of property is determined at the date of the instrument while in the case of a will in considering the validity of the bequest the state of the family at the death of the testator and not at the date of the will is to be regarded. A will is an ambulatory document having no force or effect until death of the testator (m).

The rule against perpetuities.—The origin and growth of the rule of law against perpetuities, based as it is upon public policy, is described in *Cadell v. Palmer* (n) and *Thelluson v. Woodford* (o). According to the rule every estate or interest must vest, if at all, not later than 21 years after the determination of some life in being at the time of the creation of such estate or interest and not only must the person to take be ascertained but the amount of his interest must be ascertained within the prescribed period (p). A perpetuity, as it is a legal word or term of art, is the limiting an estate either of inheritance or for years, in such manner as would render it inalienable longer than for a life or lives in being at the same time and some short or reasonable time thereafter. The 21 years are allowed because the law considers that time reasonable. The particular estate and the remainder must be created at one and the same time as making part of the same estate. This is undoubtedly the general rule. The law does not recognize dispositions which would practically make the property inalienable for ever. It is an equity doctrine, the invention of Chancellors, in favour of alienation, that property could not be tied up longer than for a life in being and 21 years after (q).

This is the rule against perpetuities. It started with limiting alienations to a life or lives in being, and later stretched to include the period of gestation. And in *Stephens v. Stephens* (r) the Court extended it still further to 21 years, saying that this would not create a perpetuity. There are two well-known rules to the vesting of all executing trusts and limitation. The one is that they must take effect within the period of a life or lives in being and 21 years after with a sufficient allowance in addition for the birth of a posthumous child. It is not sufficient that it may vest within that period; it must be good in its creation; and unless it is created in such

(i) *In re Deloitte, Griffiths v. Deloitte* (1926) 1 Ch. 56; *Ward v. Van Der Loeff* (1924) A. C. 653; *Re. Hocking, Mitchell v. Loe* (1898) 2 Ch. 567; *In re Dawson, Johnston v. Hill* (1888) 39 Ch. D. 155; *Re. Sayer's Trust* (1867) 36 L. J. Ch. 350; *Jee v. Audley* (1787) 1 Cox. 324, 29 E. R. 1186.
 (j) *In re Moore, Prior v. Moore* (1901) 1 Ch. 936.
 (k) *Cowasji v. Rustomji* (1896) 20 Bom. 511.
 (l) Sec. 114 of the Indian Succession Act. XXXIX

of 1925.
 (m) *Re. Thompson, Thompson v. Thompson* (1906) 2 Ch. 199.
 (n) (1833) 1 Cl. & Fin. 372, 6 E. R. 956.
 (o) (1805) 11 Ves. 112, 32 E. R. 1030.
 (p) *Re. Thompson, Thompson v. Thompson* (1906) 2 Ch. 199.
 (q) *In re. Ridley, Brickton v. Hay* (1879) 11 Ch. D. 645.
 (r) (1736) Cas. Temp. Talb. 228, 25 E. R. 751.

S. 14 terms that it cannot vest after the expiration of a life or lives in being and 21 years and the period allowed for gestation, it is not valid, and subsequent events cannot make it so. The other rule is that if at the time of its creation the limitation is so framed, as not, *ex necessitate*, to take effect within the prescribed period, that is, if it is bad in its inception, it will not become valid by reason of the happening of the subsequent events which may bring the time of actual vesting and taking effect within the prescribed period by law (s). The rule against perpetuities is that an executory trust or limitation not only may but necessarily must take effect, if it takes effect at all, within a life or lives in being and 21 years after, and if at the time of its creation the limitation is so framed as that an event can be named in which, if it should happen, the rule would be infringed, the limitation is bad. If, therefore, the limitations being known, an event can be pointed to such that if it happens the rule will be infringed, the limitation is bad. It is wrong and inconsistent with the decisions to affirm that if at the date of the instrument (in this case the will) the limitations are not known, but are to be determined in an indicated manner, the devise must fail because it may turn out when they are known that they infringe the rule against perpetuities (t).

Number of lives.—There is no restriction as to the number of lives to which an estate may be limited. The limitation of a term to several persons in remainder, one after another, if those persons were in being and particularly named, could in no wise tend to the creation of perpetuity (u).

Number of lives do not count whether three or twenty, as they are all spending at the same time, all the candles lighted up at once, all these limitations would be good; for in effect it is only for one life, viz., that which shall happen to the survivor (v). In such cases it is the vagueness of the statement as to the persons during whose lives the trust is to last that makes it an uncertainty and therefore void. In *Thelluson v. Woodford* (w), Macdonald, C.B., said as to the number of lives during which an executing devise is permitted by the rules of law, that it might be for any number of lives the extinction of which would be proved without difficulty.

Persons living at the date of the transfer.—The section does not require that the lives chosen under the section need be interested in the property for it is not material to restrain it to the life of the tenant for life. All that the section requires is that it should be restrained to a life or lives in being (x).

Minority.—The legal period under the rule for a limitation is life or lives in being and the minority of some person who shall be in existence at the expiration of the period and to whom if he attains full age the interest created is to belong. In India, both under the Succession Act and the present Act the rule is that the minority must be of the person interested. In English Law this is not necessary (y). Unlike the fixed rule of 21 years in England, the law here has stretched the period of limitation to minority. Minority in India is regulated by the Indian Majority Act, IX of 1875.

Equitable interest in land.—Although the Act does not recognise equitable interests in land, contracts for conveyance of land stand in a class by themselves

(s) *Dungannon (Lord) v. Smith* (1846) 12 Cl. & Fin. 546, 8 E. R. 1523.

(t) *In re Fane, Fane v. Fane* (1913) 1 Ch. 404.

(u) *Goring v. Bickerstaff* (1862) 1 Cas. in Ch. 4, 22 E. R. 665.

(v) *Low v. Burron* (1734) 3 P. Wms. 262, 24 E. R.

1055.

(w) (1805) 11 Ves. 112, 8 E. R. 104.

(x) *Hopkins v. Hopkins* (1738) 1 Atk. 581, 26 E. R. 365.

(y) *Packer v. Scott* (1864) 39 Beav. 511, 55 E. R. 467.

and if they purport to do indirectly what the law forbids to be done directly they are void, and the principles applicable are the same in India as in England (z).

S. 14

All possible contingencies.—It should be borne in mind that in construing a covenant from the point of view of the doctrine of perpetuities or to test it on the ground of remoteness it is the invariable practice of the English Courts to pay regard to all possible contingencies and not to actual events only (a). And this practice has been followed in the Indian Courts (b). It has been laid down with great force on many occasions that it is not permissible in determining rights in law to inquire into the capacity of persons to beget or bear children (c).

Immediate parties.—A covenant which is affected by the vice of remoteness is void and ineffectual even as between the immediate parties thereto (d).

Period of gestation.—A child *en ventre sa mere* is in contemplation of law treated as being alive (e). There is no fixed rule of construction which compels a Court to hold that a child was born in the lifetime of the testator because it was at that time *en ventre sa mere*. That peculiar rule of construction is limited to cases where that construction of the word "born" is necessary for the benefit of the unborn child, as decided by Lord Westbury, L.C., in *Blasson v. Blasson* (f).

The English authorities relating to the construction of the words "life in being" in the rule against perpetuities establish this, that in construing the rule a child *en ventre* may be deemed a "life in being" and the period of gestation might be added at both ends of the period of 21 years mentioned in the rule as this trifling prolongation of the period during which property may be tied up did not in any way bring about the mischief against which the rule was directed (g). But the extension is for the benefit of such child only and not for any third person.

The whole of such years and months is not to be taken in gross. The Court considered 21 years as the limit and the period of gestation to be allowed in those cases only in which gestation exists (h).

Vesting suspended for more than 21 years.—If the interest of an unborn child of a person in being does not vest when that unborn child attains 21 the gift is too remote and void and the limitations over are void also (i).

Exceptions to the rule.—This rule has no application—

1. To personal contracts (j), although there is some connection with a reference to land (k).

(a) *Kalachand v. Jatindra* (1929) 56 Cal. 487; *London South Western Railway Co. v. Gomm* (1882) 20 Ch. D. 562; *Edwards v. Edwards* (1909) A. C. 275.

(a) *Dungannon (Lord) v. Smith* (1846) 12 Cl. & F. 546, 8 E. R. 1523; *Jee v. Audley* (1787) 1 Cox Eq. Cas. 324, 29 E. R. 1186.

(b) *Srimati v. Jages Chandra* (1871) 8 Beng. L. R. 400; *Soudaniney v. Jogesh Chunder* (1877) 2 Cal. 262; *Nabin Chandra v. Rajani Chandra* (1920) 25 C. W. N. 901; *Ranganadha v. Bhagirathi* (1906) 29 Mad. 412; *Ram Newaz v. Nankoo*, A. I. R. (1926) All. 283.

In re Deloitte, Griffiths v. Deloitte (1926) 1 Ch. 56.

(d) *Kalachand v. Jatindra* (1929) 56 Cal. 487; *Anant Nait v. Kumar Keshav* (1910) 14 C. W. N. 601; *London & South Western Railway Co. v. Gomm* (1882) 20 Ch. D. 562.

(e) *Thellusson v. Woodford* (1805) 11 Ves. 112, 32 E. R. 1030; *Re. Wilmer's Trust, Moore v.*

Wingfield (1903) 2 Ch. 411.

(f) (1864) 34 L. J. Ch. 18, 46 E. R. 534.

(g) *Villar v. Gilbey* (1907) A. C. 139.

(h) *Cadell v. Palmer* (1833) 1 Cl. & Fin. 372, 6 E. R. 956 (974).

(i) *Palmer v. Holdford* (1828) 4 Russ. 403, 38 E. R. 857.

(j) *Matura Subba Rao v. Surendranath Sahu* (1929) 8 Pat. 243; *Mackenzie v. Himalaya Assurance Co., Ltd.*, A. I. R. (1926) Cal. 745; *Bimal Jati v. Biranja Kuar* (1900) 22 All. 238; *Kalimuddin v. Reazuddin* (1909) 14 C. W. N. 295; *Harris Paik v. Jahuruddi Gazi* (1897) 2 C. W. N. 575; *London & South Western Rly Co. v. Gomm* (1882) 20 Ch. D. 562; *Borland's Trustee v. Steel Bros. & Co., Ltd.* (1901) 1 Ch. 279.

(k) *South Eastern Rly. Co. v. Associated Portland Cement Manufacturers* (1900) Ltd. (1910) 1 Ch. 12; *Kalimuddin v. Reazuddin* (1909) 14 C. W. N. 295; *Jogesh Chandra v. Asaf Khatun*, A. I. R. (1927) Cal. 41.

S. 14

2. To a revocable licence to enter and build up windows in default of the owner of the building doing so (*l*), for it does not give the adjoining owner any interest in land. If it did such an interest would be void for perpetuity.
3. To covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land (*m*).
4. To transfers for benefit of public (*n*).
5. To a covenant giving a mortgagee a right of pre-emption (*o*).
6. To equity of redemption which is a present interest in property in exercise of which the property is sought to be redeemed (*p*).
7. To a restrictive covenant or contract not being a limitation of property (*q*).
8. To general powers (*r*).
9. To an agreement to sell or to reconvey land (*s*).
10. To an easement acquired in virtue of a local custom known as customary easement (*t*).
11. To a covenant for pre-emption (*u*).
12. To a covenant in a lease for perpetual renewal (*v*).
13. To intents created or allowed by statute (*w*), for example, a lease in perpetuity (*x*).
14. To corporations (*y*).
15. To payment of the debts of the transferor or any other person taking any interest under the transfer (*z*).
16. To provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer (*z*).
17. To preservation or maintenance of the property transferred (*z*).

Easement "in futuro."—The reservation of an easement *in futuro* which may come into force at a time beyond the period allowed by the rule against perpetuities is bad (*a*).

Remoteness when ascertained.—The rule in the section is directed against the first taking effect of limitation and not in the determination thereof.

By a deed of settlement made in 1847 on the marriage of W., property was settled upon trust to pay the income to W. for life and after her death for such one or more of the children of the marriage in such shares and subject to such conditions and limitations and in such manner as W. should appoint by deed. There were three children of the marriage, T. J. and H., and in 1890 W., by deed, appointed that after her death one-third of the property should be held in trust for T., one-

(*l*) *Smith v. Colbourne* (1914) 2 Ch. 533.
 (*m*) *Muller v. Trafford* (1901) 1 Ch. 54.
 (*n*) Sec. 18, Transfer of Property Act, IV of 1882.
 (*o*) *Haris Paik v. Jahuruddi Gazi* (1897) 2 C. W. N. 575; *Bimal Jati v. Biranja Kuar* (1900) 22 All. 238; *Biggs v. Hodkinson* (1898) 2 Ch. 307; *Santley v. Wilde* (1899) 2 Ch. 474; *Orby v. Trigg* (1722) 9 Mod. 2, 88 E. R. 276.
 (*p*) *Padmanappa v. Sitarama Ayyar*, A. I. R. (1928) Mad. 28; *Shahzadi Bibi v. Sheikh Jamal* (1913) 17 C. W. N. 1053.
 (*q*) *Mackenzie v. Childers* (1889) 43 Ch. D. 265.
 (*r*) *In re Fane, Fane v. Fane* (1913) 1 Ch. 404.
 (*s*) *Avula Charamudi v. Marriboyma Raghavulu* (1915) 28 M. L. J. 471.
 (*t*) Sec. 18, The Easements Act (V of 1882).

(*u*) *Birmingham Canal Co. v. Cartwright* (1879) 11 Ch. D. 421.
 (*v*) *Hare v. Burges* (1857) 27 L. J. Ch. 86, 70 E. R. 19.
 (*w*) *Sevenoaks Maidstone & Tunbridge Rly. Co. v. London Chatham & Dover Rly. Co.* (1879) 11 Ch. D. 625.
 (*x*) Sec. 105 of the Transfer of Property Act, IV of 1882.
 (*y*) *Mulliner v. Midland Railway Co.* (1879) 11 Ch. D. 611; *Queen v. South Western Railway Co.* (1850) 14 Q. B. 902.
 (*z*) Sec. 17 (2) of the Transfer of Property Act, IV 1882.
 (*a*) *Sharpe v. Durant* (1911) 55 Sol. Jo. 423.

third in trust for J., and as to the remaining one-third upon trust to pay the income to H. If not then a member of the Roman Catholic Church or of any sisterhood or until she should become a member of either and subject as aforesaid as to capital and income to T. and J. W. died in 1893 and H. became a member of a sisterhood in 1895. Held, in accordance with the dicta in *Boughton v. James* (b), that the appointment was not open to objection on the ground of remoteness (c).

Limitations following a limitation void.—It has been held many times that limitations depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation (d). And so is a life-interest given to a living person dependent upon an event which may transgress the rule invalid (e). But limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities (f).

Void restrictions on valid limitations.—The principle cannot be disputed that if the first estate in the order of succession is not void for remoteness; if it is a good estate it would not be affected by the fact of the successive estates being void on that account but the first or prior estate would not be benefited by the failure of the successive estates (g). Testatrix, in pursuance of a power in her marriage settlement, appointed a fund to her son C. for life, with remainder to his eldest son, provided that, in the event of their refusal to comply with a request by her son A. to release their interests in certain other property their interests in the fund were to go over to her son A. absolutely. Held the condition was void as being contrary to the rule against perpetuities (h).

Future husband or wife.—A testator made a provision in his will as follows, "In case any of my said children shall marry and have issue and any such child or children and his, her or their issue shall all die in the lifetime of any husband or wife with whom any of my said children shall have so inter-married then I give the share or shares of my said children respectively unto such other of my said children as shall be then surviving and to the respective issue of such of them as shall be then dead. It being my will and mind and full determination that none of the son's wives or daughter's husbands shall become heirs to their children's property." It was held that the gift over in case any of his children and their issue should die in the lifetime of any husband or wife with whom his children should have inter-married was too remote (i).

Covenant for pre-emption.—Such a covenant, prior to the Transfer of Property Act at any rate, was within the mischief of the rule against perpetuities (j).

(b) (1840) 1 H. L. C. 406, 9 E. R. 815.

(c) *Wainwright v. Miller* (1897) 2 Ch. 255; *Purnashashi Bhattacharji v. Kalidhan Rai Chowdhuri* (1911) 38 Cal. 603, 38 I. A. 112.

(d) *Monypenny v. Dering* (1852) 2 De M. & G. 145, 42 E. R. 826; *Beard v. Westcott* (1822) 5 B. & Ald. 801, 106 E. R. 1383.

(e) *In re Hewett's Settlement, Hewett v. Eldridge* (1915) 1 Ch. 810; *In re Thatcher's Trusts* (1859) 26 Beav. 365, 53 E. R. 939.

(f) *In re Abbott, Peacock v. Frigout* (1893) 1 Ch. 54; *Rutledge v. Dorril* (1794) 2 Ves. 357;

Robinson v. Hardcastle (1788) 2 Term Rep. 241, 100 E. R. 131.

(g) *Dungannon (Lord) v. Smith*, 12 Cl. & Fin. 546, 8 E. R. 1523; *Tregonwell v. Sydenham* (1815) 3 Dow. 194, 3 E. R. 1035.

(h) *Re Staveley, Dyke v. Staveley* (1920) 90 L. J. Ch. III.

(i) *Hodson v. Ball* (1845) 14 Sim. 558, 60 E. R. 474.

(j) *Kalachand v. Jatindra* (1929) 56 Cal. 487; *Maharaj Bahadur v. Balchand* (1926) Pat. L. J. 163, 48 I. A. 376.

S. 14

A covenant binding one party and his successors to sell to another and his successors is a covenant unlimited in point of time and therefore not enforceable (*k*).

Instances in which the Courts have refused to enforce such or similar covenants when they were sought to be enforced by or against the successors in interest of the covenantors themselves are common (*l*).

Contract for transfer of immoveable property.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not of itself create any interest in such property and is therefore not within the rule against perpetuities (*m*).

Section 14 applies as much to contracts for transfer as to actual transfers though section 54 enacts an important distinction between the two. The rule against perpetuities vitiates the offending covenant from end to end. The words of section 14 are "no transfer can operate to create an interest." The agreement cannot be split up into two parts, viz., that which would create an interest and therefore valid and the other which may not create an interest. The covenant is forbidden by law and is absolutely void even in part and void *ab initio*, and this whether the covenant is between the immediate parties or their successors, and they come within the mischief of the rule. Prior to the Transfer of Property Act the Indian Legislature recognized that a contract for the sale of immoveable property as under English Law created an equitable interest in the property and made the purchaser the owner in equity. And this followed from illustration (g) to section 3 and illustration (a) to section 13 and section 27, clause (b) of the Specific Relief Act, I of 1877, also section 17, clause (2) of the Registration Act, XX of 1866, and section 17, clause (b) of the Registration Act, III of 1877. The only decision of the Privy Council on the subject is *Maharaj Bahadur Singh v. Balchand Choudhury* (*n*). Where the proprietor of a hill had in 1872 agreed with a society of Jains that if the latter required a site thereon for the erection of a temple he and his heirs would grant the same free of cost and thereafter alienated the hill in favour of a third party. The society then sued the alienees for possession alleging that they had given notice to the proprietor requiring the site and further alleging that they had taken possession but had been dispossessed. The Judicial Committee held that such a covenant as this cannot and does not run with the land and could not be so enforced. Further, if it could be regarded in another light, viz., an agreement to grant in future whatever land might be selected which is a site for a temple, as the only interest created would be one to take effect by entry at a later date and as this date was uncertain, the provision offends the rule against perpetuities. This pronouncement is sufficient authority for the proposition that a covenant for pre-emption prior to the Transfer of Property Act, at any rate, was within the mischief of the rule against perpetuities. The Madras High Court in *Ramasami v. Chinnan Asari* (*o*), while dealing with the case of a more restricted power of a Hindu by virtue of clause (d) of section 2 of the Transfer of Property Act, doubted whether the English doctrine of perpetuities and section 14 of the Transfer of Property Act which applied to transfer of interest in land would apply to contracts for sale of land in India, observing that there was really no substantial difference between English and Indian Law in respect of

(*k*) *Kalachand v. Jatindra* (1929) 56 Cal. 487; *Sreemully Tripoora v. Juggur Nath* (1875) 24 W. R. 321; *Stocker v. Dean* (1852) 16 Beav. 161, 51 E. R. 739.
(*l*) *Nobin Chandra v. Nabab Ali* (1900) 5 C. W. N. 343; *Nabin Chandra v. Rajani Chandra* (1920) 25 C. W. N. 901; *Kolathu Ayyar v.*

Ranga Vadhyar (1912) 38 Mad. 114; *Dinkar-rao v. Narayan* (1922) 47 Bom. 191.
(*m*) Sec. 54, Transfer of Property Act, IV of 1882.
(*n*) (1920) 6 Pat. L. J. 163, 48 I. A. 376.
(*o*) (1901) 24 Mad. 449.

contract of sale of immoveable property and it did not seem reasonable and in accordance with the principles of general jurisprudence that there should be some limit of time beyond which the performance of contracts for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed. In India, on the one hand, a substantive law of property, viz., Transfer of Property Act, IV of 1882, does not recognize equitable interest in land and the rule of English Law that the contract for sale of real property making the purchaser the owner in equity of estate has no application to those parts of India where the Transfer of Property Act is in force (*p*), while on the other hand section 27 (a) of the Specific Relief Act recognizes that contracts with regard to land can be specifically enforced against third parties in certain cases. Section 91 of the Indian Trust Act also lays down that a transferee taking with notice of a prior contract in favour of another, must hold the right obtained under the transfer as a trustee for the previous promisee. A series of judicial decisions has settled the view that contracts of this description, if they purport to do indirectly what the law forbids to be done directly, are void and the principles applicable to them are the same in India as in England. In the latter country, what may now be considered to be the leading case on the point is that of *London and South Western Railway Co. v. Gomm* (*q*), where the Court of Appeal held that an option to purchase gave an equitable interest which was within the rule against perpetuities. The authority of this is supreme at the present moment and it is unnecessary to deal with subsequent decisions which have explained or followed this principle (*r*). Another principle that should be borne in mind is that in construing a covenant from the point of view of the doctrine of perpetuities or to test it on the ground of remoteness it is the invariable practice of the English Courts to pay regard to all possible contingencies and not to actual events only (*s*), and this practice has been followed in Indian Courts (*t*). Now contracts of pre-emption admit of different varieties according as the promise is made by one person in favour of another or by one person for himself and his heirs, etc., in favour of another or in favour of another and his heirs, etc., and there may be also further varieties caused by the promise on the side being made by one person or by one person for himself and one person for himself and his heirs and so on. There is nothing inherently wrong or objectionable in a contract between persons tying up property for a limited time for a definite purpose or for the sake of mutual convenience. To a personal contract the doctrine of perpetuities or of remoteness has no application (*u*). On the other hand, a covenant binding one party and his successors to sell to another and his successors is a covenant for pre-emption unlimited in point of time, and has been held not enforceable in numerous cases in different Courts in this country. So a case where A and B respectively for themselves and their heirs for all times agreed to a right of pre-emption for each other and their heirs, is bad as offending the rule against perpetuities and on the ground of remoteness. It is a covenant which amounts to an agreement to convey immoveable property upon happening of an event which might occur at a more remote period than the lives in being and

(*p*) *Maung Shwe Goh v. Maung Inn* (1916) 44 Cal. 542, 45 I. A. 15.

(*q*) (1882) 20 Ch. D. 562.

(*r*) *Trevelyan v. Trevelyan* (1885) 53 L. T. 853; *Woodall v. Clifton* (1905) 2 Ch. 257; *Worthing Corporation v. Heather* (1906) 2 Ch. 532; *Edwards v. Edwards* (1909) A. C. 275.

(*s*) *Dungannon (Lord) v. Smith* (1846) 12 Cl. & F. 546, 8 E. R. 1523; *Jee v. Audley* (1787) 1 Cox. Eq. Cas. 324, 29 E. R. 1186.

(*t*) *Srimati Bramamayi v. Jages Chandra* (1871)

8 Beng. L. R. 400; *Soudaminy v. Jogesh Chunder* (1877) 2 Cal. 262; *Nabin Chandra v. Rajani Chandra* (1920) 25 C. W. N. 901; *Pan Kuer v. Ram Narain*, A. I. R. (1929) Pat. 353; *Ranganadha v. Bhagirathi* (1906) 29 Mad. 412.

(*u*) *Kalimuddin v. Reasuddin* (1909) 14 C. W. N. 295; *Haris Paik v. Jahuruddi Gazi* (1897) 2 C. W. N. 575; *Bimal Jati v. Biranja Kuar* (1900) 22 All. 238.

- S. 14 18 years afterwards (v). Instances in which Courts have refused to enforce such or similar covenants when they were sought to be enforced by or against the successive interests of the covenantors themselves are common. Amongst such instances may be cited a case in which a conveyance executed by the plaintiffs in favour of the defendant's father it was provided that if the latter sold the property subsequently he would be bound to give preference to the plaintiff and the covenant was sought to be enforced against the defendants who were the sons of one of the contracting parties (w).

In *Nabin Chandra v. Rajani Chandra* (x), a Hindu transferred certain immovable property to his son-in-law, reserving a condition that if the transferee or his successor found it necessary to sell the property he must sell it to the vendor or his nephew or his heirs at a specified price and the son of the son-in-law having sold the property to strangers the nephew unsuccessfully sued for enforcement of his right of pre-emption. In *Kolathu Ayyar v. Ranga Vadhyar* (y), a covenant of pre-emption between two persons was sought to be enforced against the heirs of one of them and the Court observed that one who had obtained a promise for the conveyance of the land had by virtue of section 27 (b) of the Specific Relief Act and section 91 of the Trust Act "a substantial interest in it." This case was later distinguished by the same Court which held that a contract to reconvey whenever demanded was personal and that it created no interest in land and was not void under this rule (z). In a recent case the Madras High Court while dealing with a counter-part agreement by the purchaser on the same day as the sale deed to convey the land to the vendor on his paying the sale price in a limited period mentioned in the agreement, on the ground that such an agreement did not create any interest in land, held that the undertaking by the purchaser was not a mere standing offer but an executory contract giving a right to the vendor to get a conveyance from the purchaser, that it was assignable by the vendor and was not void as offending the rule against perpetuities (a). In a Bombay case (b) the dispute was for right of pre-emption in favour of the vendor and his heirs against the purchaser and his heirs where on an originating summons the covenant in question was held void as offending the rule of perpetuities. The agreement was of 18th September 1878 and being prior to the Transfer of Property Act, was regarded as creating an equitable interest in the property.

A similar agreement prior to the Transfer of Property Act was held to create an equitable interest in the property. There, in execution of a decree against the plaintiff's father, land belonging to him was sold at a Court sale and purchased by an auction purchaser who sold it to defendants' father on 14th May 1874. The latter on the same day agreed to reconvey the land to a brother of the plaintiff on payment of a certain sum of money. It was held that the agreement was void as offending the rule against perpetuities (c). A later Full Bench decision of the same Court held that the sale passes the title absolutely to the purchaser and the agreement to resell in no way limits his right as owner (d). The Allahabad High Court has held that a contract of pre-emption was not void for uncertainty nor as being opposed to public policy, neither did it offend the rule against perpetuities, inasmuch as it

(v) *Kalachand v. Jatindra* (1929) 56 Cal. 487.
 (w) *Nabin Chandra v. Nabab Ali* (1900) 5 C. W. N. 343.
 (x) (1920) 25 C. W. N. 901.
 (y) (1912) 38 Mad. 114.
 (z) *Charamudi v. Raghavulu* (1916) 39 Mad. 462.

(a) *Munuswami v. Saglaguna* (1926) 49 Mad. 387.
 (b) *Dinkarrao v. Narayan* (1922) 47 Bom. 191.
 (c) *Allibhai v. Dada Ali* (1931) 33 Bom. L. R. 1926.
 (d) *Harkissondas v. Bai Dhanu* (1926) 50 Bom. 566.

did not create an interest in immoveable property (e). A contrary view has been taken by the Patna High Court that a covenant for pre-emption unlimited in point of time was void as offending the rule (f). But the same Court has held that a covenant in a mortgage creating a right of pre-emption in favour of the mortgagee the operation of which is not to extend beyond the lifetime of the parties is not obnoxious to the rule (g).

Hindu Law.—The section prior to the Amending Act, 20 of 1929, did not apply to Hindus by virtue of section 2 (d) as it then stood. Now this section applies to Hindus. Further, the Hindu Disposition of Property Act, XV of 1916, makes provision for the application of limitations described in Chapter II of the Transfer of Property Act to transfers *inter vivos* by Hindus. This Act applies to British India except the province of Madras where the Madras Act I of 1914 is enacted for the Presidency of Madras and for the town of Madras Act VIII of 1921. An agreement between coparceners never to divide certain property is invalid under Hindu Law as tending to create a perpetuity (h). Under sections 14, 16, 17 and 18, non-charitable dispositions, void for perpetuity, will not be validated by the presence of charitable trusts (i).

Mahomedans.—The section does not apply to Mahomedans. Under the Mussalman Wakf Validating Act of 1913 made retrospective by Act XXXII of 1930, it is lawful for a person professing the Mussalman faith to create a *wakf* of his property which is in all respects in accordance with the provisions of the Mussalman Law by settling the same for the benefit of his generations in perpetuity for the maintenance and support, wholly or partially, of his family, children or his descendants or where he is a Hanafi Mussalman for his own maintenance and support till his life, provided that the ultimate benefits are reserved for the poor or a purpose recognized by Mahomedans as pious, religious or charitable of a permanent character.

Clause for re-entry in a lease.—A clause entitling the lessor to terminate a permanent lease at any time does not offend against the rule of perpetuities (j).

Covenant for renewal of lease.—A covenant in a lease for renewal from time to time at the option of the lessee is not void as being in violation of this rule. Covenants for renewal differ from covenants for pre-emption in regard to this rule (k).

A covenant in a lease that if the lessee or his representative intended to transfer the whole or any portion of the lease the transfer would be made in favour of the lessor for a proper price offends the rule against perpetuities. Cases of pre-emption stand on their own peculiar law (l).

Where a lessor by a *patni pattah* after easing a *mauzah* exempted from its operation certain lands and covenanted that on certain contingencies happening the lessee should acquire a right thereto as *patnidar* but no time was specified within which the contingency was to happen in order to vest the right in the *patnidar*,

(e) *Aulad Ali v. Ali Athar* (1927) 49 All. 527 overruling *Balli Singh v. Raghubar Singh* (1923) 45 All. 492; *Gopiram v. Jeotram* (1923) 45 All. 478; *Basdeo Rai v. Jhagru Rai* (1924) 46 All. 333.
(f) *Maharaj Rajaramji v. Ramnath*, A. I. R. (1927) Pat. 412.
(g) *Matura Subba Rao v. Surendra Nath* (1929) Pat. 243; *Bimal Jati v. Birenja Kuer* (1900) 22 All. 238; *Hari Paik v. Jaharuddi Gazi* (1897) 2 C. W. N. 575; *Rajaram v. Krishna*

(1893) 16 Mad. 301; *Kalimuddin v. Reazuddin* (1900) 10 C. L. J. 626.
(h) *Ramlinga v. Viru Pakshi* (1883) 7 Bom. 538.
(i) *Kayastha Pathshala v. Bhagwati* (1937) 41 C. W. N. 262 P. C.
(j) *Rama Rao v. Thimmappa*, A. I. R. (1925) Mad. 732.
(k) *Pichi Naidu v. Jefferson* (1921) 44 Mad. 230.
(l) *Swarma Kumar Ghosh v. Prahlad Chandra*, A. I. R. (1922) Cal. 474, 26 C. W. N. 874.

S. 14 held such a covenant was void as offending the rule even as between the parties to the covenant (m).

"Interesse termini."—*Interesse termini*, which a reversionary lease (say for a term to commence more than 21 years after its date) confers on the lessee, is not an executory but an immediate vested interest. Such a reversionary lease therefore does not offend the rule against perpetuities (n).

Lease in perpetuity.—A. executed in favour of W. an *ijara* lease for a term of years which contained the following covenant on the part of the lessor, "If out of the Ijara Mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any bund or tank or for construction of any cutchery house I shall grant you a *Mourasi Mocurrari Pattah* for it on proper rent." It was held that the lease was valid and that the covenant did not infringe the rule against perpetuities (o).

Contract of indemnity.—A security bond was executed by a third party to a purchaser undertaking to compensate the latter with equivalent lands in case the purchaser or his representative was deprived of possession. It was held that the bond was only a covenant for indemnity and not a covenant for title; that a covenant for indemnity was not one running with the land and therefore not enforceable and even if such property was rendered permanently liable to the purchaser or his assigns it would be unenforceable as offending the rule against perpetuities (p).

Transaction not amounting to a transfer of interest.—The rule in the section does not apply to a transaction which does not amount to a transfer of interest. An agreement to pay maintenance allowance to a person and to continue to pay the same to his descendants from generation to generation making it a charge over the property creates a charge and not a mortgage and does not offend the rule (q).

"Cy pres" doctrine.—A settlor made a trust in the following words:—"To expend after the liquidation of all the debts the sum of Rs. 500 per month for such medical and educational charities within the zemindaris of the settlor as shall with the approval of the settlor appear just to the trustee." He died before approving any trust and the zemindari was sold before any charitable trust was selected by the trustees. It was held that the conditions precedent to the constitution of the trust were not satisfied and it failed.

The question whether a charitable trust, if otherwise valid, is vitiated by the rule against perpetuities was left open, but it was pointed out that the preponderance of authority was for the proposition that the doctrine of *cy pres* was applicable only in wills and not in deeds.

Between the applicability of the *cy pres* doctrine and the failure of a charitable trust for the non-satisfaction of a condition precedent, the distinction is that in the former there is the breakdown of the machinery required to carry out validly-created charitable trusts and in the latter there is the initial failure of the conditions essential to bring the trust into existence (r).

Indefinite failure of issue.—Two brothers, K. and N., subject to the Dayabhaga School of Hindu Law, executed on 28th March 1866, a document whereby after reciting that, "whereas body is mortal it is impossible to say what may befall at

(m) *Anath Nath Maitra v. Kumar Keshah Chandra* (1910) 14 C. W. N. 601.

(n) *Mann, Crossman & Paulin v. Land Registry (Registrar)* (1918) 1 Ch. 202.

(o) *Matheson v. Rani Kenai Singh* (1909) 36 Cal. 675.

(p) *Natesa v. Gopalaswami* (1928) 51 Mad. 688.

(q) *Mallub Hasan v. Mt. Kalawati*, A. I. R. (1933) All. 934.

(r) *Santana Ray v. The Advocate General of Bengal* (1921) 48 Cal. 124.

what time, and as ruin may ensue from disputes relating to the shares arising in future among son, daughter, daughter's son and childless widow unless some rules are regularly framed, and it has accordingly become necessary to prescribe a set of rules in that behalf, and hence the rules mentioned below are laid down : these shall become operative and come into force on our death," they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule, and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs and their descendants. K. died in 1868, leaving a son A., a daughter D., his brother N., and their mother C. A. died in 1872 without any issue and C. in March 1901. The plaintiffs (appellants), who were the sons of D., instituted this suit on 29th July 1901, against N. claiming as next reversioners to A., their maternal uncle, the properties which originally belonged to K. and which had since come into the possession of N., the defendant. N. died shortly after the suit was brought, his sons (the respondents) being substituted for him on the record. Their contention was that under the instrument of 1866 the properties in dispute passed on the death of A. to N. and on his death to them.

The Judicial Committee held that the clear intention of the instrument of 1866 was to vary the rules of Hindu Law and to control the devolution of the properties until the indefinite failure at some remote period of the male line of K. and N., and that such an attempt to alter the mode of succession was, on the principles laid down in the case of *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (s), illegal and void. Throughout the instrument there was no indication of an intention to make a gift to any person; and there was no warrant for the contention that there was a devise in favour of A. with a gift over to N., his uncle. The question was not whether the gift was good in the event which happened, but whether it was good in its creation (t).

Powers.—General powers are exempt from the restriction of this rule for there exists, by the existence of the power, a present, immediate and unrestrained alienability. Particular or special powers such as a power to appoint among a named class of persons differ from general powers in that the donee has not an unrestricted power of alienation and in that case the rule against perpetuity requires that all limitations made in pursuance of the power shall be such only as would have been valid if inserted in the original will or settlement. When the power is exercised the limitations created under it are to be written into the instrument which created the power and if and so far as they do not exceed the rule against perpetuities they are good (u).

Sections 13 and 14.—Both sections deal with limitations on disposition and aim at setting bounds to the disposing power of property laying down restrictions against the natural wishes of men to perpetuate property in their own families. Section 13 deals with remoteness of limitation while section 14 prevents property from being chained longer than the period prescribed therein and enacts that the vesting must be within the compass of life or lives in being and the minority of a person who shall be in existence at the death of the survivor. Section 13 dealing

(s) (1872) 9 Beng. L. R. 377.
(t) *Purna Shashi Bhattacharji v. Kalidhan Rai*.
Chowdhuri (1911) 88 Cal. 603, 38 I. A. 112.

(u) See *in re Fane, Fane v. Fane* (1913) 1 Ch. 404.

14-15 with remoteness enacts that a transfer of property may be made in favour of an unborn person subject to a prior interest provided that such unborn person takes the whole of the remaining interest of the transferor in the property. This section leaves it open to allow the estate to remain in abeyance or suspense between a prior interest and the taking effect in favour of an unborn person so that any number of years may elapse between the extinction of a prior interest and the interest in favour of an unborn person taking effect. To guard against this abuse tending to perpetuate the property in the family section 14 enacts that a settlor shall not lock his property for a greater period than a life or lives in being and the minority of a person who shall be in existence at the death of the longest survivor. In either case the law's anxiety is to set a restraint on alienation.

Sections 14 and 15.—By a deed of trust dated the 27th April 1921, C. D., settled various properties on trust for himself and his family and after his death, the trustees were directed to pay Rs. 20 per month “to the daughter or each of the daughters, if more than one, for and during the term of her or their natural life and lives, commencing from the date of her or their marriage.”

Held, that the principle in *Leake v. Robinson* (v) applied to Hindus, and, in the case of a gift covered by section 14 of the Transfer of Property Act, section 15 of the Act applies, subject to it being shown that there is some rule of Hindu Law at variance with that section. Section 3 (a) of the Hindu Disposition of Property Act does not exclude the application of section 15 of the Transfer of Property Act, in a case which is covered by section 14 of the Act. Therefore the gift to the daughters was bad (w).

Transfer for benefit of the public.—The restriction in this section does not apply when a transfer of property is made for the benefit of the public in the advancement of religion, knowledge, commerce, help, safety or any other object beneficial to mankind (x).

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class*.

Transfer to a class
some of whom come
under sections 13 and
14.

Changes in the section.—The section being a rule of construction was modelled on the rule of construction laid down in *Leake v. Robinson* (y) and settled by antecedent decisions. The old section laid down that when there was a transfer to a class of persons with regard to some of whom the transfer could not take effect owing to the vice of remoteness or as offending the rule of perpetuity the interest created for the benefit of the class failed as regards the whole class. *Leake v. Robinson* (y) was a case of construction of a will making bequests not to individuals but to a class. The Court had to determine whether the class could take and the Master of the Rolls said, “I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will

(v) (1817) 2 Mer. 363, 35 E. R. 979.

(w) *Sewdayal Ramjeedas v. Official Trustee of Bengal* (1931) 58 Cal. 768.

(x) Sec. 18, Transfer of Property Act, IV of 1882.

(y) (1817) 2 Mer. 363, 35 E. R. 979.

make his bequests, what he never intended them to be, viz., a series of particular legacies to particular individuals or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."

By the Amending Act, 20 of 1929, the words "as regards the whole class" have been substituted by the words "in regard to those persons only and not in regard to the whole class," thus departing from the rule in *Leake v. Robinson* (2). Prior to the amendment the persons belonging to the class stood or fell together.

The reasons for amendment.—The Special Committee in their report explain the reasons for amendment as follows:—"Section 15 of the Transfer of Property Act deals with a gift to a class. It reproduces with slight verbal alterations the provisions of section 102 of the Indian Succession Act, 1865 (now section 115 of the Indian Succession Act, 1925), which was enacted on the principle of the decision in *Leake v. Robinson* (2).

Prior to certain special Acts, to be presently noted, Hindu Law did not permit a gift in favour of a person who was not in existence at the date of the gift or a bequest in favour of a person who was not in existence at the death of the testator (*Tagore v. Tagore* (1872) 9 Beng. L. R. 377, 397, 400, I. A. Sup., Vol. 47) on the ground that a person capable of taking must be in existence at the material date. Difficulties, however, arose where a gift was made to a class of persons of whom some were and some were not in existence at the date of the gift. The leading case on the subject is that of *Rai Bishen Chand v. Mussumat Asmaida Koer* (a), wherein a Hindu made a gift of his property to his grandson S. who was then in existence "and his (S.'s) brothers who may be born thereafter." It was argued on the strength of the rule in *Leake v. Robinson* and the analogy of section 102 of the Indian Succession Act, 1865, that as the gift to the unborn grandsons was invalid according to the Hindu Law, no benefit could be taken even by the grandson who was in existence at the date of the gift. But this contention was overruled by the Judicial Committee.

The true scope of the rule in *Leake v. Robinson* was pointed out by Sir Lawrence Jenkins in *Radha Prasad v. Ranimoni Dasi* (1911) 38 Cal. 188, affirmed in 41 I. A. 176.

The rule that a Hindu could not dispose of his property by gift or sale in favour of an unborn person fettered the free disposition of property. To remove this disability three Acts were passed, namely, (1) Madras Act I of 1914, (2) the Hindu Disposition of Property Act, XV of 1916, and (3) Madras Act VIII of 1921. The Madras Act I of 1914 applies to the Madras Presidency except the town of Madras; the Madras Act VIII of 1921 applies to the town of Madras; and the Hindu Disposition of Property Act extends to the whole of British India except the province of Madras.

Class.—A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares (b). A gift to all the children of testatrix "with the exception of one, viz.," has been held not to be effected by the incomplete exception (c).

The gift to the class is not defeated by the words which follow as the testatrix had not made up her mind whether she would except any of her grandchildren or

(2) (1817) 2 Mer. 263, 35 E. R. 979.

(a) (1884) 6 All. 560, 11 I. A. 164.

(b) *Pearks v. Moseley* (1880) 5 A. C. 714; *Kings-*

bury v. Walter (1901) A. C. 187.

(c) *Illingworth v. Cooke* (1851) 9 Hare 37, 68 E. R. 404.

ss. 15-16 which of them she would except from the benefit of her bequest. But if the devise be to one of the sons of J. S. who hath several sons the devise is void (d).

Transfer to take effect on death of lineal descendants.—Such a transfer offends the rule in the section and is therefore void. The fact that it happened to fall within the legal period is not the test. What you have to see is whether the events can be postponed to beyond the period of a life or lives in being and 21 years after and not what in fact happened. A sale deed of a 9-pie odd share minus the 2 bighas specifically numbered stated as follows:—"Let this be known that the bighas of *nankar* land which I have excluded from the sale shall remain in my possession for life and after my death in the possession of my *aulad khas* without payment of rent or Government revenue. I or my lineal descendants have no right to transfer the property excluded either permanently or temporarily. If none of my lineal descendants is alive in my family then the said land shall be declared to be the own property of the vendee and his heirs and the persons of my family shall have no claim to the same." It was held that the transfer offended the rule laid down in section 15 (e).

Hindu Disposition of Property Act.—In section 3, clause (a) for the words and figures "sections 13, 14 and 20" the word and figure "Chapter II" have been substituted so that the present section applies to Hindus. The Calcutta High Court decided before the amendment that section 3 (a) did not exclude the application of section 15 of the Transfer of Property Act in a case covered by section 14 of the Act (f).

Wills.—Testamentary dispositions are governed by section 115 of the Indian Succession Act which corresponds with section 15 of the Transfer of Property Act. The former section, also based on the rule in *Leake v. Robinson* (g), has been amended on the same lines as the present section by section 14 (1) (a) of the Transfer of Property (Amendment) Supplementary Act, 21 of 1929. The rule in *Leake v. Robinson* (g) was held not to apply to a Khoja will.

16. Where, by reason of any of the rules contained in sections 13 and 14, an interest *created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class*, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer to take effect on failure of prior interest.

Amendment.—This section has been amended by the Transfer of Property Act, 20 of 1929. As owing to the amendment made therein section 15 will no longer provide for the case of a failure of transfer, reference to it has been omitted in section 16. But a transfer may fail as to all the members of a class by reason of sections 13 and 14 as where a gift over is intended to take effect after a prior gift in favour of a class and the prior gift fails. To make this clear section 16 has been amended by the addition of the words "an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class" before the words "any interest."

(d) *Strode v. Russell* (1707) 2 Vern. 621, 23 E. R. 1008.

(e) *Ram Nawaz v. Nankoo*, A. I. R. (1926) All. 283.

(f) *Sewdayal v. Official Trustee of Bengal* (1931) 58 Cal. 768.

(g) (1817) 2 Mer. 363, 35 E. R. 979; *Advocate General v. Karmali* (1905) 29 Bom. 133.

Subsequent limitation.—The rule in the section which is one of construction enacts that if a subsequent limitation depends upon a prior estate which is void the subsequent limitation must fall together with it (*h*). The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exercised, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation. For further notes refer to notes on section 14 under the caption "Limitation following a limitation void."

Invalid power of appointment.—It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid but limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities (*i*).

Independent and alternative limitations.—If a subsequent limitation is not dependent upon the other it might then take place notwithstanding the first was bad. If a limitation is made dependent on the happening of either of two events one of which is too remote but the other is not it will take effect if the latter event happens (*j*). When the ultimate gift is independent of the original gift and is an alternative gift which comes into operation on an event which can be determined and fixed within the limits of the rule in sections 13 and 14 it is valid.

The invalidity of one alternative will not necessarily defeat the other (*k*).

The void alternative is disregarded (*l*).

Benefit.—This covers expenditure which does not strictly come under the heads of "maintenance" or "education" (*m*).

Indian Succession Act.—Section 116 enacts a similar rule. See the illustrations to it.

Transfer for benefit of the public.—The restriction in this section does not apply when a transfer of property is made for the benefit of the public in the advancement of religion, knowledge, commerce, help, safety or any other object beneficial to mankind (*n*).

17. (1) *Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—*

Direction for accumulation.

(a) *the life of the transferor, or*

(h) *Robinson v. Hardcastle* (1788) 2 Term. Rep. 241, 100 E. R. 131; *Palmer v. Holford* (1828) 4 Russ. 403, 38 E. R. 857; *Beard v. Westcott* (1822) 5 B. & Ald. 801, 106 E. R. 1383; *Money Penny v. Daring* (1852) 2 De G. M. & G. 145, 42 E. R. 826; *Re. Thatcher's Trust* (1859) 26 Beav. 365, 53 E. R. 939. *In re Hewell's Settlement, Hewell v. Eldridge* (1915) 1 Ch. 810; see notes of sec. 14 under the caption "Limitations following a limitation void."

(i) *Re. Abbott, Peacock v. Frigout* (1893) 1 Ch. 54.

(j) *Minter v. Wraith* (1842) 13 Sim. 52, 60 E. R.

21; *Goring v. Howard* (1848) 16 Sim. 395, 60 E. R. 926; *Watson v. Young* (1885) 28 Ch. D. 436; *Re. Davies & Kent's Contract* (1910) 2 Ch. 35; *Re. Davey, Prisk v. Mitchell* (1915) 1 Ch. 837.

(k) *Evers v. Challis* (1859) 7 H. L. Cas. 531, 11 E. R. 212.

(l) *Wilkinson v. South* (1798) 7 Term Rep. 555, 101 E. R. 1129.

(m) *Tattersall v. Peel, in re Peel* (1936) 1 Ch. 161.

(n) Sec. 18, Transfer of Property Act, IV of 1882.

S. 17 (b) *a period of eighteen years from the date of the transfer,*

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) *This section shall not affect any direction for accumulation for the purpose of—*

- (i) *the payment of the debts of the transferor or any other person taking any interest under the transfer, or*
- (ii) *the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or*
- (iii) *the preservation or maintenance of the property transferred ;*

and such direction may be made accordingly.

Changes in the Law.—The present section 17 is substituted (o) in place of the old section 18. According to the old section, accumulation for a period of one year was allowed in certain cases. This worked great hardship, because even in England a much longer period was allowed, and in certain cases restriction against accumulation was not applicable at all. According to the new section, therefore, accumulations are allowed for longer periods than was originally allowed by the old section 18 and in three cases exceptions are made permitting accumulations.

Part of the income.—The direction for accumulation may be of the whole income or part of it.

Wills.—Subject to the three exceptions enumerated, section 117 of the Indian Succession Act, XXXIX of 1925, forbids accumulation. Section 57 makes this section applicable to Hindus. Prior thereto they were governed by the Hindu Wills Act, which made applicable to them certain portions of the Indian Succession Act of 1865. Section 104 of that Act dealt with the effect of directions for accumulation contained in a will. This was omitted in the Hindu Wills Act and it therefore became necessary for the Courts to examine whether a direction to accumulate was contrary to the provisions of Hindu Law. As early as 1841, the Supreme Court of Calcutta thought it competent to a Hindu testator to provide for the accumulation of the surplus income of his estate within the limits allowed by law (p). After this

(o) See sec. 10 of Act 20 of 1929.

(p) *Soorjeemoney Dossi v. Denobundo Mullick*, 6 M. I. A. 526.

followed two other cases (*q*) which although they did not decide that a direction to accumulate was good it is clear from them that the practice of directing accumulation was of long standing and that at the time it was considered that such a direction would have effective operation. There is nothing illegal in a direction to accumulate unless it be against public policy or for an illegal object or inconsistent with Hindu Law (*r*). A direction to accumulate for the marriage expenses of the testator's son (*s*) or till a boy to be adopted attained the age of 18 (*t*) was upheld. A direction to accumulate for 99 years was held bad (*u*) but it obviously offended the rule against perpetuities and so a direction which aimed at postponing the enjoyment of a presently vested interest created by the testator's will failed for repugnancy (*v*). So far the cases present no difficulty but in *Amrito Lall Dutt v. Surnomoni Dasi* (*w*), Trevelyan, J., said, "I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate." The other members of the Bench declined to express an agreement with this view. If, as the decisions above cited imply, it was within the power of a Hindu testator to direct the accumulation of property then there would seem to be no difficulty in the way of making a gift of it to a person who under the same gift may become entitled to the original corpus of the testator's property. The result of the authorities is that a direction to accumulate is not contrary to Hindu Law, for so long a time as an absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable or its course or its devolution can be directed and controlled by a testator (*x*). A direction in a will to accumulate the income till the boy to be adopted attained the age of 16 years, was not a direction to accumulate it for ever and could not be treated as infringing the law as to perpetuities (*y*).

A trust for perpetual accumulation is, however, void. A Hindu testator attempted to create a trust for accumulation for 99 years of the surplus income of his estate in the purchase of zemindaris from time to time and empowered the trustees to continue the trust after the expiration of the 99 years' term. The will contained no disposition of the beneficial interest in the zemindaris so to be purchased. The trust was held void (*z*).

A trust was held to have failed as creating a perpetuity, where a testator directed the interest to accumulate till the aggregate sum was Rs. 3 lakhs to be transferred to and divided amongst his sons and the survivors or survivor together with the descendants of such of them as may be deceased, *per stirpes* and as soon as the new accumulation arose in the hands of the trustees the same be again in like manner divided (*a*).

Mahomedan Law.—A provision for accumulation which will enure solely for the benefit of charitable purposes will not be bad as offending the rule of perpetuities. The performance of *Fateha* (distribution of alms to the poor accompanied with prayers for the welfare of the souls of deceased persons), which so far as it involves

(*q*) *Bissonauth Chunder v. Bamasoondery Dossee*, 12 M. I. A. 41; *Sonatun Bysack v. Juggul Soondree*, 8 M. I. A. 66.

(*r*) *Rajendra Lall v. Raj Coomari Debi* (1906) 34 Cal. 5.

(*s*) *Nafor Chandra v. Ratan Mala* (1910) 15 C. W. N. 66.

(*t*) *Jamnabai v. Dharsey* (1902) 4 Bom. L. R. 893.

(*u*) *Kumara Asima v. Kumara Kumar Krishna* (1868) 2 Beng. L. R. O. C. 11.

(*v*) *Bramamoyi Dasi v. Joges Chandra* (1871) 8

Beng. L. R. 400; *Mokoondo Lall v. Ganesh Chandra* (1875) 1 Cal. 104.

(*w*) (1898) 25 Cal. 662.

(*x*) *Watkins v. The Administrator General of Bengal* (1920) 47 Cal. 88.

(*y*) *Jamnabai v. Dharsey Takersey* (1902) 4 Bom. L. R. 893; *Amrito Lall v. Surnomoyee*, 24 Cal. 589, followed.

(*z*) *Kumari Asima v. Kumara Kumar Krishna* (1869) 2 Beng. L. R. O. C. 11.

(*a*) *Krishnaramani v. Ananda Krishna* (1869) 4 Beng. L. R. O. C. 231.

- S. 17 the expenditure of any money consists in feeding the poor, is a valid object of *wakf* (b). It is, however, competent for a Mahomedan to create a trust in perpetuity under the Wakf Act, VI of 1913.

Principle of the section.—This section is framed on the lines of English Law now consolidated in sections 164-166 of the Law of Property Act 1925 (c) which re-enacts with certain alterations, the Accumulation Act of 1800 known as the Thellusson Act (d), which is not an enabling but a disabling Act. Prior to the passing of that Act an accumulation could be directed for any period provided it did not violate the perpetuity rule. The section has been enacted to restrict accumulation and to prevent settlors from taking full advantage of the liberty which they had to tie up property for successive lives. It only permits accumulation in respect of two periods, viz., life of the transferor and an alternative period of 18 years from the date of the transfer. A transferor may direct accumulation for the life of himself or 18 years from date of transfer, whichever be the longer of the two. He is not bound to mention only one of the two periods, which are alternative and not cumulative. It also permits accumulation as to three objects which are specified in sub-section (2), viz., (a) payment of debts of the transferor or person taking interest under the transfer, or (b) provisions for raising portions for children or remoter issue of the transferor or any of the other person taking an interest in the transfer, or (c) preservation or maintenance of the property transferred.

Void to what extent.—The effect of an invalid provision is to render void accumulation which exceeds the longer of the two statutory periods. In the event of a direction for accumulation exceeding the longer of the two statutory limits, the accumulation for the entire period is not void but only so far as it infringes the period allowed by the statute.

Illustrations.

(a) A settlor by deed directs accumulation for 25 years and himself lives for 40 years, from the date of the transfer. The accumulation for 25 years is good.

(b) A settlor directs accumulation for 25 years and lives for 17 years. The accumulation for 18 years is good.

(c) A transferred stock to trustees with a direction to accumulate the dividends during the joint lives of M. and N. The direction is good for so much only of the joint lives as expired between the date of the deed and A.'s death. *Re. Rosslyn's (Lady) Trust* (1848) 16 Sim. 391, 60 E. R. 925.

The property and the income thereof shall be disposed of.—In the event of the accumulation being directed for a period longer than either of the two permitted limits the accumulation will be allowed till the longer of the two periods permitted by the section expires and at the determination of such period the property and the income shall be disposed of as directed on the expiration of the accumulated period.

Illustration.

A settles property in trust for B and directs it to be delivered to the latter with the accumulated income at the end of 25 years. A dies five years after the settlement, the property shall be delivered to B with the accumulated income at the end of 18 years from the date of the instrument.

Life estate.—The restrictions as to accumulation imposed by the section relate to all classes of interest created by deed. If an interest is given to a person for

(b) *Ramanadham v. Vada Leuva* (1911) 34 Mad. 12.

(c) 15 Geo. V. C. 20.
(d) 39 and 40 Geo. 111, C. 98.

life no accumulation of income of the whole or part which infringes the rule laid in the section will be permitted. The section does not recognize any accumulation being made other than for the three objects excepted as also during the two periods permitted. The words "transfer of property" used in the section are defined by section 5 to mean an act by which property is conveyed by a living person in present or in future to one or more other living persons, or to himself, or to himself and one or more living persons. This definition is wide enough to cover trusts and settlements so that a person obtaining a life estate under a settlement would be included in section 17.

At the end of the last mentioned period.—These words refer to the words of the section immediately preceding them, viz., "the longer of the aforesaid periods."

Effect of an invalid direction.—In case of an absolute gift a trust for accumulation which exceeds the prescribed period is rejected as to the excess and the gift takes effect free from such excess (e). When the primary gift is not absolute the effect is not to accelerate the interest of those who take subject to such trusts (f). If a trust for accumulation has been allowed to continue after the statutory period for accumulation there would be a resulting trust of the income arising during the forbidden period in favour of the settlor and if he be dead it will revert to his estate (g).

Exceptions within certain limited periods.—The section deals with restrictions as to accumulation but provides two periods during which and three objects for which a condition as to accumulation shall be held valid. With regard to the periods, the section first contemplates the case of a man who settles property otherwise than by will, in which case he may direct that the rents and profits be accumulated during his life. The settlor cannot direct an accumulation during his life and some further period. The second of the two periods contemplates an accumulation which is to commence from the date of the settlement and to last for a period of 18 years thereafter. No such accumulation is to go on for more than 18 years. The two periods are alternative and not cumulative. The settlor can select one of the two and not attempt to add one to the other so that the accumulations cannot be permitted to be endured during both the periods (h). Therefore when one period has been applied and exhausted a second period cannot be applied in order to extend the time for accumulation (i).

Exception from statutory restrictions :—

Payment of debt—

- (a) of the transferor, or
- (b) any other person taking any interest under the transfer.

The provision of portions—

- (a) For children or remoter issue of the transferor.
- (b) For children or remoter issue of any person taking any interest under the transfer.

Preservation or maintenance—

- (a) of the property transferred.

(e) *Trickey v. Trickey* (1832) 3 My. & K. 560, 40 E. R. 213; *Combe v. Hughes* (1865) 34 L. J. Ch. 344, 46 E. R. 531.
 (f) *Nettleton v. Stephenson* (1849) 18 L. J. Ch. 191, 64 E. R. 518; *Green v. Goscoyne* (1865) 34 L. J. Ch. 268, 46 E. R. 1038.

(g) *Re. Rosslyn's (Lady) Trust* (1848) 13 Jur. 27, 60 E. R. 925.
 (h) *Wilson v. Wilson* (1851) 20 L. J. Ch. 365, 61 E. R. 111.
 (i) *Jagger v. Jagger* (1883) 25 Ch. D. 729.

S. 17

Debts within the exception.—Debts may be secured (*j*) or unsecured, may be present, future or contingent (*k*), may be due by the transferor or a stranger (*l*), but the exception will not include a provision for accumulating income to recoup capital applied in discharge of a debt (*m*). A trust for payment of debts unlimited in duration is not void (*n*). The provision for payment of debts must be *bona fide* (*o*). After debts are satisfied the accumulation can only be for the statutory periods and subject to the statutory restrictions.

Portions for children.—These are within the exception to the prohibition against accumulation. A portion means a sum of money secured to a child out of property, out of the income of which, a provision is made for the parent (*p*). They are not restricted to children in existence but include remoter issue who may be children coming into existence afterwards (*q*). It includes portions directed to be raised by an instrument other than the trust which contains a clause for accumulation (*r*). The law as to accumulation in England prior to its repeal by the Law of Property Act, 1925, was the Accumulation Act, 1800, known as the Thelluson Act.

Preservation or maintenance of the property transferred.—This exception provides for the accumulation of income in respect of the maintenance or preservation of the property which forms the subject-matter of the transfer. This is commonly found in trusts and settlements of immoveable properties where the settlor makes a provision that a certain definite proportion of the income should be allowed to accumulate as a reserve fund for the purpose of repairing the property should occasion arise. The rule which prevents accumulation beyond the two permitted limits does not apply to such a case. The provision, however, must be made for repairs, that is, keeping up the property in good and tenantable condition, commonly known as the sinking fund. A direction to lay out money for building houses on the land would be within the section whilst improvements which in substance could be regarded as "maintaining in good habitable repair houses and tenements on the property would be outside the accumulation clause" (*s*). The provision must be in respect of the property transferred.

Transfer of property for benefit of the public.—Transfers of property for the benefit of the public in the advancement of religion, knowledge, common health, safety, or any other object beneficial to mankind are not within the restrictions imposed by this section (*t*). The meaning of public purposes is wider than charitable purposes.

Savings out of income.—Savings out of income are not within the operation of the section and therefore trustees are not prevented by reason of this section from making accumulations on savings (*u*).

Presumed intention of the Act.—It must not, however, be supposed that the Act prevents accumulation during minority or the respective minorities of bene-

- (*j*) *Bacon v. Proctor* (1822) Turn & R. 31, 37 E. R. 1005; *Baleman v. Holchkin* (1847) 10 Beav. 426, 50 E. R. 646.
 (*k*) *Varlo v. Faden*, (1859) 6 Jur. N. S. 257, 45 E. R. 339; *Re. Hurlbatt*, *Hurlbatt v. Hurlbatt* (1910) 2 Ch. 553.
 (*l*) *Barrington v. Liddell* (1852) 17 Jur. 241, 42 E. R. 958.
 (*m*) *Re. Heathcote*, *Heathcote v. Trench* (1904) 1 Ch. 826.
 (*n*) *Baleman v. Holchkin* (1847) 10 Beav. 426, 50 E. R. 646.
 (*o*) *Mathews v. Keble* (1868) 3 Ch. 691.
 (*p*) *Jones v. Maggs* (1852) 9 Har. L. 48 E. R.

654.
 (*q*) *Beech v. St. Vincent (Lord)* (1850) 19 L. J. Ch. 130, 64 E. R. 658; *In re. Stevens*, *Kilby v. Betts* (1904) 1 Ch. 322.
 (*r*) *Bourne v. Buckton* (1851) 21 L. J. Ch. 193, 61 E. R. 275; *Beech v. St. Vincent (Lord)* (1850) 19 L. J. Ch. 130, 64 E. R. 658.
 (*s*) *Vine v. Raleigh* (1891) 2 Ch. 13; *Re. Gardiner*, *Gardiner v. Smith* (1901) 1 Ch. 697; *Re. Mason*, *Mason v. Mason* (1891) 3 Ch. 467.
 (*t*) See sec. 18 of the Transfer of Property Act.
 (*u*) *Lindsay's Trustees* (1911) S. C. 584; sec. 41, Indian Trusts Act, 1882; see *Tattersall v. Peel*, *in re. Peel* (1936) 1 Ch. 161.

ficiaries under the settlement or even successive accumulations, for instance, accumulation during the life of the transferor and thereafter for the benefit of the child during minority may be made. Here there are successive accumulations to be made of what practically, if not theoretically, is the same fund, which accumulations taken together may last a considerable time. These periods may when added together amount to considerable time yet the periods in question are not really within the vice against which the Act is directed. A settlement may be made directing accumulation during the life of the transferor and thereafter a life-interest may be given to a child. In such a case the life of the transferor may lengthen out for more than 50 years at the end of which a child may be born who may not attain majority till 21 years after the settlor's death and therefore accumulation would go on for 71 years. When a beneficiary is of full age a trust for accumulation operates to postpone his enjoyment, but in the case of an infant his inability to give a receipt would in any case postpone his enjoyment during his minority. A man may direct a settlement of property upon A. for life and after his death upon his children on attaining 18 years and if he goes on to provide that during the minority or respective minorities of his children the income of the property shall be accumulated, it is only a clause in common form the validity of which has never been doubted (*v*). The restrictions apply to a lunatic (*w*).

Instances where the section does not apply.—The section does not apply to a direction to keep up a policy on foot (*x*), or to property situate in foreign lands to which the Act does not apply (*y*), or when funds are settled by a foreign settlement (*z*), or where the settlor is domiciled in a foreign land to which the Act does not apply, though he settles a fund in the land to which the Act applies (*a*) or to savings of income.

Law of Property Act, 1925.—Section 164 runs as under:—

(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:—

- (a) the life of the grantor or settlor; or
- (b) a term of 21 years from the death of the grantor, settlor or testator; or
- (c) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator; or
- (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void and the income of the property directed to be accumulated shall, so long as the same is directed to be

(*v*) *Tench v. Cheese* (1855) 6 De G. M. & G. 453, 43 E. R. 1309; see sec. 41 of the Indian Trusts Act II of 1882; sec. 42, Conveyancing and Law of Property Act, 44 and 45 Vic. c. 41.

(*w*) *Mathews v. Keble* (1868) 3 Ch. App. 691.

(*x*) *Bassil v. Lister* (1851) 9 Hare, 177, 68 E. R. 464; *Re. Vaughan, Halford v. Close* (1883)

W. N. 89; *Vine v. Raleigh* (1891) 2 Ch. 13; *Re. Gardiner, Gardiner v. Smith* (1901) 1 Ch. 697.

(*y*) *Ellis v. Marcell* (1849) 12 Beav. 104, 50 E. R. 1000.

(*z*) *Heywood v. Heywood* (1800) 29 Beav. 9, 54 E. R. 527.

(*a*) *Haldane v. Eckford* (1871) 24 L.T. 934.

Ss. 17-18

accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

(2) This section does not extend to any provision—

(i) for payment of the debts of any grantor, settlor, testator or other person

(ii) for raising portions for—

(a) any child, children or remoter issue of any grantor, settlor or testator ; or

(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited ;

(iii) respecting the accumulation of the produce of timber or wood ; and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

(3) The restrictions imposed by this section apply to instruments made on or after the twenty-eighth day of July eighteen hundred, but in the case of wills only where the testator was living and was of testamentary capacity after the end of one year from that date.

In case of direction for excessive accumulation the law is different in India and in England. Suppose A. makes a settlement of his property directing accumulation for 100 years and dies at the end of 19 years after the date of settlement. In such a case the accumulation would be good for the life of the transferor which is the longer of the two periods permitted by the section. On death of the settlor, "which would be the end of the last mentioned period," the property and the income, according to the section, is to be disposed of as if the 100 years during which the accumulation had been directed had elapsed. Now under the English Act, section 164, a direction contrary to the four periods permitted therein is altogether void. Further, the Indian Act provides that at the end of 19 years the property and the income shall be disposed of as if the period had elapsed.

Sections 14 and 17.—Except within certain limits specified, both sections aim against tying up in perpetuity, the one, of lands, and the other, of the income arising therefrom.

18. The restrictions in sections 14, 16 and 17 shall not apply *in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.*

Transfer in perpetuity
for benefit of public.

Changes in the section.—Mention of section 15 has been omitted and section 17 has been added. Reference to section 15 has been omitted both from the present section as well as section 16 in view of the fact that as amended it no longer provides the case of a failure of a transfer. Section 17 has been added as restrictions as to accumulation are not to be applicable to charities. It has already been pointed out that in India, although infringing the rule against perpetuities, Hindu and Mahomedan religious endowments have been upheld (b).

(b) *Rajendra Lall v. Raj Coomari* (1907) 34 Cal. 5; *Ramanadham v. Vada Levvai* (1911)

34 Mad. 12; *Sarojini v. Gnanendra* (1916) 23 C. L. J. 241.

Private charities.—The section does not apply to charities in which the public are not interested.

Resulting trust.—Section 83 of the Indian Trusts Act (II of 1882) enacts “where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee in the absence of a direction to the contrary, must hold the trust-property or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.”

Illustration (c) to the section is as follows :—

(c) A conveys land to B upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.

Indian Succession Act.—Section 118 of this Act, while controlling bequests to religious or charitable uses enumerates, by way of illustrations, the following examples of religious or charitable uses: (1) relief of poor people, (2) maintenance of sick soldiers, (3) erection or support of a hospital, (4) education and preferment of orphans, (5) support of scholars, (6) erection or support of a school, (7) building and repairs of a bridge, (8) making of roads, (9) erection or support of a church, (10) repairs of a church, (11) benefit of ministers of religion, (12) formation or support of a public garden.

Charity.—The purposes mentioned in the section are charitable purposes or objects for the public benefit. The word “charity” is not defined by the Act but it must be understood in the sense in which lexicographers use it and not in any way connoting anything which English lawyers understand by that term. The English cases upon the technical meaning of the word “charity” are no guide nor are we concerned with the preamble of the English Statute, 43 Eliz., c. 4.

In England, under the Statute 43 Eliz., c. 4, the word “charitable” has a specific meaning much wider than its natural signification, and the statute may be referred to for the definition of what is “charitable.” In order to ascertain what are charitable purposes, recourse is usually had to the preamble of the Statute 43 Eliz., c. 4, which preamble has been reproduced in the Mortmain and Charitable Uses Act (1888) (51 and 52 Vict. c. 42), though the latter enactment otherwise repeals the former. In *Commissioners for Special Purposes of Income-tax v. Pemsel* (c), it was held that the word “charity” is by no means limited to the exact forms of it enumerated in the Statute of Elizabeth and that in its legal sense it comprises four principal divisions, viz :

- (1) trust for the relief of poverty ;
- (2) trust for the advancement of education ;
- (3) trust for advancement of religion ; and
- (4) trust for other purposes beneficial to the community not falling under any of the preceding heads.

But in India there is no such statute and it must not be assumed that the word “charitable” in both countries represents the same category of interests.

S. 18

"Such charitable or public purposes as my trustee thinks proper."—Such a direction, by the House of Lords, has been held as void for uncertainty (*d*). It is in effect giving someone else power to make a will for him instead of making a will for himself. The Bombay High Court has held that a gift by will of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable (*e*), following *Moggridge v. Thackwell* (*f*), in which it was held that where the execution is to be by a trustee with general or some objects pointed out there, the Court will take the administration of the trust. The Court of the Judicial Commissioner of Nagpur has held such a bequest void (*g*).

Christians.—It has been held that a devise for the support of hospitals by an Englishman was a valid devise and one to which the Court would give effect as being a charitable trust within the scope of 43 Eliz., c. 4. The Statutes of Mortmain not being applicable to India, the Court will carry out such a trust when the subject is immoveable property just as it would if it had been personal property (*h*). In British India a bequest for a purpose which is charitable within the meaning of that term in English is valid and the Indian Trusts Act, 1882, will apply to it. But if it is a devise in the alternative for purposes which are not charitable though benevolent or philanthropic then it is void (*i*).

Hindus.—Under Hindu Law, even prior to the Amending Act of 1929, if there was a valid dedication for religious purposes it was not invalid because it transgressed the rule forbidding the creation of perpetuities. A Hindu idol is capable of being endowed with property and no express words of gift to such idol in the shape of trust or otherwise are required to create a valid dedication (*j*). The establishment of an image and the worship of a Hindu deity are valid charitable objects (*k*). A direction to spend the income in feeding poor indigent Hindus is valid (*l*).

So also a trust for the performance of ceremonies and giving feast to Brahmins is valid (*m*).

The establishment and maintenance of a *sadavarat*, the building of a well and cistern for animals to drink water from, have been held to be charitable objects (*n*).

A direction for distribution of an ascertained sum amongst poor relatives, dependents and servants as also a gift to a University, are valid charitable objects (*o*).

Where there was a Hindu temple with *dharماسala* and *sadavarat* attached to it and the surplus funds not required for the service of the temple were to be applied for feeding travellers and maintaining a *sadavarat*, it was held that the intention of the founder was to devote the property to public religious and charitable purposes (*p*).

To feed the really needy and poor, to spend for the annual *sraddhas* or anniversaries of the father, mother and grandfather, the feeding of Brahmins, expenditure for marriage of daughters of poor and of the poor Brahmins and towards the education of the sons of the poor as the trustee shall think fit, are valid charitable purposes (*q*).

(*d*) *Grimond v. Grimond* (1905) A. C. 124; *Blair v. Duncan* (1902) A. C. 37.
 (*e*) *Smith v. Massey* (1906) 30 Bom. 500.
 (*f*) (1803) 7 Ves. 36, 32 E. R. 15.
 (*g*) *Elkins v. Cullen* (1917) 13 N. L. R. 51.
 (*h*) *Broughton v. Mercer* (1875) 14 Beng. L. R. 442.
 (*i*) *Elkins v. Cullen* (1917) 13 N. L. R. 51.
 (*j*) *Bhuggobutty v. Gooroo Prosonno* (1898) 25 Cal. 112; *Manohar v. Lakhmiram* (1887) 12 Bom. 247.

(*k*) *Bhupati v. Ram Lal* (1910) 37 Cal. 128.
 (*l*) *Rajendra Lall v. Raj Coomari* (1907) 34 Cal. 5.
 (*m*) *Lakshmishankar v. Vaijinath* (1882) 6 Bom. 24.
 (*n*) *Jamnabai v. Khimji Vullubdass* (1890) 14 Bom. 1.
 (*o*) *Manorama v. Kali Charan* (1904) 31 Cal. 166.
 (*p*) *Jugalkishore v. Lakshmandas* (1899) 23 Bom. 659.
 (*q*) *Dwarkanath v. Burroda* (1879) 4 Cal. 443.

Giving of alms for the testator's spiritual benefit is void for uncertainty (r).

Trust for the performance of *Durga* and *Lakshmi Pujahs* are valid (s).

Gifts to hospitals are valid. The institution to be benefited need not be a corporate body. It is sufficient if there be some responsible authority charged with the general administration of the funds of the institution (t). A bequest for feeding Brahmins on the day following the night of *Sivratni* is valid (u). Offerings by followers of the Radha Swami religion to the spiritual head do not constitute a charitable trust (v).

Mahomedans.—Transfers by a Mahomedan for the benefit of the public are governed by the Mussalman Wakf Validating Act, VI of 1913, made to operate retrospectively by Act 32 of 1930. The application of the rule in this section is excluded by section 2 of the present Act. As *wakfs*, transfers for the following purposes have been held valid religious and charitable purposes or objects.—*Fateha* and *kadam sharif* (w), the celebration of the birth of Ali Murtaza, the expenses of keeping *tazias* in the month of Muharram, the anniversaries of the deaths of members of the *waqif's* family and the expenses for repairs of *imambara* (x), the expenses of the annual *fateha* of the *waqif*, of her husband and members of her family, the annual expenses of burning lamps in a mosque and the salary of *hafiz* and readers of Koran (y).

A trust for the benefit of the poor for aiding pilgrimages and marriages, and for the support of wells and temples are charitable objects (z).

Dedication for the upkeep of and other ceremonies at a private tomb is not valid, it being neither religious nor charitable (a), unless it has relation to shrines and tombs of great religious teachers and saints (b), nor is the reciting of Koran over the tomb of a private person (c).

Parsis.—Trusts and bequests of lands or money—for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing *muktd*, *baj*, *vejushni* and other like ceremonies, are valid "charitable" bequests (d).

Trust for 'masses.'—In England these trusts were at one time held bad under the effect given to the Statute of Edward VI and on general grounds of public policy as being superstitious. The question whether or not this was part of the law brought by the English into India was answered in the negative as to Hindus in *Advocate General v. Vishvanath* (e), as regards Christians in *Andrews v. Joakim* (f), and as to Armenians in *Colgan v. Administrator General of Madras* (g).

A recent decision of the English Court has held that a gift for the saying of masses is charitable as being for the advancement of religion, (1) because it enables a ritual act to be performed which is the central act of religion of a large proportion

(r) *Joseph Ezekiel v. Aaron Hye* (1870) 5 Beng. L. R. 433.

(s) *Prafulla Chunder Mullick v. Jogendra Nath Sreemany* (1905) 9 C. W. N. 528.

(t) *Fanindra Kumar v. The Administrator General of Bengal* (1901) 6 C. W. N. 321.

(u) *Kedar Nath v. Atul Krishna* (1908) 12 C. W. N. 1083.

(v) *Chhotabhai v. Jnan Chandra* (1935) 57 All. 330.

(w) *Phul Chand v. Akbar Yar Khan* (1897) 19 All. 211; *Ramanandan v. Vada Levvai* (1917) 40 Mad. 116, 44 I. A. 21.

(x) *Biba Jan v. Kalb Husain* (1909) 31 All. 136.

(y) *Mazhar Husain Khan v. Abdul Hadi Khan* (1911) 33 All. 400.

(z) *Fatmabibi v. The Advocate General of Bombay* (1882) 6 Bom. 42.

(a) *Kaleloola v. Nuseerudeen* (1895) 18 Mad. 201; *Zooleka Bibi v. Syed Zynul* (1904) 6 Bom. L. R. 1058.

(b) *Zooleka Bibi v. Syed Zynul* (1904) 6 Bom. L. R. 1058; *Kaleloola v. Nuseerudeen* (1895) 18 Mad. 201.

(c) *Kunhamuthy v. Ahmad* (1935) 58 Mad. 204.

(d) *Jamshedji v. Soonabai* (1909) 33 Bom. 122; *Limji Nowroji v. Bapooji Ruttonji* (1887) 11 Bom. 441, dissented from.

(e) (1870) 1 Bom. H. C. R. App. p. 9.

(f) (1869) 2 Beng. L. R. 148.

(g) (1892) 15 Mad. 424.

- S. 18 of Christian people, and (2) because it assists in the endowment of priests whose duty it is to perform the act (h).

Idol, not moveable property.—There may be purposes for which an idol, considered with reference to the material substance of which it is composed, may be regarded as moveable property. But an image considered as a legal or spiritual entity cannot properly be said to be the subject of gift (i).

Dharam.—A gift to *dharam* is void (j). The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control (k). The law on this point is the same in the mofussil as in the Presidency towns (l).

Kherat.—The word *kherat* is used by Mahomedans as *dharam* is used by Hindus as expressing alms or charity. Cases are met with where Mahomedans have used the words *dharam* and *kherat* together, which may be construed as a composite phrase. But these words are synonyms, one derived from the Sanskrit and the other from the Arabic, the former probably due to Hindu ancestry, the latter to Islamic religion. It cannot, however, be said that the vagueness of the word *dharam* is clarified by its conjunction with the more definite term *kherat*; for it might with equal justice be said that the definiteness of the word *kherat* is obscured by the word *dharam* nor is it easy to concede that *kherat* is a definite term. A bequest so made was considered void for uncertainty by the Bombay High Court (Crump, J.,) where the parties were Borahs (m), but a bequest for *dharma-kriya* was held valid by Mirza, J., where the parties were Cutchi Memons (n).

Limitation over of property from one charity to another.—A contingent limitation over of property from one charity to another is not within the principles of the rule against perpetuities because a valid perpetuity is created by the first gift and so the gift over on an event beyond the limit of perpetuities cannot tend to make the property more inalienable. That is to say, a gift to a charity for charitable purposes with a gift over on an event which may be beyond ordinary limits of perpetuities by another charity is not illegal (o). The exception to the rule of perpetuities in favour of a charitable bequest as laid down in *Christ's Hospital v. Grainger* (p) not having been embodied in section 114 of the Indian Succession Act, the Calcutta High Court did not apply that decision to this country (q). That case was of a will. There is nothing in the Indian Succession Act corresponding to section 18 of the Transfer of Property Act and it is submitted that a case under this section would be decided on the lines of *Christ's Hospital v. Grainger* (p).

Cy-pres doctrine.—The preponderance of authority is for the proposition that this doctrine is applicable in wills and not in deeds. Between the applicability of the *cy-pres* doctrine and the failure of a charitable trust for the non-satisfaction of a condition precedent, the distinction is that in the former there is the breakdown of the machinery required to carry out a validly-created charitable trust and in the

(h) *In re Caus, Lindeboom v. Camille* (1934) 1 Ch. 162; *West v. Shuttleworth* (1835) 2 Myl. & K. 684, 39 E. R. 1106 and *Heath v. Chapman* (1854) 2 Drew 417, 61 E. R. 781 dissented from.

(i) *Pradyumna Kumar v. Pramatha Nath*, A. I. R. (1923) Cal. 708.

(j) *Morarji v. Nenbai* (1893) 17 Bom. 351; *Devshankar v. Motiram* (1894) 18 Bom. 136; *Runchordas v. Parvatibai* (1899) 23 Bom. 725, 26 I. A. 71; *Parthasarathy v. Thiruvengada* (1907) 30 Mad. 340.

(k) *Runchordas v. Parvatibai* (1899) 23 Bom. 725, 26 I. A. 71; *Morice v. The Bishop*

of *Durham* (1805) 10 Ves. 522, followed 32 E. R. 947.

(l) *Devshankar v. Motiram* (1894) 18 Bom. 135.

(m) *Mariambai v. Fatmabai* (1929) 31 Bom. L. R. 135.

(n) *Abdulsakur v. Abubakkar* (1930) 32 Bom. L. R. 215.

(o) *Christ's Hospital v. Grainger*, 1 Mac. & G. 460, 41 E. R. 1343; *In re Tyler, Tyler v. Tyler* (1891) 3 Ch. 253.

(p) 1 Mac. & G. 460, 41 E. R. 1343.

(q) *Jones v. The Administrator General of Bengal* (1919) 46 Cal. 485.

latter there is the initial failure of the conditions essential to bring the trust into existence (r).

Ss. 18.

Language and religion.—A Division Bench of the Madras High Court, while differing as to whether a trust for the spread of the Sanskrit language was void or not, held that a trust for the spread of the Hindu religion was void for uncertainty of its object (s).

Superstitious uses.—The English Law relating to superstitious uses does not apply in India (t).

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith, or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen, the interest shall pass to another person.

The section.—On a transfer of property—an interest is said to be vested when

- (1) no time is specified as to when it is to take effect, or
- (2) according to the terms thereof it is to take effect immediately, or
- (3) it is to take effect on the happening of an event which must happen.

Possession.—Death of transferee before possession does not divest a vested interest.

Presumption.—There is no presumption against a vested interest by reason of

- (a) the enjoyment having been postponed to a future date, or
- (b) a prior interest is given or reserved to another in the same property, or
- (c) income is to be accumulated till arrival of the date of enjoyment, or
- (d) the interest is to pass to another on the happening of a particular event.

Construction.—Sections 19 to 34 relate to rules of construction.

(r) *Santana Ray v. The Advocate General of Bengal* (1921) 48 Cal. 124.
 (s) *Venkatanarasimha v. Subba Rao* (1923) 46 Mad. 300.

(t) *Khusalchand v. Mahadevgiri* (1875) 12 B. H. C. 214; *The Advocate General v. Vishvanath* (1870) 1 Bom. H. C. App. 9; *Joseph Ezekiel v. Aaron Hye* (1870) 5 Beng. L. R. 433.

S. 19

Time limit for vesting.—The law is always in favour of construction which vests the estate absolutely and indefeasibly at the earliest moment (*u*).

According to the section, unless a contrary intention appears from the terms of the transfer, an interest therein vests immediately when created in favour of a person :

- (a) without specifying the time when it is to take effect, or
- (b) in terms specifying that it is to take effect forthwith, or
- (c) on the happening of an event which must happen.

If a bequest is to a person for life and after his death to his children the vesting is not postponed to the death of the life tenant (*v*).

When in doubt.—In case of doubt the Court leans to that construction which leads to an early vesting (*w*).

Vest; vested.—An estate or interest may vest either in possession or in interest. When it gives a present right to immediate enjoyment or possession it is said to be vested in possession. It is said to be vested in interest when it gives a present right to future possession or enjoyment.

Illustration.

A trust is made for A for life and after his death to B absolutely. A's estate is vested in possession and B's in interest. If B dies before obtaining possession the estate passes to his representatives. The word "vested" *prima facie* means vested in interest, but by force of a context it may have a different meaning such as "vested in possession" or "indefeasibly vested" (*x*). It means "come into possession" and not "accrue in point of interest" (*y*).

Words.—Words of futurity when introduced in a deed of transfer raise the question whether the enjoyment and possession of the estate are deferred or merely the vesting is postponed.

The words "to hold for the use and benefit of" the son or sons strongly support an immediate vesting of the interest. The words "to be made over" are more consistent with the postponement of the vesting in possession of that which is vested in interest, than with the postponement of the vesting in interest itself as is implied by such words as "to be transferred" (*z*). As to the words "on his attaining" and "when" or "if" he shall attain "twenty-three" or "at twenty-three" there is no difference. All equally import contingency when they are contained in the gift itself and are uncontrolled by other portions of the deed (*a*). The expression "after his death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests. But if the bequest is to such children as may survive the testator or be living at his death, then the condition of surviving or being alive on his death would be a condition precedent to the vesting and no child that does not survive will acquire a vested interest (*b*). In considering the vesting of estate under a bequest the Judicial Committee held that the vesting of the estate in the son was

(u) *Hervey-Bathurst v. Stanley* (1876) 4 Ch. D. 251; *Re, Merrick's Trust* (1866) 35 L. J. Ch. 418

(v) *Adams v. Gray*, A. I. R. (1925) Mad. 599; *Maitland v. Charlie* (1822) 6 Mad. 243, 58 E. R. 1084.

(w) *Brocklebank v. Johnson* (1855) 25 L. J. Ch. 505, 52 E. R. 581.

(x) *Re. Stevens, Clarke v. Stevens* (1896) 40 Sol.

Jo. 296.

(y) *Richardson v. Robertson* (1862) 6 L. T. 75.
(z) *Sewdayal v. The Official Trustee of Bengal* (1931) 58 Cal. 768.

(a) *In re Francis Francis, v. Francis* (1905) 2 Ch. 295.

(b) *Adams v. Gray*, A. I. R. (1925) Mad. 599; *Halifax v. Wilson* (1809) 16 Ves. 168, 33 E. R. 947.

not suspended by the direction that the estate should remain in the hands of the executor, who should "make over the share" of each on his attaining twenty-one years; those words merely pointed to the possession and enjoyment of the shares, which had already been vested (c).

Statutory vesting.—The word 'vest' is used specially to denote a transfer under a statute. Notable instances are—under the Presidency Towns Insolvency Act, III of 1909 (d), on a person being adjudicated insolvent his property vests in the Official Assignee—so also under various provisions of Trustees Act, XXVII of 1866, the Trustees and Mortgagees Powers Act, XXVIII of 1866, the Indian Succession Act, 1925 (e), the Code of Civil Procedure in case of trustees of public charities (f) and sale of moveable property by the Court (g).

Limitation Act, 1908.—The words "vested in trust" are used in section 10 of the Indian Limitation Act. It has been held while transfer of proprietary rights is not intended, mere transference of management or control is not enough to satisfy the requirements of "vesting" as contemplated by this section: a right to call for a transfer and to possess the property for the purpose of the trust and also the power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the "vesting" (h).

Indian Succession Act, 1925.—Section 119 is the vesting section as to wills. There are a number of illustrations to this section, but it is doubtful how far, if at all, it is permissible to refer to illustrations in one statute for the purpose of construing another in similar terms.

Contrary intention.—The explanation to the section illustrates what is not a contrary intention. There is no definition in the Act of "convey" or of "property" but it is to be noticed that a transfer under section 5 of the Act means a conveyance of property not only in the present but also in future (i). The explanation to the section gives examples of vested interests which import a contingency.

Transferee's representatives.—On death of a transferee whose interest in property has vested, his representatives are entitled to the same. This is exemplified by illustration (i) to section 119 of the Indian Succession Act, 1925. And according to the present section a vested interest is not defeated by the death of the transferee before he obtains possession.

Enjoyment of interest postponed.—The explanation to the section deals with certain rules of presumption, one of them being that an inference should not be drawn against the vesting of interest by reason of a provision in the instrument whereby the enjoyment of the interest is deferred. A similar provision is added in the explanation to section 119 of the Indian Succession Act, 1925, which is explained by illustration (ii) as follows:—

A bequeaths to B Rs. 100 to be paid to him upon his attaining the age of 18 years. Upon A's death the legacy becomes vested in B.

A testator died in 1896 bequeathing his property, with the exception of an annuity to his wife and some other specific legacies, to his only son who had attained his majority at the date of his father's death, subject to restriction that he should not be allowed to enjoy it until the end of the year 1900. The Court held that the

(c) *Harris v. Brown* (1901) 28 Cal. 621.
 (d) Section 17.
 (e) Section 211.
 (f) Section 92.
 (g) O. 21 r. 81.

(h) *Bidhutibhusan v. Anwarinath* (1934) 61 Cal. 119; *Mahomed Habeeb Alum v. Anjuman Ara Begum* (1935) 62 Cal. 393.
 (i) *Sumsuddin v. Abdul Husein* (1907) 31 Bom. 165 172.

- S. 19 son took an immediate vested interest in the estate of the testator and the condition restricting his immediate enjoyment was repugnant and thus invalid (j). Reference was made to *Hanson v. Graham* (k) in which case the subject of immediate gifts postponing enjoyment and gifts postponed to or contingent on the donee attaining a certain age has been discussed.

The rule under which the Courts will set aside or disregard conditions or restrictions as repugnant to a previous gift is well recognized in England and is thus stated by Lindley, L.J., in the case of *Harbin v. Masterman* (l). Now notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void and may consequently be disregarded. This doctrine underlies the rule laid down in *Saunders v. Vautier* (m) and enunciated with great clearness by Vice-Chancellor Wood in *Gosling v. Gosling* (n) and in *Weatherall v. Thornbough* (o) by Lord Justice James. The Judicial Committee of the Privy Council in *Harris v. Brown* (p) held that the vesting was not suspended by the direction that the estate should remain with the executor who should "make over the share" of each of the sons on his attaining twenty-one years, and that these words merely pointed to the possession and enjoyment of the shares which had already vested. It must be remembered that it is within a comparatively recent period that Indian settlers and testators have adopted English modes of creating interests in their estates. The only safe course is to give to the words their plain ordinary meaning. The postponement of an adopted son's estate during the widow's life by agreement does not make the son's interest contingent, but he has a vested interest which he is entitled to deal with during the life of the adoptive mother (q). A settlor after making provision for his widow for life directed the trustee to hold the rest of the trust estate . . . for the use and benefit of the son or sons of the settlor "to be made over" to such son or sons on the attainment by him or them of the age of twenty-one years. It was held that the gift to the sons vested on the death of the tenant for life subject to a possibility of being divested in the case of sons who should fail to attain the age of twenty-one, and therefore, the gift was good (r).

A Portuguese inhabitant of Bombay by his will of 1866 devised his estate in trust to pay the dividends for the maintenance and education of his children until each of his sons should attain the age of twenty-one when his or their share was to be paid unto him or them. He further directed that whatever might remain of the moneys collected by the executors after all the sons had attained twenty-one and the daughters had married, should be distributed in equal parts between the sons and daughters that might be surviving at the time and in case any of his children should happen to die under twenty-one his or her share should be given to the survivors or survivor of them. It was held that the sons took a vested interest on attaining the age of twenty-one and that the provision which related to distribution did not divest the shares so vested (s).

A prior interest in the same property is given or reserved to some other person.—
The second rule in the explanation is that vesting is not delayed by reason of the

(j) *Lloyd v. Webb* (1896) 24 Cal. 44.
(k) (1801) 6 Ves. 239, 31 E. R. 1030.
(l) (1894) 2 Ch. Div. 184.
(m) (1841) 4 Beav. 115, 41 E. R. 482.
(n) (1859) Joh. 265, 70 E. R. 423.
(o) (1878) 8 Ch. D. 261.

(p) (1901) 28 Cal. 621.
(q) *Bakwant Singh v. Joti Prasad* (1918) 40 All. 692.
(r) *Sewdayal v. Official Trustee of Bengal* (1931) 58 Cal. 768.
(s) *De Souza v. Vaz* (1888) 12 Bom. 137.

fact that a prior interest precedes. This is illustrated by illustration (iii) of section 119 of the Indian Succession Act, 1925.

S. 19

A fund is bequeathed to A for life and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

A Hindu testator after giving his wife and his mother possession of his properties, directed that on their death the sons of his sisters should hold the properties in possession and enjoyment. It was held by the Privy Council that the sons of the testator's sisters took a vested interest in their respective shares at the testator's death though their possession and enjoyment were postponed until the deaths of the mother and widow (t). The fact that the estate was subject to partial trusts or charges did not delay vesting (u).

Direction to accumulate the income until time of enjoyment.—A gift of the interim income does not lead to the inference that there was an intention to delay the vesting. Where a legacy is directed to be paid at a particular age and the whole income is given in the meantime, that gives a present vested interest (v). There is not only a gift of the intermediate interest indicative of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate; but a positive direction to separate legacy from the estate, and to hold it upon trust for the legatee when he shall attain twenty-five (w). The practice of the English Courts in disregarding direction for postponement of the enjoyment after coming of age of the devisee is followed in this country, and consequently, where a testator by his will directed that out of the net income of the estate he should spend Rs. 500 every year for maintenance of each of his two disciples and when one of them, J., should attain the age of 30 years should give to him the net residue of his property or in case of his decease to the other disciple S., it was held that the income of the property including all income accrued since majority must be paid to J., the Official Trustee retaining the corpus until J. should attain the age of thirty years (x).

This is so under section 119 of the Indian Succession Act, 1925, as per illustration (v). A bequeaths the whole of his property to B upon trust to pay certain debts out of the income and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

Gift of interim maintenance.—Maintenance is not equivalent to "interest" for the purpose of vesting a legacy (y).

Vested subject to being divested.—These words mean that the estate when vested is defeasible on the happening of a particular event. Divesting clauses receive a strict construction, as the law does not favour divesting. The condition for divesting and the intention to divest should be clearly made out (z). The fourth rule in the explanation that where there is a provision that on the happening of a particular event, the interest shall pass to another person, does not import a

(t) *Bhagabati v. Kalicharan* (1911) 38 Cal. 468.

(u) *Cally Nath v. Chunder Nath* (1882) 8 Cal. 378; *Chunilal v. Bai Muli* (1900) 24 Bom. 420; *Lallu v. Jugmohan* (1898) 22 Bom. 409; *Jairam v. Kuverbai* (1885) 9 Bom. 491; *Badrilas v. Sundar Das*, A. I. R. (1927) Lah. 166; *Bilaso v. Munni Lal* (1911) 33 All. 558; *Ranganatha v. Mohanakrishna*, A. I. R. (1926) Mad. 645; *Subramaniam v. Subramaniam* (1882) 4 Mad. 124.

(v) *Re. Peek's Trusts* (1873) L. R. 16 Eq. 221; *Hanson v. Graham* (1801) 6 Ves. 239, 31 E. R. 1030.

(w) *Saunders v. Vautier* (1841) 4 Beav. 115, 41 E. R. 482.

(x) *Gosavi Shivagar v. Rivett-Carnac* (1889) 13 Bom. 463; *Gosling v. Gosling* (1859) Joh. 265, 70 E. R. 423 followed; *Husenbhoy v. Ahmedbhoy* (1901) 26 Bom. 319.

(y) *Pulsford v. Hunter* (1792) 3 Bro. C. C. 416, 29 E. R. 618; *Re. Martin, Tuke v. Gilbert* (1887) 57 L. T. 471; *Re. Wintle, Tucker v. Wintle* (1896) 2 Ch. 711.

(z) *De Souza v. Vaz* (1888) 12 Bom. 137; *Adams v. Gray*, A. I. R. (1925) Mad. 599.

S. 19 postponement of vesting. Similar provision is made in explanation to section 119 of the Indian Succession Act, 1925, of which illustration (vi) affords an example. A testator gave his residuary estate to trustees upon trust to invest and divide the same among the children of his brothers A and B, the share of each son to be paid on his attaining the age of twenty-one and the share of the daughter on attaining that age or previously marrying with benefit of survivorship between and among all the said sons and daughters. The testator left surviving his two brothers and a sister C. A and B both died before the eldest of the testator's nephews or nieces attained twenty-one or married. In a suit by the widow and executrix of A for a declaration that the bequests were void, it was held that the legatees took vested interests, subject to being divested on death before the contingencies in the will happened, and that the period of distribution alone was postponed and the bequests were valid (a). A bequest to A for life and afterwards to B but if he should be then dead to C and D in equal shares or the whole to survivor of them. B died in the lifetime of the tenant for life as did also C and D. Held the gift to C and D was a vested interest in them as tenants in common subject to be divested if one only should survive the tenant for life (b). And where in a compromise of a suit between two brothers for possession of immoveable property it was provided that certain property should be held by one brother for his life and afterwards should go to the second brother if he survives the first the second brother was held to have taken a vested interest (c). So where a settlor made a trust for himself and his family and after his death, directed the trustee, after making provision for a monthly payment of Rs. 30 to the widow for life, to hold the rest of the trust estate "for the use and benefit of the son or sons" of the settlor, "to be made over" to such son or sons on the attainment by him or them of the age of twenty-one years, it was held the gift to the sons vested on the death of the tenant for life, subject to a possibility of being divested in the case of sons who should fail to attain the age of twenty-one and, therefore, the gift was good (d).

Mahomedan Law.—The application of this section to Mahomedans is excepted (e). Gifts of future and limited estates resembling what we call vested remainders (f) are not recognized by the Sunni Mahomedan Law, but they are so recognized by the Shiah Law (g). The latter point is not, however, free from doubt (h). A mere *spes successionis* is unknown and not recognized (i).

Life estate and vested remainder.—Certain lands were conveyed to a trustee in trust for A during his life and on his death to convey the lands to R provided that the trustee should at any time convey the lands to R if A should so desire. Held that the right of R was a vested interest (j). On a partition between a Hindu father and his three sons the father was given a life estate in certain lands and on his death the same to be divided between his three sons in certain proportions; held the interest of the sons was a vested remainder in the land (k). Under Hanafi Law a life estate is not recognized, nor can it be created. A Sunni Mahomedan female made a will in favour of her daughter whereby she was to enjoy the property during her

(a) *Maseyk v. Fergusson* (1879) 4 Cal. 304.
 (b) *Browne v. Kenyon* (Lord) (1818) 3 Mad. 410, 56 E. R. 556; *Re. Pickeworth, Snaith v. Parkinson* (1899) 1 Ch. 642.
 (c) *Sunder Bibi v. Lal Rajendra* (1925) 47 All. 496.
 (d) *Sewdayal v. Official Trustee of Bengal* (1931) 58 Cal. 768.
 (e) Section 2, Transfer of Property Act, 1882.
 (f) *Abdul Wahid v. Nuran Bibi* (1885) 11 Cal. 597.

(g) *Banoo Begum v. Mir Abed Ali* (1908) 32. Bom. 172.
 (h) *Jainabai v. R. D. Sethna* (1910) 34 Bom. 604 (612); *Cassamally v. Currimbhoy* (1912) 36 Bom. 214 (253).
 (i) *Abdool Hoosein v. Goolam Hoosein* (1906) 30 Bom. 304.
 (j) *U. Zoe v. Ma Mya May*, A. I. R. (1930) Rang. 184.
 (k) *Raghunath v. Madhav* (1923) 25 Bom. L. R. 456.

life but was forbidden to alienate it by way of sale, mortgage, gift, etc. She further directed that on the death of the daughter her step-son and his descendants should take the property as absolute owners. The step-son having died during the lifetime of the daughter, it was held by Beaumont, C. J., that under the will the daughter did not take an absolute interest but a life-interest with remainder to the step-son but the remainder failed to take effect as he did not survive the daughter. Held by Rangnekar, J., that the grant of a life-estate to the daughter operated under Mahomedan Law as a grant of an absolute estate. Mahomedan Law does not recognize a vested remainder (l).

Where performance of an act is not a condition precedent ; the transferee takes a vested interest.—A certain person made a disposition of his property in favour of his wife by means of a will which provided that the son should get the property after performing the obsequies of the mother in whose favour the disposition was made. No provision was made in the will for the enjoyment of the property in case the son should die before performing the obsequies. Held, the condition of performing the obsequies was not a condition precedent and the son got a vested interest in the property (m).

Interest dependent on the death of present holder.—Where in a compromise suit between two brothers for possession of immoveable property it was provided that certain property should be held by one brother for his life and afterwards should go to the second brother if he survived the first, it was held that the second brother took a vested and not a contingent interest in the property so settled (n).

Transferable and attachable.—A vested interest is transferable (o) and is therefore susceptible of being attached and sold in execution of a decree (p).

Postponement of adopted son's estate during the widow's life.—An agreement depriving the adopted son of his right to take possession of the property of an adoptive father is not prohibited by law. Where such an agreement gives a life estate to the adoptive mother and the remainder to the adopted son, the latter's interest is not that of a contingent collateral Hindu reversioner, but that he has a vested interest which he is competent to deal with subject to the life estate of the mother. He is not barred by the provisions of section 6 (a) of the Transfer of Property Act of 1882 from dealing with the property (q).

Beneficiary's right to transfer of possession.—Under section 56 of the Indian Trust Act, II of 1882, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust property to him or them, or to such person as he or they may direct.

Illustrations.

(a) Certain Government securities are given to trustees upon trust to accumulate the interest until A attains the age of 24 and then to transfer the gross amount

(l) *Rasoolbibi v. Yusuf* (1933) 35 Bom. L. R. 643; *Abdul Wahid Khan v. Mussamat Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91; *Abdul Karim Khan v. Abdul Qayum Khan* (1906) 28 All. 342; *Harpal Singh v. Lakhraj Kunwar* (1908) 30 All. 406; *Abdool Hoosein v. Goolam Hoosein* (1905) 30 Bom. 304; but see *Saroobai v. Hussein Somji* (1937) Bom. 18.

(m) *Narayana Ayyar v. Subbaraya Ayyar*, A. I. R. (1929) Mad. 32.

(n) *Sundar Bibi v. Lal Rajendra* (1925) 47 All. 496.

(o) *Badri Das v. Sundar Das*, A. I. R. (1927) Lah. 166; *Sundar Bibi v. Lal Rajendra* (1925) 47 All. 496; *Bilaso v. Munni Lal* (1911) 33 All. 558; *Bhagabati v. Kali Charan* (1911) 38 Cal. 468; *Umec Chunder Sircar v. Zahur Fatima* (1891) 18 Cal. 164, 17 I. A. 201; *U. Zoe v. Ma Mya May*, A. I. R. (1930) Rang. 184.

(p) *Sundar Bibi v. Lal Rajendra* (1925) 47 All. 496; *U. Zoe v. Ma Mya May*, A. I. R. (1930) Rang. 184.

(q) *Balwant Singh v. Joti Prasad* (1918) 40 All. 692.

S. 19

to him. A on attaining majority may, as the person exclusively interested in the trust property, require the trustees to transfer it immediately to him.

(b) A bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for B, who has attained his majority and is otherwise competent to contract. B may claim the Rs. 10,000.

(c) A transfers certain property to B and directs him to sell or invest it for the benefit of C who is competent to contract. C may elect to take the property in its original character.

Right of inheritance.—The right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definition of a “vested interest” in section 19 of the Transfer of Property Act, IV of 1882, or of “a contingent interest” in section 21 of the Act and section 119 of the Indian Succession Act. So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (a) of section 6 of the Transfer of Property Act (IV of 1882), “the chance of an heir-apparent succeeding to an estate” or “a mere possibility” of succession which cannot be transferred.

A mere *spes successionis* is unknown to, and not recognized by, Mahomedan Law (r).

Vested or contingent interest for what purpose treated alike.—In *New's* case (s) it was held that where there arises an emergency or a state of circumstances which, it may reasonably be supposed, was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not yet in existence, the Court will exercise its general administrative jurisdiction by sanctioning on behalf of all parties interested, those acts being done by the trustees. This case constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts. It shows how far the Court will go and beyond what point it will not go. When an advance under the above-mentioned circumstances was sought out of the estate for the benefit of a minor who was a beneficiary with a vested or contingent interest, the Court exercised its extraordinary jurisdiction and granted a reasonable amount (t).

Onus.—The burden of showing that in a transfer of property there is no vesting of interest, is on those who assert it (u). And the weight of the burden is aggravated by the elimination, in the explanation, of circumstances, which might, apart from the explanation, be thought sufficient to discharge it.

Limitation expressed in form contingent construed as vested.—A leading authority for this construction is *Boraston's* case (v). Lands were devised for eight years and afterwards to remain with the executors till such time as H. should accomplish the age of twenty-one and thereupon to him and his heirs and assigns for ever. H. died before attaining twenty-one. It was contended that the remainder had not vested in him but the Court held otherwise, observing that the

(r) *Abdool Hoosein v. Goolam Hoosein* (1906) 30 Bom. 304.
(s) (1901) 2 Ch. 534.
(t) *Rajagopala Gramani v. Baggiammal* (1933)

58 Mad. 508.
(u) *Sewdayal v. Official Trustees of Bengal* (1931) 58 Cal. 768.
(v) (1587) 3 Co. Rep. 16a, 76 E. R. 664.

adverbs "when" and "then" only denoted the time when the remainder was to take effect in possession and not when it was to vest. The authorities on the subject were summed up in *Maddison v. Chapman* (w), in which it was laid down that a vested interest previously given is incapable of destruction except upon the clearest terms to that effect, contained in the limitation over and where a limitation over which though expressed in the form of a contingent limitation is in fact merely dependent upon a condition essential to the determination of the interest previously limited, the Court is at liberty to hold that notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interest so previously limited. The true test is, Can the words which in form import contingency be read as equivalent to "subject to the interest previously limited?"

Ss. 19-

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

Interest acquired by an unborn person.—On a transfer made for the benefit of a person not born, he takes a vested interest although the enjoyment may be deferred beyond his birth. Thus where a settlement is made in trust for A for life and on his death in trust for his child B for life and on the death of B in trust to the children of B absolutely, although the children of B are not entitled to the property till the death of B, they take a vested interest in the property on birth. But a trust for the benefit of an unborn person must not infringe the rule in section 13.

Contrary intention.—An interest may be vested or contingent; when the intention is against a vested interest it must be a contingent interest.

Sections 19 and 20.—The former section deals with vested interests in favour of living persons, the latter with unborn persons.

Particular estate and deferred estate.—In transfers referred to in sections 19 and 20 there are necessarily two estates, the particular estate and the deferred estate. The prior estate is known as the particular estate and the subsequent estate as the deferred estate.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of

Contingent interest.

S. 21 the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

What is a contingent interest.—On a transfer of property an interest is said to be contingent when it is to take effect only if a specified uncertain event

(a) shall happen or

(b) shall not happen.

Every contingent interest must become vested at one time or other, in case (a) on the happening of the event, in case (b) when the happening of the event becomes impossible.

Devises and bequests contingent.—These are dealt with in section 120 of the Indian Succession Act which contains numerous illustrations of which (i) to (iii) and (v) to (ix) are examples of bequests and devises to take effect in case a specified uncertain event shall happen, while illustrations (x) and (xi) are examples of bequests and devises in case a specified uncertain event shall not happen. Illustrations (xii) and (xiii) exemplify the exception to that section. This section of the Indian Succession Act is parallel to section 21 of the Transfer of Property Act, but the two sections are in conflict with one another in the case of a gift over by reason of section 12 of the Transfer of Property Act, of which there is no parallel section in the Indian Succession Act, so that a condition like the one referred to in illustration (vii) to section 120 of the Indian Succession Act would be void in the case of a transfer *inter vivos* under section 12 of the Transfer of Property Act. A Bengali Hindu by his will authorized his widow to adopt a son, one after another, five in succession. He further directed that if his wife died without adopting or the adopted boy pre-deceased her without leaving male issue his estate on the death of his wife should pass to the sons of his sister who might be living at the time of his death. There were two sons of his sister living at his death. The widow adopted a boy who died childless and unmarried. She then died after him. It was held that there was a valid contingent bequest in favour of the testator's nephews (x).

Where the terms of a bequest were "if both my daughters have issue they shall divide the properties equally, those who have no issue shall enjoy the income for their lives and those who have issue shall enjoy the whole property," it was held that birth of issue was a contingency on which the gift in each case was absolute (y).

Providing for his daughters, a Hindu testator directed "when they will be married" separate houses should be provided for them. The direction was coupled with a gift for maintenance to each of Rs. 600 a year and that "as long as the

(x) *Bhubendra Krishna v. Amarendra Nath Dey* (1916) 43 Cal. 432, 43 I. A. 12.
(y) *Gurusami v. Sivakami* (1895) 18 Mad. 347, 22 I. A. 119; *Bai Kamala v. Rameshankar*

(1924) 26 Bom. L. R. 249; *Soorjeemoney Dossey v. Denobundoo Mullick* (1862) 9 M. I. A. 123.

daughters will live in the separate houses they would get the fixed allowances and if they do not live in this place they would get Rs. 10." The daughters were married and lived in separate houses. Held that the payment of maintenance was not contingent on the daughter's marriage or any other future event (z).

A Hindu died in 1875 leaving a widow, I., and a son's daughter, B. By his will he authorized his widow to adopt, prohibiting her from doing so if B. had a son. He further provided if I. died without adopting B., her sons were owners of the property. B. gave birth to a son in 1891. In 1896 I. adopted. B. died in 1897 and I. three weeks later. In a suit by B.'s son for possession of the property it was held that there was no direct gift of the remainder to B. but a gift contingent on the happening of an uncertain event, viz., the dying of I. without having taken a boy in adoption. The contingency could not be regarded as having occurred in view of the fact that I. did not adopt (a).

Person entitled to interest upon attaining a particular age.—The exception to the section deals with the case where under a transfer a person becomes entitled to the interest therein upon attaining a particular age. These words, though apparently importing a contingency (b), do not prevent the vesting of the estate and the transferee is deemed to have taken a vested interest where the income of the property is given to him absolutely till he reaches that particular age or where there is a direction in the transfer that the income or so much thereof as may be necessary shall be applied for his benefit until he reaches that age. Section 120 of the Indian Succession Act contains a similar provision. But section 172 of that Act enacts that where a bequest of the interest of a fund is made to a person without affording any indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest belongs to the legatee.

In a Bombay case a Parsi by his will directed his executor to maintain himself and the testator's son and to defray the expenses of educating the son out of the testator's "property and effects" and to make over the "remaining properties" to the son upon reaching his majority. The son died an infant. It was attempted to bring the case within the exception to section 120 of the Indian Succession Act, but the Privy Council held that the case did not fall within the exception and the bequest of the residue to the son was contingent on his attaining the age of majority (c). A devise of real estate to a devisee when he shall attain a certain age, or if he shall attain a certain age, without any further context to assist, is contingent, and the attainment of the prescribed age is a condition precedent to the estate vesting in him (d).

The context may enable the Court to declare the estate to be a vested estate defeasible on death under the prescribed age: for instance, there may be in terms a disposition of the intermediate income, or a gift over in the event of the devisee failing to attain the necessary age or some other sufficient context. The rule, however, is that if possible, you hold a condition to be subsequent rather than precedent (e). It has been much contested whether this rule in *Edwards v. Hammond* (f) can be applied where attainment of the given age is made part of

(z) *Chandra Kishore Roy v. Prasanna Kumari* (1911) 38 Cal. 327, 38 I. A. 7.

(a) *Nalvarlal v. Ranchhod* (1920) 22 Bom. L. R. 71.

(b) *Hanson v. Graham* (1801) 6 Ves. 239, 31 E. R. 1030; *In re Francis, Francis v. Francis* (1905) 2 Ch. 295; *Harris v. Brown* (1901) 28 Cal. 621.

(c) *Dadachanji v. Ruttonbai* (1925) 49 Bom. 167.

(d) *In re Francis, Francis v. Francis* (1905) 2 Ch. 295.

(e) *Edwards v. Hammond* (1683) 3 Lev. 132, 83 E. R. 614.

(f) (1683) 3 Lev. 132, 83 E. R. 614.

S. 21 the description of the devisee ; and that when it is a part of the description until there is a person who answers that description there can be no vesting of the property in question, for there cannot be a vesting in an unascertained person. The proper way of dealing with a question of this sort is to see if the authorities prevent one from giving the words the natural construction which they would otherwise have. There are certain cases, of which *Phipps v. Ackers* (g) is an example, in which a gift to a named person if and when he attains the age of twenty-one years, with a gift over in the event of his dying under the age, was held to confer upon the original devisee a vested estate liable to be divested. The origin of that rule is not in doubt. It was derived from the anxiety of the Court to prevent the failure of a contingent devise taking effect in the future, for default of an estate of freehold sufficient to support it. Of the other class of authorities, the leading case of *Duffield v. Duffield* (h) is the best example. That was the case of a gift to a person not definitely described by name or description but to a person who may or may not fulfil a particular description and a devise to him if he does fulfil that description, with an alternative devise, or even a devise over, if there should be no such person. In those cases it has been held that the gift is contingent. It is an established principle of law that estates must remain contingent until there be a person having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in his will. A testator by his will dated 1917 devised and bequeathed his properties "upon trust in fee simple or absolutely for such son of my son W. A. as first or alone attains the age of twenty-one years or failing any such son, then upon trust as part of my residuary estate." He gave the residue of his estate in trust for both or either of his sons W. A. and J. J. A. who should survive him, and if both, in equal shares. It also provided that if and so long as some son of his son W. A. should be living, the property should not become absolutely vested beneficially in any such son but the trustee should out of the residuary estate maintain and keep up the establishment and allow the same to be used by any of the persons for the time being entitled in expectancy thereto. The testator died in 1919 and his two sons survived. W. A. had four sons living at the testator's death, the eldest son being thirteen years of age. Held that the interests of the grandsons were contingent, and until one of them attained the age of twenty-one or all of them died without attaining that age, W. A. and J. J. A. were entitled to the intermediate rents and profits of the property (i).

Where a testatrix directed that certain moneys should be held upon trust to pay the dividends unto her daughter for life and after her death in trust for the lawful children of the said daughter who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry and if more than one in equal shares, it was held that attaining of twenty-one years was a condition precedent and that no child who did not attain twenty-one years could take (j).

A single Judge of the Calcutta High Court, dealing with a will prior to the Succession Act and, therefore, construing it according to the rules of the English Law, held that "where the words of contingency form part of the description of the class of persons to take, where, as in this case, the gift is to those "who shall attain the age of twenty-one" the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. Of this class of

(g) 9 Cl. & F. 583, 134 E. R. 453.
(h) 1 Dow. & Cl. 268, 4 E. R. 1334.

(i) *In re Astor, Astor v. Astor* (1922) 1 Ch. 364.
(j) *Adams v. Gray* A. I. R. (1925) Mad. 599.

cases, *Festing v. Allen* (k) and *Bull v. Pritchard* (l) are leading cases. It is true that in *Browne v. Browne* (m) Stuart, V. C., refused to follow *Festing v. Allen* (k) and in *Jull v. Jacobs* (n), Malins, V. C., expresses disapproval of the same case: "I think it clear, however, upon all the authorities, that in such cases there must, at any rate, be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction" (o).

S. 21

Remainders.—These are of two kinds, vested and contingent. The former is one which is always ready to come into enjoyment or possession the moment the prior estate determines. In case of a vested remainder the gift is complete, only the enjoyment is deferred till the particular or prior estate determines. A contingent remainder is a future estate. In a contingent remainder the estate depends upon the determination of the prior estate but, unlike a vested remainder, it is not ready to come into possession the moment the particular estate determines. A vested remainder is alienable. A contingent remainder is not. Every contingent remainder of an estate of freehold must have a particular estate of freehold to support it (p). In a vested remainder the estate which follows the preceding estate is certain. In a contingent remainder it is uncertain or conditional. A. by her will devised that the yearly income of her settled estate should be equally divided between her daughters L. and M. and that in the event of the death of either the survivor should receive the whole income. It was held that gift to the survivor was a contingent and not a vested estate, for it was uncertain which of the two would be the survivor (q).

To enable a remainder to be vested the gift must be direct (r).

Mahomedan Law.—A vested remainder is not recognized by Mahomedan Law (s).

Discretionary trust to apply intermediate income in maintenance.—A testatrix devised her estate to trustees upon trust to convey and transfer the same to U. "when and so soon as he shall attain the age of twenty-five years." She then directed her trustees to apply "the whole or such part as they in their absolute discretion think fit" of the income for the "maintenance, education or benefit" of the person "presumptively entitled" to her residuary estate and "during the suspense of absolute vesting" to accumulate the surplus income (if any) in augmentation of her residuary estate with power to resort to accumulations as income in any subsequent year for the purpose aforesaid. Held, following *Fox v. Fox* (t) and *In re Williams* (u), that U. took a vested interest at the testatrix's death and on attaining twenty-one was entitled to an immediate conveyance and transfer (v).

A discretionary power to the trustees "to spend such sum or sums out of the income for the maintenance, education, etc. of such son or sons as trustee or trustees shall think fit" does not bring a contingent gift within the exception (w).

(k) (1843) 12 M. & W. 279, 152 E. R. 1204.
 (l) (1826) 1 Russ. 213, 38 E. R. 83.
 (m) (1857) 26 L. J. Ch. 635, 65 E. R. 783.
 (n) (1876) 3 Ch. D. 703.
 (o) *Ballin v. Ballin* (1881) 7 Cal. 218.
 (p) *Williams on Real Property*, 20 Ed., p. 351.
 (q) *Whitby v. Von Luedecke* (1906) 1 Ch. 783.
 (r) *Natvarlal v. Ranchhod* (1920) 22 Bom. L. R. 71.
 (s) *Rasoolbibi v. Yusuf* (1933) 35 Bom. L. R. 643; *Abdul Wahid Khan v. Mussumat Nuran Bibi* (1885) 11 Cal. 597 12, 1. A. 91;

Abdul Karim Khan v. Abdul Qayum Khan (1906) 28 All. 342; *Harpal Singh v. Lekhraj Kunwar* (1908) 30 All. 406; *Abdool Hoosein v. Goolam Hoosein* (1905) 30 Bom. 304.
 (t) (1879) L. R. 19 Eq. 286.
 (u) (1907) 1 Ch. 180.
 (v) *In re Ussher, Foster v. Ussher* (1922) 2 Ch. 321; *In re Parker, Barker v. Barker* (1880) 16 Ch. D. 44.
 (w) *Sayedajal v. The Official Trustee of Bengal* (1931) 58 Cal. 768.

Ss. 21-22

Gifts to a class.—These would be governed by the same rules as are prescribed in the section for an individual.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to members of a class who attain a particular age.

Class gifts.—In construing gifts to a class due attention must be paid to two well-known canons of construction:—(1) That “where there is a gift to a class any members of which may have to be ascertained beyond the limits of perpetuity for instance, to the children of a living person who shall attain twenty-five the whole gift is void.” (2) That “where there is no direction as to vesting, it is important to distinguish a gift to a contingent class and a gift to a class upon a contingency; thus, a gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as, for instance, at twenty-one, might have the effect of vesting the bequest”(x).

It is well settled that if there be a gift to an individual or a class upon the attainment of a certain age, such gift is *prima facie* contingent on the specified age being attained, but that where there is also a gift to the same individual or class of the income to accrue before the specified age be attained, the gift of the corpus, though in form contingent, will be construed as conferring a vested interest. Further, there is a broad distinction between a gift to a class upon attaining a specified age and a gift to such member of a class as attain a specified age. In the latter case clearly no one is intended to take unless he attains the age in question. It is no longer a question of construing as vested a gift which is only *prima facie* contingent, but of adding to the class of beneficiaries. It is with the latter class of cases that the present section deals, while the former class is the subject of section 21 of the Act.

Such members only of a class as shall attain a particular age.—Under a gift to a class contingently on their attaining twenty-one, the eldest of the class on attaining twenty-one takes a vested interest in possession of his share and a contingent interest in the share of other members of the class who have not attained the age of twenty-one (y). But where “the gift is to a class on the youngest attaining twenty-one, all who attain twenty-one will take vested interests whether they survive the time of distribution or not. But a member of the class dying under twenty-one takes nothing”(z).

Gift “prima facie” contingent controlled by other provisions.—Where a bequest to children of a tenant for life was followed by gift over of the share if such tenant died without issue, a provision that any beneficiary being entitled to a vested interest

(x) Theobald on Wills, 8th Ed., p. 653; *Bull v. Pritchard* (1826) 1 Russ. 213, 38 E. R. 83; *Leake v. Robinson* (1817) 2 Mer. 363, 35 E. R. 979; *Lloyd v. Lloyd* (1852) 21 L. J. Ch. 596, 61 E. R. 338; *Dewar v. Brooke* (1880) 14 Ch. D. 529; *Re. Hume, Public Trustee v. Mabey* (1912) 1 Ch. 693; *Ricketts v. Ricketts* (1911) 103 L. T. 278.

(y) *Re. William's Settlement, Williams v. Williams* (1911) 1 Ch. 441. *In re Holford, Holford v. Holford* (1894) 3 Ch. 30.

(z) Theobald on Wills, 8th Ed., p. 661; *Lloyd v. Lloyd* (1852) 21 L. J. Ch. 596, 61 E. R. 338; *Parker v. Sowerby* (1853) 1 Drew 488, 61 E. R. 539.

in any capital moneys under the will should until attaining twenty-five years be only entitled to the net income to arise from his "expectant share or interest" was construed as entitling each of the children to a vested interest before attaining the age of twenty-five years, the words "expectant share or interest" being construed as having reference to the vested share of a child liable to be divested upon death under twenty-five years of age (a).

The rules of construction deducible from the authorities are :

- (1) Where there is a clear gift to an individual an additional direction to pay does not delay the vesting.
- (2) The same rule applies where there is gift to a class and the distribution is postponed for the convenience of the estate or of division till the members attain a certain age or till the youngest attains twenty-one (b).
- (3) If the gift to the individual is in terms apparently made contingent upon his attaining majority, or a certain age, the giving of the interest in the meantime will have the effect of vesting (c).
- (4) The same rule does not apply where there is a gift of an entire fund payable to a class of persons equally upon their attaining a certain age. There a direction to apply the income of the whole fund, in the meantime, for their maintenance, does not create a vested interest in the member of the class who does not attain that age (d). Where the only gift to a class is contained in the direction to distribute, those alone, who answer to the description of the persons amongst whom the distribution is to be made at the time of distribution, are entitled to share (e).

These rules of construction must give way where the words exclude their application.

Bequests and devises.—These are governed by section 121 of the Indian Succession Act which corresponds with section 22 of the Transfer of Property Act. The illustration to the section renders it clear that in the case of a gift to such members of a class as attain a specified age the payment of the income of the share to him for his maintenance and education does not vest the gift in such member of a class as has not attained the specified age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

Contingent remainder.—This section is based on the principle of English Law for the creation of a contingent remainder. "Of the rules required for the creation

(a) *Re. Campbell, Cooper v. Campbell* (1919) 88 L. J. Ch. 239.

(b) *Parker v. Sowerby* (1853) 1 Drew 488, 61 E. R. 539; *Vorley v. Richardson* (1856) 8 De G. M. & G. 126, 44 E. R. 337.

(c) *Hanson v. Graham* (1801) 6 Ves. 239, 31 E. R. 1030; *In re Hart's Trust* (1858) 3 De G. & J. 195, 44 E. R. 1243.

(d) *In re Parker, Barker v. Barker* (1880) 16 Ch. D. 44; *Leake v. Robinson* (1817) 2 Mer. 363, 35 E. R. 979; *In re Hunter's Trust*, (1865) 1 Eq. 295; *Lloyd v. Lloyd* (1852) 21 L. J. Ch. 596, 61 E. R. 338.

(e) *Sansbury v. Read* (1805) 12 Ves. 75, 33 E. R. 29.

S. 23 of a contingent remainder the first and principal is that the seisin or feudal possession must never be without an owner and this rule is sometimes expressed as follows:—That every contingent remainder of an estate of freehold must have a particular estate of freehold to support it.” Accordingly a transfer to A for life and after his decease and one day to B, is void, for the moment that A’s estate is determined by death, the possession is not to belong to B till one day afterwards. The consequence is that the gift of the future estate intended to be made to B is absolutely void, as for one day the possession is without an owner. “As a corollary to the rule above laid down, arises another proposition, frequently itself laid down as a distinct rule, viz., that every contingent remainder must vest or become an actual estate during the continuance of a particular estate which supports it or *eo instanti* that such particular estate determines” (f).

Contingent bequest.—These are dealt with under sections 124 and 125 of the Indian Succession Act, 1925, of which the former section corresponds with section 23 of the Transfer of Property Act. Under the former section it is necessary that the event should happen “before the period when the fund is bequeathed is payable or distributable.” While under the Transfer of Property Act such event must happen “before or at the same time as the intermediate or preceding interest ceases to exist.” A testamentary disposition by a Hindu of his residuary estate to his grandson who may be born within ten years after his death was held invalid, for until then the estate would not vest in any person (g). A Hindu testator left three sons, the eldest of full age and the other two minors. He directed, “my three sons are entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons being sonless, the surviving sons shall be entitled to all the properties equally.” It was held that these words gave a legacy to the survivors contingently on the happening of a specified uncertain event which had not happened before the property bequeathed was distributable, the period of distribution being the time of the testator’s death (h). A Hindu by his will provided that his daughters’ and brother’s daughters should be *maliks* and come in possession in equal shares of the property. In the event of his daughter or brother dying childless, “the shares shall devolve in equal shares on the surviving daughters.” It was held that the expression *maliks* ordinarily implied an absolute gift and that the provision of survivorship applied only to the case of a daughter dying during the lifetime of the testator and did not take effect in the present case, the daughter whose share was in question having died several years after the testator (i). A Parsi testator bequeathed certain legacies to his son N. and directed that in the event of his dying after the death of the testator, without marrying or if married without an heir, his share should revert to the surviving sisters or their heirs. The testator died and N. claimed the legacies absolutely. Upholding his contention, it was observed that no time was fixed for the happening of the event and the mere fact that the testator contemplated that in the ordinary course of nature his son would survive him and die after him would not justify the Court in concluding that the testator had fixed the time for the occurrence of that event (j).

Acceleration of remainder on failure of life estate.—A gift in remainder expectant on the termination of an estate for life, does not fail, but is accelerated by reason of the gift of such prior life estate not taking effect (k).

(f) Williams on Real Property, 20 Ed., pp. 351-353.

(g) *The Official Assignee of Madras v. Vedavalli*, A. I. R. (1926) Mad. 936.

(h) *Norendra Nath v. Kamal Basini* (1896) Cal. 563. 23 I. A. 18.

(i) *Lala Ramjewan v. Dal Koer* (1897) 24 Cal. 406.

(j) *Nowroji Padamji v. Putlibai* (1913) 37 Bom. 644.

(k) *Adjudhia v. Rakhman* (1884) 10 Cal. 182, 11 I. A. 1.

Child "en ventre sa mere."—Such a child is considered in law as actually born for the purpose of taking any benefit to which if born, he would be entitled (*l*).

Ss. 23-24

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified. the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

General rule.—Words of survivorship are to be referred to the period of division or enjoyment unless there be an intention to the contrary (*m*). English authorities shew that the same principles apply in construing a deed as in construing a will (*n*). In construing survivorship clauses, the difficulty is to ascertain the time at which the survivors are to be determined. In case of a gift following a life-interest, the survivors are determined on the death of the tenant for life. If there be several tenancies for life, the time to determine is when the last tenant for life dies. The absence of a gift over of the entire fund on the failure of issue of all the tenants for life, is not of itself conclusive to shew that the words "survivors or survivor" are to be read in their strict literal sense (*o*). There are, however, cases (*p*) which attribute to the words "survivors or survivor" the meaning "others or other." The Courts are reluctant to go so far (*q*) though with the assistance of an ultimate gift over, they have frequently done so.

Time of division.—The section lays down the rule of construction of gifts to survivors who outlive the happening of a particular event or the death of a particular person.

Gift over to survivor.—The general rule as laid down in *Cripps v. Wolcott* (*r*) is that where there is a gift to A for life with remainder to A, B and C and to the survivors or survivor, the survivorship is ascertained at the death of the tenant for life. In *White v. Baker* (*s*), Turner, L. J., says: "Where there is a bequest to A for life and after his death to B and C or the survivor of them, some meaning must of course be attached to the words "the survivor." They may refer to any one of three events—to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life, and in the absence of any indication to the contrary they are taken to refer to the latter event, as being the more probable one to have been referred to." The above rule and passage were referred to by Cozens-Hardy, M. R., in *In re Poultney, Poultney*

(*l*) *Re Wilmot's Trust, Moore v. Wingfield* (1903) 2 Ch. 401.

(*m*) *Cripps v. Wolcott* (1819) 4 Mad. 11, 56 E. R. 613.

(*n*) *Cole v. Allcot* (1906) 1 Ch. 47.

(*o*) *Powell v. Hellicar* (1919) 1 Ch. 138.

(*p*) *In re Friends Settlement, Cole v. Allcot* (1906)

1 Ch. 47; *Lucena v. Lucena* (1877) 7 Ch. 255; *In re Billham, Buchanan v. Hill* (1901) 2 Ch. 169.

(*q*) *King v. Frost* (1890) 15 A. C. 548.

(*r*) (1819) 4 Mad. 11, 56 E. R. 613.

(*s*) (1860) 2 De. G. F. & J. 55, 45 E. R. 542

Ss. 24-25 *v. Poultney (t)*, where the testator devised his estate to his wife for life and from and after her death equally between his eight children named in the will. The last clause in the will provided, "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." The eight named children survived the testator, but one of them died in the widow's lifetime, leaving children. Held only those children who survived the widow were entitled to share in the testator's estate.

Wills.—In case of testamentary disposition the law is as prescribed in section 125 of the Indian Succession Act, 1925. Of the four illustrations to that section, in (i) the time of payment is the death of the testator when the will comes into operation, in (ii) on the termination of the life estate. Illustration (ii) is similar to the illustration to section 24 of the Transfer of Property Act, 1882. The rule of construction in the section does not apply to illustrations (iii) and (iv).

Unless a contrary intention appears.—The rule in the section does not apply where an intention to the contrary is expressed. That is, the survivorship has no reference to the time of division but to some other period.

Exception to rule.—Under an express gift over after an interest for life by words importing a joint interest, the survivorship is to be referred to the period of distribution. Where a bequest is to A for life and after his death to B and C and in case either of them dies in the lifetime of A, the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other (*u*).

Presumption of survivorship.—There is no presumption as to survivorship. The presumption under section 108 of the Evidence Act that a man not heard of for some years is dead, is at the time when the question is raised and not at some antecedent date (*v*). A similar view was expressed by the Burma Chief Court (*w*) and accepted by the Privy Council.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

Illustrations.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer, C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that he shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

(t) (1912) 2 Ch. D. 541.

(u) *White v. Baker* (1860) 2 De. G. F. & J. 55, 45 E. R. 542.

(v) *Narki v. Lal Sahu* (1910) 37 Cal. 103, *Fani*

Bhushan v. Surjya Kamta Roy (1907) 35 Cal. 25.

(w) *Moolla Cassim v. Moolla Abdul* (1905) 33 Cal. 173.

Condition.—The word “condition” is not defined in the Act. Being a term in the contract, it is the essence of it. Conditions have been classified in a variety of ways but we are concerned with conditions precedent and conditions subsequent. This and the following sections relate to conditions. In the case of a condition precedent the performance of the condition is essential for the transfer to operate (x). Till then there is no vesting, the transfer is suspensory. It is a description of the event on which the transferee is to take. A condition subsequent is one on the non-performance of which an estate vested is divested (y). Section 25 treats of conditions precedent and section 29 of conditions subsequent. In the former case the non-performance of the condition causes the transfer to fail. In the latter case the non-performance divests the estate which passes to another. In the former case substantial compliance is enough, according to section 26, while in the latter case strict compliance is necessary, according to section 29.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent the Court will prefer the latter construction (z). A similar construction would apply to a deed.

Continuing conditions.—These belong to the group of conditions subsequent. A condition requiring a transferee to reside in a particular house belongs to this class. A testatrix made a charitable bequest and amongst other conditions made an “abiding condition” that the black gown should be worn in the pulpit. It was held that the condition was subsidiary to the main charitable object and as the performance had been shewn to be impracticable, the condition might be dispensed with (a).

Time for performance.—The section is silent as to the time within which the condition must be performed. It is submitted that it must be performed within a reasonable time before it can be imputed to the transferee that he had failed to perform (b).

When the period is prescribed the Court may enlarge the time and in all cases that lie in compensation it may dispense with the time even in the case of a condition precedent (c). A testator gave a legacy to A in the event of B dying unmarried on the express condition that he should, within three years from the testator's death, pay to the executors all moneys due from him to the testator. Held that the condition was substantially performed by payment after the expiration of three years and the legacy was payable (d). So where a testator bequeathed a legacy to his daughter on the express condition that she should settle upon certain trusts of the will a sum to which she was entitled within a year of his death, it was held that the limit of time was not of the essence or substance of the condition and it was sufficiently complied with by the execution of a settlement within the year (e).

There is no general rule in computing time from an act or an event, that the day is to be inclusive or exclusive, depending upon the reason of the thing, according

(x) *Lester v. Garland* (1808) 15 Ves. 248, 33 E. R. 748; *Re. Noruse, Hampton v. Noruse* (1899) 1 Ch. 63.

(y) *Popham v. Bamfield* (1682) 1 Vern. 167, 23 E. R. 391.

(z) *In re Greenwood, Goodhart v. Woodhead* (1903) 1 Ch. 749.

(a) *In re Robinson, Wright v. Tugwell* (1923) 2 Ch. 332.

(b) *Ganendra Mohun Tagore v. Rajah Juttendro*

Mohun Tagore (1874) 22 W. R. 377, 1 I. A. 387, 397.

(c) *Woodman v. Blake* (1691) 2 Vern. 222, 23 E. R. 743.

(d) *Paine v. Hyde* (1841) 4 Beav. 468, 49 E. R. 420.

(e) *Pickard, Pickard v. Waters* (1920) 1 Ch. 596; *Re. Goodwin, Anislie v. Goodwin* (1924) 2 Ch. 26.

- S. 25 to the circumstances (f). Under the Indian Succession Act when time is specified, failure to perform within the specified time amounts to non-performance of the condition. According to section 128, illustration (vii), a legacy is bequeathed to A if he executes a certain document within the time specified in the will. The document is executed by A within a reasonable time but not within the time specified in the will. A has not performed the condition and is not entitled to receive the legacy.

Lunacy.—The Court should act for the lunatic to perform a condition as if he were a person of sound mind and guided by reasonable motives (g).

Condition distinguished from election.—Election is treated in section 35 of this Act. The rule of election applies whether the transferor does or does not believe that which he professes to transfer to be his own. Under section 26 a man may in making a transfer of his property impose upon the transferee a condition that he shall dispose of his property in a particular way. In this case the transferor must have known that what he was disposing of was not his own. The main distinction between the two is that in the former case the transfer fails on non-compliance, in the latter case the disappointed transferee is compensated.

Conditional conveyances.—The section deals with interests created on a transfer dependent upon a condition. It enacts that such a transfer shall fail when the condition is such, that if it formed part of the consideration for an agreement, the agreement would be void. Under section 23 and other cognate sections of the Indian Contract Act, 1872, the condition referred to in the section is what is known as a condition precedent, till the fulfilment of which, the operation of the transfer is suspended. A condition must be performed according to the intention of the parties. It must be actually performed, not covinously or in an illusory way.

Presumption.—Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law that the first ought to be adopted (h). The law presumes against illegality. Those who wish to prove illegality must establish it (i). There are two senses in which the word unlawful is commonly used, though somewhat inaccurately. There are some contracts to which the law will not give effect and, therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that in point of form the parties have agreed. Some contracts may be void on the ground of immorality, some on the ground that they are contrary to public policy as, for example, in restraint of trade, and contracts so tainted, the law will not lend its aid to enforce. It treats them as if they had not been made at all (j).

Ignorance of condition.—Want of notice of the condition does not relieve the transferee of the consequences, particularly where there is a gift over. It has been held that no duty is cast on an executor to give notice to a legatee of the condition of a legacy (k), but this was doubted in a subsequent case (l).

(f) *Lester v. Garland* (1808) 15 Ves. 248, 33 E. R. 748.
 (g) *In re Charles William Hilton, Earl of Sifton* (1898) 2 Ch. 378.
 (h) *Norwich Corporation v. Norfolk Railway Company* (1855) L. J. Q. B. 105, 119 E. R. 143.

(i) *Hire Purchase Furnishing Co. v. Richens* (1887) 20 Q. B. D. 387.
 (j) *Mogul Steamship Co. v. McGregor, Gow & Co.* (1892) A. C. 25.
 (k) *In re Lewis, Lewis v. Lewis* (1904) 2 Ch. 658.
 (l) *In re Mackay, Mackay v. Gould* (1906) 1 Ch. 25.

Impossible condition.—Section 56 of the Indian Contract Act, 1872, enacts that an agreement to do an act impossible in itself is void. Hence where the subject-matter of a contract is liable to destruction on a contingency which has already happened, the contract is void (*m*). A bequest dependent on a condition made impossible of fulfilment by the testator cannot take effect (*n*). In English Law a distinction prevails when impossibility is brought about by the act or default of the testator, by excusing performance in case of personalty (*o*), but not in case of realty (*p*).

Forbidden by law.—These would be acts declared unlawful by statute, criminal or otherwise, such as letting premises to a prostitute for an illegal purpose (*q*), or to a person for publication of blasphemous lectures (*r*).

Defeat the provisions of the law.—These would be acts which tend to prevent the course of justice, such as stifling prosecutions and compounding non-compoundable offences. Any contract having a tendency, however slight, to affect the administration of justice, is illegal and void (*s*), such as securing higher than standard rent (*t*), the transfer of occupancy rights prohibited by statute (*u*), a lease of a farm to retail opium without the Collector's permission (*v*), an agreement in contravention of the Excise Act (*w*), an assignment by a debtor to defeat the provisions of the Insolvency Law (*x*), a usufructuary mortgage in contravention of the Tenancy Act, 1901 (*y*), a bond given by an insolvent after personal discharge to his creditor in consideration of the latter not opposing his final discharge (*z*), a nominal sale deed and rent note passed by the defendant to his pleader to indemnify the latter against loss which he might suffer under a bail bond (*a*). The word "any law" in the phrase "would defeat the provisions of any law" has reference to substantive and not to adjectival law (*b*). Section 24 of the Indian Contract Act is not applicable to transfers of immoveable property, see (*c*).

Fraudulent.—As to acts or omissions declared fraudulent, see (*d*).

Involves or implies injury to the person or property of another.—A familiar instance of this is a clog on redemption. A contract to give a son in adoption in consideration of an annual allowance to the natural parents involves an injury to the person and property of the adopted son (*e*).

Court regards it as immoral.—Contracts not prohibited by positive law nor adjudged illegal by precedent, may nevertheless be void as against principles (*f*). In English Law a deed executed in consideration of past cohabitation is valid (*g*).

(*m*) *Hitchcock v. Giddings* (1817) 4 Price 135, 146 E. R. 418; *Strickland v. Turner* (1852) 22 L. J. Ex. 115, 155 E. R. 919; *Couturier v. Hastie* (1852) 25 L. J. Ex. 253, 10 E. R. 1065; *The Salvador* (No. 1) (1909) 25 T. L. R. 384, 385.

(*n*) *Rajendra Lal v. Mrinalini* (1921) 48 Cal. 1100.

(*o*) *Darley v. Langworthy* (1774) 3 Bro. P. C. 359, 1 E. R. 1369; *Guth v. Burton* (1839) 1 Beav. 478, 48 E. R. 1025; *Walker v. Walker* (1860) 29 L. J. Ch. 856, 45 E. R. 619.

(*p*) *Re. Turton, Whittington v. Turton* (1926) Ch. 96.

(*q*) *Gas Light & Coke Co. v. Turner* (1840) 9 L. J. Ex. 336, 133 E. R. 127.

(*r*) *Cowan v. Milbourn* (1867) 36 L. J. Ex. 124.

(*s*) *Egerton v. Brownlow* (1853) 23 L. J. Ch. 348; see sec. 28, Indian Contract Act, 1872.

(*t*) *Saleh Abraham v. Maneckji Cowasji* (1923) 50 Cal. 491.

(*u*) *Durga v. Jhinguri* (1885) 7 All. 878.

(*v*) *Raghunath v. Nathu Hirji* (1895) 19 Bom. 626.

(*w*) *Behari Lal v. Jagodish Chunder* (1904) 31 Cal. 798.

(*x*) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1907) 34 Cal. 289.

(*y*) *Ram Sarup v. Kishan Lal* (1907) 29 All. 327; *Madon Lal v. Muhammad Ali* (1906) 28 All. 696.

(*z*) *Naoroji v. Kazi Sidick* (1896) 20 Bom. 636.

(*a*) *Laxmanlal v. Mulshankar* (1908) 32 Bom. 449.

(*b*) *Hukum Chand v. Taharunnessa* (1889) 16 Cal. 504.

(*c*) *Dip Narain Singh v. Nageshar Prasad* (1930) 52 All. 342.

(*d*) See sec. 17, Indian Contract Act, 1872.

(*e*) *Esham Kishar v. Haris Chandra* (1874) 13 Beng. L. R. 42 App.; *Narayan Laxman v. Gopalrao Trimbak* (1922) 46 Bom. 908.

(*f*) *Jones v. Randall* (1774), 1 Corp. 37, 98 E. R. 954. *contra* in *Fender v. Mildmay* (1937) 53 T. L. R. 885.

(*g*) *Re. Henderson, Henderson v. Bird* (1889) 5 T. L. R. 374; *Re. Woolan, Isaacson Sanders v. Smiles* (1904) 21 T. L. R. 89.

- S. 25 though not for future cohabitation (*h*). In India, past cohabitation is not a good consideration for the transfer of property (*i*). Contracts for letting premises to prostitutes are void (*j*). No distinction can be made between an illegal and immoral purpose. The rule which is applicable to the matter is *ex turpi causa non oritur actio*, and whether it is an immoral or illegal purpose in which the plaintiff has participated, it comes equally within the maxim and the effect is the same. No cause of action can arise out of either one or the other (*k*). Further, there is a distinction between an immoral consideration for a gift and an immoral condition which is subsequently attached to a gift. In the former case the transfer fails altogether, in the latter the gift remains unaffected (*l*).

Court regards it as opposed to public policy.—Public policy is something which is really part of the common law of the land and does not depend on statute (*m*). It is a variable thing, fluctuating with the times (*n*). It is well settled that when it is apparent on the face of the contract that it is unlawful, it is the duty of the Judge himself to take the objection and that too, whether the parties take or waive the objection (*o*). Any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void. Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good (*p*). The following bonds or agreements are opposed to public policy:—to obtain or enforce rights resulting from a man's own crime (*q*), that which creates an interest in death (*r*), to use undue influence (*s*), trading with enemy in time of war (*t*), sale of public offices (*u*), an assignment of salaries and pensions (*v*), wagering agreements (*w*), agreement relating to marriage such as restraint on marriage (*x*), marriage brocage (*y*), agreement in fraud of marriage (*z*), concealment of adultery (*a*), compromise of divorce suit (*b*), or to obtain a divorce (*c*), an agreement before marriage to live separate or apart after marriage (*d*), or to marry on obtaining a decree of nullity of existing marriage (*e*), or a promise to marry after *decree nisi* or before decree absolute (*f*), or licence to commit adultery (*g*). A contract entered into by a Hindu living in Assam by which it is agreed that upon the happening of a certain event a

- (*h*) *Ford v. De Pontes* (1861) 30 Beav. 572, 54 E. R. 1012; *Phillips v. Probyn* (1899) 1 Ch. 811; *Thasi Muthu Kannu v. Shunmugavelu* (1905) 28 Mad. 413; *Kandaswami v. Narayanaswami* (1923) 45 M. L. J. 551; *Alice Mary Hill v. William Clark* (1907) 25 All. 266; *Gumna v. Ram Chandra Rao* (1925) 47 All. 619.
 (*i*) *Husseinali v. Dinbai* (1923) 25 Bom. L. R. 252; *Kisondas v. Dhondu* (1920) 44 Bom. 542.
 (*j*) *Appleton v. Campbell* (1826) 2 C. & P. 347; *Ritchie v. Smith* (1848) 6 C. B. 462; *Upfil v. Wright* (1911) 1 K. B. 506; *Bani Mancharam v. Regina Stanger* (1908) 32 Bom. 581; *Choga Lal v. Piyari* (1909) 31 All. 58.
 (*k*) *Pearce v. Brooks* (1866) 35 L. J. Ex. 134.
 (*l*) *Gumna v. Ram Chandra Rao* (1925) 47 All. 619; *Thasi Muthu Kannu v. Shunmugavelu Pillai* (1905) 28 Mad. 413; *Ram Sarup v. Bala* (1883) 6 All. 613.
 (*m*) *In the Estate of Hall, Hall v. Knight & Baxter* (1914) 1 P. 1.
 (*n*) *Naylor Benzon & Co. v. Krainische Industrie Gesellschaft* (1918) 1 K. B. 331; *Janson v. Driefontein Consolidated Mines, Ltd.* (1902) A. C. 487; *Re. Bowman, Secular Society, Ltd. v. Bowman* (1915) 2 Ch. 447; *Nordensfelt v. Maxim Nordensfelt Guns & Ammunition Co.* (1894) A. C. 535.

- (*o*) *Montefiore v. Menday Motor Components Co.* (1918) 2 K. B. 241.
 (*p*) *Egerton v. Brownlow (Earl)*, (1853) 23 L. J. Ch. 348, 10 E. R. 359.
 (*q*) *In the Estate of Crippen* (1911) P. 108.
 (*r*) *Debenham v. Ox* (1749) 1 Ves. Sen. 276, 27 E. R. 1029.
 (*s*) *Beckley v. Newland* (1723) 2 P. Wms. 182.
 (*t*) *Janson v. Driefontein Consolidated Mines, Ltd.* (1902) A. C. 484.
 (*u*) *Blackford v. Preston* (1799) 8 Term Rep. 89.
 (*v*) *Liverpool Corporation v. Wright* (1859) 28 L. J. Ch. 868, 70 E. R. 461.
 (*w*) See sec. 30, Indian Contract Act, 1872.
 (*x*) *Lowe v. Pears* (1770) 4 Burr. 2225, 98 E. R. 160; see sec. 26, Indian Contract Act, 1872.
 (*y*) *Roberts v. Roberts* (1730) P. Wms. 66, 24 E. R. 971.
 (*z*) *Peyton v. Bladwell* (1684) 1 Vern. 240, 23 E. R. 440.
 (*a*) *Brown v. Brine* (1875) L. J. Q. B. 129.
 (*b*) *Gibbs v. Hume* (1861) 10 W. R. 38; *Weekes v. Weekes* (1905) 21 T. L. R. 227.
 (*c*) *Bai Vijli v. Nansa Nagar* (1886) 10 Bom. 152.
 (*d*) *Brodie v. Brodie* (1917) P. 271.
 (*e*) *Siveyer v. Allison* (1935) 2 K. B. 403.
 (*f*) *Fender v. Mildmay* (1937) 52 T. L. R. 102.
 (*g*) *Hyman v. Hyman* (1929) A. C. 601.

marriage is to become null and void is contrary to public policy (h). Restraint of trade (i), fraud on bankruptcy laws (j), are opposed to public policy.

S. 25

Illustrations to the section.—(a) and (b) are instances of an impossible condition, (c) and (d) of conditions the fulfilment of which would be contrary to law or to morality.

Bequests.—A bequest upon an impossible condition or upon a condition, the fulfilment of which would be contrary to law or to morality is void. These are dealt with in sections 126 and 127 of the Indian Succession Act, 1925, the illustrations of which are similar to illustrations in the present section.

Indian Contract Act.—Just as a conditional transfer depends upon a lawful condition, so every agreement depends upon a consideration or object which is lawful. Where they are unlawful, the agreements are void. Such agreements are dealt with in section 26 of the Indian Contract Act. Other instances of void agreements in the same Act are referred to in sections 27, 28, 30, 36 and 56.

Charitable gift.—Where a charitable gift is subject to a condition precedent, the gift fails if the condition is not satisfied (k).

Vesting of legacy.—Under section 128 of the Indian Succession Act of 1925, a condition imposed by a will before the legatee take a vested interest is considered to have been fulfilled if substantially complied with.

Condition when not complied with.—In case of a condition precedent, the performance of it subsequent to the act or event is no performance and this is rendered clear by illustration (v) of section 128 of the Indian Succession Act.

Capricious retraction of consent.—This does not deprive the legatee of his benefit, according to illustration (iv) of the above section.

Champerty and maintenance.—Maintenance is the unlawful meddling in other people's quarrels by rendering assistance either with money or otherwise from other than charitable motives (l). Champerty is the unlawful undertaking to divide the land or other matter sued for, in which the champertor has no personal interest and which he is to carry on or defend at his own expense (m). The English laws of maintenance and champerty are not enforced as specific laws in India either in the mofussil or in Presidency towns. The leading case on the subject is *Ram Coomar v. Chunder Canto* (n). The Privy Council held that an agreement to supply funds to carry on a suit in consideration of having a share in the property if recovered is not necessarily opposed to public policy, unless extortionate or made for the purpose of gambling in litigation.

An assignment of property, valued at Rs. 3 lakhs by the next reversioners for Rs. 52,600, of which Rs. 600 was paid at the time of execution, was held not contrary to public policy (o), nor where the lender had a share in the property sued for if recovered (p). So also a transaction which was a present transfer by the vendor of

(h) *Sitaram v. Mt. Ahearee* (1873) 11 Beng. L. R. 129.

(i) *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (1896) A. C. 535; see section 27, Indian Contract Act, 1872.

(j) Sections 56 and 55, The Presidency Towns Insolvency Act, 1909; sections 54 and 53, The Provincial Insolvency Act, 1920.

(k) *Santona Roy v. The Advocate General of Bengal* (1920) 32, C. L. J. 453.

(l) *Anderson v. Radcliffe* (1860) 29 L. J. Q. B. 128.

(m) *Stanley v. Jones* (1831) 1 L. J. (O. S.) C. P.

51, 131 E. R. 143.

(n) (1877) 2 Cal. 233, 4 I. A. 23; *Fischer v. Kamala Naicker* (1860) 8 M. I. A. 170; *Chedambara Chetty v. Renga Krishna* (1878) 13 Beng. L. R. 509, 1 I. A. 241; *Ragunath v. Nil Kanth* (1893) 20 Cal. 843, 20 I. A. 112; *Achal Ram v. Kazim Husain* (1905) 27 All. 271, 32 I. A. 113; *Ramanamma v. Viranna* (1931) 61 M. L. J. 94 P. C.

(o) *Bhagwat Dayal v. Debi Dayal* (1908) 35 Cal. 420, 35 I. A. 48.

(p) *Rajah Mohkam Singh v. Rajah Rup Singh* (1893) 15 All. 352.

Ss. 25-26

a moiety of his interest in the taluk and where it appeared that without such assistance the vendor could not have prosecuted his claim to the estate (q), was upheld. In both countries there is no distinction with regard to fruits of success in the action and whether the plaintiff obtains the same by compromise or by a decree or verdict in his favour (r). Neither an agreement to advance money in defence of an existing possession of property (s), nor the purchase of an equity of redemption, however speculative, is champertous (t). Acceptance of an inadequate price on account of need does not render the transaction invalid as being champertous (u). But a conveyance of property tending to foster gambling in litigation is void (v), so also a bond of Rs. 25,000 in consideration of the obligee agreeing to defray the expenses of an appeal to the High Court and the obligor only receiving Rs. 3,700, was held unenforceable. The Court, however, gave a decree for the actual amount advanced (w). A stipulation by an attorney to retain one moiety of what might be recovered absolutely and out of the other moiety to repay himself costs and advances made and pay the residue to the client was held void (x).

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Conditions.—The old distinction between conditions precedent and conditions subsequent, to which Lord Coke calls attention as of the first importance, is this: that, where an estate is given on a condition subsequent, the estate vests till the condition or contingency takes place, and then it operates by divesting or destroying the estate. It is resorted to in order to enforce the object of the donor by the terror of a penalty, and as it operates by the destruction of estates it is considered as odious and *stricti juris*. One effect of this disfavour is, that if the condition is, or by the act of God, becomes impossible, the estate is absolute as if there had been no condition. So where the condition subsequent is unlawful. Another effect of the odium under which they lie, is that they are construed strictly. Thus it appears that, in respect to the penal nature of these conditions, the phrase '*in terrorem*' is peculiarly applicable to them.

(q) *Achal Ram v. Kazim Husain* (1905) 27 All. 271, 32 I. A. 113.

(r) *Glegg v. Bromley* (1912) 3 K. B. 479; *Vatsavaya v. Poosapati* (1924) 47 M. L. J. 93, 52 I. A. 1.

(s) *Damodhar Madhavji v. Kahandas Narandas* (1871) 8 Bom. H. C. R. 1.

(t) *Gopal Ramchandra v. Gangaram* (1890) 14 Bom. 72.

(u) *Gurusami v. Subbraya* (1889) 12 Mad. 118; *Bhagwat Dayal v. Debi Dayal* (1908) 35

Cal. 420, 35 I. A. 48; *Gossain Ramdhan v. Gossain Dulamir* (1909) 14 C. W. N. 191.

(v) *Debi Dayal v. Bhan Perlal* (1904) 31 Cal. 433.

(w) *Chunni Kuar v. Rup Singh* (1889) 11 All. 57.

(x) *Grose v. Amirtamayi Dasi* (1869) 4 Beng. L. R. 11; *Rajah Mohkam Singh v. Rajah Rup Singh* (1893) 15 All. 352; *Tarasoon-duree v. The Court of Wards* (1873) 20 W. R. 446.

The condition precedent is of quite an opposite nature ; there the estate cannot commence until the condition is performed, or the contingency has happened. The condition, therefore, is beneficial, not penal, and is favoured and benignantly interpreted, according to the intention of the words. The phrase '*in terrorm*' is, therefore, from its nature, inapplicable to them and actual performance is essential to them, notwithstanding their favourable interpretation ; therefore, though the condition be impossible or illegal, no estate can arise, and it is the same as if none had been given. The result is, that, although penal conditions to destroy estates may be dispensed with, beneficial conditions to raise estates must always be complied with (y).

Fulfilment of condition precedent.—This section is supplemental to section 25. It enacts that a condition precedent shall be deemed to have been fulfilled if substantially complied with. A Mahomedan widow agreed not to transfer certain property without the consent of three persons who were the other parties to the agreement. Two of them died and a transfer by her with the consent of the survivor was not upheld (z). In the first illustration to the section where B was to marry with the consent of C, D and E, the condition was deemed to have been fulfilled by his marrying with the consent of C and D, after E's death. The Allahabad case is open to criticism that the person whose consent the widow could obtain was only one at the time of transfer and she had substantially complied with the agreement.

A bequest was made to the female children of the testator's sister on their attaining twenty-one or marrying with the consent of their parents. The elder daughter married while under age with the consent of her mother who then was a widow. It was held (reversing the decision of Jessel, M. R.), that the consent mentioned in the will must be taken to be that of parents or parent, if any, and that the daughter who had married with the consent of the surviving parent, took a vested interest in the land (a). A legacy was given to plaintiff on marriage with the consent of parents. The parents in writing gave a general consent. On the death of the surviving parent she married. It was held consent was necessary during the lifetime of the father or mother or survivor, otherwise the general consent was sufficient (b).

Where a devise determined on the devisee ceasing to use a certain house as residence, no manner or period of residence being prescribed, it was held that exclusive residence was not meant and that occasional use thereof was a substantial compliance with the condition. Failure to use the residence for four years owing to judicial proceedings brought to defeat the title of the devisee and by his inability to obtain possession from the trustees and by the unfit state thereof owing to want of repairs which were in progress, did not operate to defeat the gift (c). In another case before the same tribunal, a bequest dependent on the condition that the legatees "should they after the final Court's decision, humbly apply for subsistence" receive a certain allowance, was held not to have been complied with where letters from the legatee to the Collector of the district administering the estate asserted a right to be maintained and demanded a sum considerably larger than

(y) *Scott v. Tyler*, 2 Bro. C. C. 432, 29 E. R. 241, 253; *Clarke v. Parker* (1812) 19 Ves. 1, 34 E. R. 419; *Lloyd v. Branton* (1817) 3 Mer. 108, 36 E. R. 42; *Aislabe v. Rice* (1818) 3 Mad. 256, 56 E. R. 503.

(z) *Beni Chand v. Ekram Ahmad*, A. I. R. (1926) All. 181.

(a) *Dawson v. Oliver—Massey* (1876) 2 Ch. D.

753.

(b) *Mercer v. Hall* (1793) 4 Bro. C. C. 326, 29 E. R. 917.

(c) *Ganendro Mohun Tagore v. Raja Juttendro Mohun Tagore* (1874) 22 W. R. 377, 1 I. A. 387; *In re Moir, Warner v. Moir* (1884) 25 Ch. D. 605.

Ss. 26-27 that given by the will, as also protesting against the inadequacy of the bequest and demanding "something suitable to our dignity" (d).

Consent generally.—Whether conditions be precedent or subsequent, if they are in restraint of marriage the Courts struggle to prevent a forfeiture. Trustees must consider themselves as parents and readily consent when there is no objection (e). After a lapse of 28 years consent was presumed (f). It may be expressed or implied (g). Where the marriage is to be with the consent of trustees, the consent of such as accept office is sufficient (h). A trustee is not required to show his reason for dissent (i). The consent must be free (j). A consent required to be in writing shall be deemed to be complied with if given orally (k). Consent after the act is not performance of the condition (l). Consent to marriage may be withdrawn upon good reason (m) but not capriciously (n).

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. This disposition in favour of B does not take effect.

Failure of prior transfer.—The manner of failure of the prior estate as prescribed is not to be construed literally. If the precedent estate by whatever means

(d) *Veerbhadr v. Chiranjivi* (1905) 28 Mad. 173, 32 I. A. 105.

(e) *Daley v. Desbouverie* (1738) 2 Atk. 261, 26 E. R. 561.

(f) *Re. Birch* (1853) 17 Beav. 358, 51 E. R. 1072.

(g) *Clarke v. Parker* (1812) 19 Ves. 1, 34 E. R. 419; *Harvey v. Aston* (1737) 1 Atk. 361, 26 E. R. 230.

(h) *Ewens v. Addison* (1858) 32 L. T. O. S. 103; *Worthington v. Evans* (1823) 1 Sim. & St. 165, 57 E. R. 66.

(i) *Clarke v. Parker* (1812) 19 Ves. 1, 34 E. R. 419.

(j) *Re. Stephenson's Trusts* (1870) 18 W. R. 1066.

(k) *Worthington v. Evans* (1823) 1 Sim. & St. 165, 57 E. R. 66.

(l) See sec. 128, illustration (v), Indian Succession Act, 1925.

(m) *Clarke v. Parker* (1812) 19 Ves. 1m. 34 E. R. 419.

(n) See sec. 128, illustration (iv) to the Indian Succession Act, 1925.

is out of the case, the subsequent limitation takes place (o). The rule of English Law is, where a testator manifests a clear intention to give a benefit to certain objects on an event which happens, the legatee shall not be deprived of it although a circumstance inadvertently coupled with it in the language used, does not literally take place (p).

A testator devised a term of years to his wife for life and after her death to the child she was then *enceinte* with ; but if such child died before twenty-one then he devised one-third part of the term to his wife. The wife was not *enceinte* at the time of the devise. It was held that the devise to her was good though the contingency never happened (q), and so where the child expected was a son and turned out to be a daughter (r). In such cases where there is a gift over at marriage it falls within the well-known rule in *Jones v. Westcomb* (s) and takes effect either on death or on marriage. A testator gave property to trustees on trust for his son for life until he should become bankrupt or insolvent and then over. Such a limitation is good in English Law (t) but would be void under section 12 of the Transfer of Property Act.

Acceleration of remainder on failure of life estate.—A gift in remainder expectant on the termination of an estate for life does not fail but is accelerated by reason of the gift of such prior life estate not taking effect (u). An award appointed D. the dedicator as first manager for twenty-one years and on the expiration of his term appointed his younger brother R. as manager for twenty-one years and on the expiry of his term, S. the third son of the dedicator, was to be manager for twenty-one years, thereafter the eldest son of D. then the eldest son of R. and then the eldest son of S. and so on. R. died before the completion of the full term of twenty-one years. S. had predeceased R. The eldest son of R. claimed the right of management for the unexpired portion of the term of twenty-one years. Held that the right of managership given to R. was personal to him, and on his death before completion of his term and S. dying before R, the result was to accelerate the succession of the eldest son of D. (v). In an earlier case a testator directed his widow to adopt a son but on the death of the adopted son without leaving issue, his estate was to be divided equally between his two daughters. The authority to adopt having been declared invalid, it was held that the bequest to adopt a son having failed, such failure did not make the bequest void but the daughters took an absolute interest under the will of the testator as tenants in common (w).

Proviso.—According to this, the subsequent limitation does not take effect unless the prior disposition fails in the manner contemplated by the transferor. A similar provision is made in section 130 of the Indian Succession Act.

- (o) *Avelyn v. Ward* (1750) 1 Ves. Sen. 420, 27 E. R. 1117; *Re. Sheppard's Trust* (1855) 1 K. & J. 269; *Underwood v. Wing* (1855) 4 De M. & G. 633, 43 E. R. 655; *Edgeworth v. Edgeworth* (1869) 4 H. L. 35; *Davies v. Davies* (1882) 47 L. T. 40; *Tennant v. Heathfield* (1855) 21 Beav. 255, 52 E. R. 857; *Barnett v. Tugwell* (1862) 31 Beav. 232, 54 E. R. 1127.
 (p) *Harman v. Dickenson* (1781) 1 Bro. C. C. 91, 28 E. R. 1004.
 (q) *Jones v. Westcomb* (1711) Prec. Ch. 316, 24 E. R. 149; *Roe d'Fulham v. Wickett* (1741) Willes, 303, 125 E. R. 1184.
 (r) *Okhoymoney Dasee v. Nilmony Mullick*

- (1888) 15 Cal. 282.
 (s) (1711) Prec. Ch. 316, 24 E. R. 149.
 (t) *In re Mason, Mason v. Mason* (1910) 1 Ch. 695; *Etches v. Etches* (1856) 3 Drew. 441, 61 E. R. 971.
 (u) *Adjudhia Baksh v. Rakhman Kuar* (1884, 10 Cal. 482; *Lainson v. Lainson* (1853) 24 L. J. Ch. 46, 43 E. R. 1063; *Jull v. Jacobs* (1876) 3 Ch. D. 703; *Re. Johnson, Danily v. Johnson* (1893) 68 L. T. 20.
 (v) *Debi Shankar v. Nand Kishore*, A. I. R. (1932) O. 161.
 (w) *Radha Prasad v. Ramee Mani* (1906) 33 Cal. 947.

Ss. 27-28

Illustration (b).—Prior to the Law of Property Act, 1925, by the law of England the question of survivorship in cases, of which the illustration is an example, was a matter of evidence and not of positive regulation and enactment, as in the French Code, and in the absence of evidence there was no conclusion of law on the subject. The illustration recalls the case of *Underwood v. Wing* (x). The English Law, however, is now altered and the presumption in simultaneous deaths by the Law of Property Act, 1925, section 184, is that in all cases where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths for the purpose of affecting title to the property are to be presumed to have occurred in the order of seniority and the younger shall be deemed to have survived the elder.

Conditional bequests and devises.—The Indian Succession Act of 1925 contains provisions similar to section 27 of the Transfer of Property Act. The rule enunciated in the section is similar to that in section 129 of the Indian Succession Act and that in the proviso as in section 130.

A testator bequeathed the residue of his estate to his grandsons who might be born to his son K. within ten years after his death and failing such grandsons to his grand-daughters equally after the death of his wife. A grandson was born within ten years of his death. It was held that the bequest in favour of the grandson being to a person not in existence, was invalid. Further, as the grandson was in existence the bequest in favour of the grand-daughters could not take effect under section 130 of the Indian Succession Act which applied to Hindu wills. Therefore, the grandson took the whole estate as heir-at-law (y). The illustration to section 130 of the Indian Succession Act which is identical with section (b) of the present section recalls the case of *Underwood v. Wing* (z), the first illustration to section 129, *Meadows v. Parry* (a), and the second illustration, *Avelyn v. Ward* (b). Other cases illustrating section 129 are collected in William on Executors, 12th Ed., Vol. II, pp. 820-822, Theobald on Wills, 8th Ed., pp. 738-740, Jarman on Wills, 7th Ed., pp. 2134-2138.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 23, 24, 25 and 27.

Ulterior transfer conditional on happening or not happening of specified event.

Condition subsequent.—This section deals with the subject known to law as condition subsequent or, to use the phrase in the section, condition superadded. These are dealt with in a group formed of sections 28, 29 and 30. The considerations applicable to conditions subsequent seem to be totally different from the considerations applicable to conditions precedent grouped under sections 25, 26 and 27

(x) (1855) 24 L. J. Ch. 293, 43 E. R. 655; *Tennant v. Heathfield* (1855) 21 Beav. 255, 52 E. R. 857; *Barnett v. Tugwell* (1862) 31 Beav. 232, 54 E. R. 1127.
(y) *Official Assignee of Madras v. Vedavalli*, A. I. R. 1926 Mad. 936.

(z) (1855) 24 L. J. Ch. 293, 43 E. R. 655; *Tennant v. Heathfield* (1855) 31 Beav. 255, 52 E. R. 857; *Barnett v. Tugwell* (1862) 31 Beav. 232, 54 E. R. 1127.
(a) (1812) 1 Ves. & B. 124, 35 E. R. 49.
(b) (1750) 1 Ves. Sen. 420, 27 E. R. 1117.

In the present group of cases there is a clear original vested gift in certain defined persons and there is a clear condition subsequent taking the benefits away from them on specified conditions. The object of conditions subsequent is to determine and divest (upon the happening of the event specified) estates or interests antecedently vested. If, therefore, the condition be void, the gift will be absolute.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction (c). The condition subsequent must be subsequent to the actual enjoyment in possession of the estate. The obligation to perform the condition does not arise until after possession is taken. The obligation to do the act and the immunity from doing it, are both measured by the same standard, namely, what are the limits of the condition,—when does the obligation arise under the condition? When you once come to the conclusion that the condition is intended to operate only after the devisee comes into possession, the occasion for any excuse for his not performing it, arises then and not till then, and it is unnecessary to consider whether he could or could not perform it before. A clause of defeasance, in order to be operative, must contain express words or words of necessary implication of a gift over to a definite person (d). A testator by his will made a settlement of his property in favour of his grand-children on the express condition that during their respective minorities they should not reside abroad except for a period not exceeding six weeks in each year. Upon non-compliance their shares were to be forfeited. Held that the condition was a condition subsequent, and as its non-compliance was void as being contrary to public policy as tending to the possible separation of parents from their children, the condition was void (e). A condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy (f). A Hindu may create a life estate or successive life estates. But a series of absolute estates defeasible in succession on the happening of an uncertain event cannot be considered as a succession of life estates. It can only be considered as an attempt to create a state of inheritance which is not recognized by Hindu Law. These were the observations in a Bombay case which was decided on section 131 of the Indian Succession Act, corresponding to the present section. A testator bequeathed his property successively to the three sons of his sister subject to the condition that, if the first died without male issue surviving, it was to go to the second, who was similarly liable to be defeated if he in his turn died without leaving male issue, in which event the property was to go to the third son subject to a similar condition. Ultimately, the property was devised in favour of charity. The first two sons having died without male issue surviving, the third son sued for construction of the will. Held, the first son took an absolute estate which on his death would go to his daughter as his heiress. Here the testator intended that the bequest to the first son should be defeasible. If he died without male issue then there should be a gift over. But he attached a condition to that gift over, and he attempted to restrict the inheritance of his estate in a manner contrary to the principles of Hindu Law (g). A testator by his will directed that any child of his taking any interest thereunder should, in respect of other funds to which the child would become entitled, execute a settlement to the satisfaction of the testator's trustees on the lines laid down in the will. The will

(c) *In re Greenwood, Goodhart v. Woodhead* (1903) 1 Ch. 749.

(d) *Amulya Charan v. Kali Das* (1905) 32 Cal. 861.

(e) *In re Boulter, Capital and Counties Bank v. Boulter* (1922) 1 Ch. 75.

(f) *In re Beard, Reversionary and General Securities Co., Ltd., v. Hall* (1908) 1 Ch. 383.

(g) *Bai Dhanlaxmi v. Hariprasad* (1921) 45 Bom. 1038.

S. 28

contained a forfeiture clause if the directions as to the settlement were not complied with. The son of the testator (the settlor) executed a settlement and the recitals in the deed stated his desire to execute it in accordance with the testator's directions. The will trustees expressed themselves satisfied with the settlement. It stated, *inter alia* : " If the settlor shall not have had any child who under the trusts in default of appointment hereintofore contained shall attain a vested interest in the trust fund, then . . . the trust fund . . . shall be held as to one-half thereof in trust for such person or persons as the settlor shall by will or codicil appoint, and as to the other half part . . . shall be dealt with as if the settlor had died in the lifetime of the (testator) without leaving any child living at the death of the said (testator)." Held (Lord Blanesburgh dissenting), that the satisfaction of the trustees was not conclusive ; that the recitals and operative part of the settlement, though clear, were inconsistent and the operative part prevailed ; that the settlement reproduced the words of the testator's will, which referred to the son's portion, whereas the settlement referred to the son's trust fund ; that the stated hypothesis of the son's death in his father's lifetime, though apt to determine the destination of the testator's own property, was not sufficient to determine that of the son's own property ; that there was a resulting trust to the son ; that there was consequently by the terms of the testator's will a forfeiture of the settlor's interest of his portion under the will (*h*).

Condition subsequent ineffectual.—Where the condition subsequent is uncertain or is contrary to public policy or impossible, it is void and ineffectual, although there may be a gift over and the gift over is also ineffectual (*i*).

Validity of condition.—A condition subsequent to be valid must be one which, if it forms the consideration of an agreement or contract, the agreement or contract would be valid.

Time for performance.—The section does not make any reference to the time in which a condition subsequent must be performed. There is no general rule in computing time. Each case depends upon the reason of the thing according to the circumstances (*j*). Even if it be performed subsequent to the time fixed for performance and the Court finds that all parties can be put in substantially the same position as they would have been, had the condition been performed within the proper time, time is not regarded as of the essence and such performance is treated as a sufficient compliance of the condition (*k*).

Ignorance of condition subsequent.—Ignorance of a condition subsequent cannot prevent a forfeiture clause for breach of the condition coming into operation (*l*). But where there was a gift over upon " refusal or neglect " to take the name and arms of the testator, and failure to comply with the condition was through ignorance of existence of the will, it was held that the estate was not forfeited as the expression " refuse or neglect " is not equivalent to " fail " or " omit " as it implies a conscious act of volition (*m*).

(*h*) *Inland Revenue Commissioners v. Raphael* (1935) 51 T. L. R. 152 ; *Same v. Ezra* (1935) 51 T. L. R. 152.

(*i*) *Thomas v. Howell* (1692) 1 Salk. 170, 91 E. R. 157.

(*j*) *Lester v. Garland* (1808) 15 Ves. 248, 33 E. R. 748.

(*k*) *Re. Goodwin, Ainslie v. Goodwin* (1924) 2 Ch. 26.

(*l*) *Astley v. Essex (Earl)* (1874) L. R. 18 Eq. 290.

(*m*) *In re Quintin Dick, Cloncurry v. Fenton* (1926) 1 Ch. 992 ; *Partridge v. Partridge* (1894) 1 Ch. 351 ; *In re Edwards* (1910) 1 Ch. 541.

Certainty.—One of the cardinal rules on this subject has been this, that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine (*n*). Limitation must be certain not only in expression but also in operation (*o*).

Impossibility.—If a condition annexed to a gift or legacy be impossible at the time of imposing it, the gift or legacy can never take effect. The testator devised the residue of his estate to J, provided she married with the consent of his two executors. One of them died. The condition being subsequent became impossible and she could therefore marry without the consent of the survivor (*p*). In such cases the performance is dispensed with and the gift becomes absolute (*q*), but where the consent is to be obtained, as of a guardian, and if there is no guardian, it cannot be said that the condition was complied with, for a guardian could have been appointed (*r*). Whenever the Courts take notice of a condition impossible, it must be a natural impossibility arising from an act subsequent, which the party could not avoid, having become impossible by an act of God (*s*). Lunacy has been held to be an act of God making performance of condition impossible, and the condition being subsequent, the legatee takes an absolute estate (*t*). A settlement for two daughters provided that if either married without the consent of their mother, it should be to her separate use. After proposing and encouraging the marriage of one of them the mother refused to give her consent out of resentment. The marriage held without her consent was held to be no forfeiture (*u*). A consent may be withdrawn if subsequent circumstances justified it. This power is not unlimited and cannot be exercised for mere caprice (*v*). A bequest to a testator's son contained a condition prohibiting marriage with two named persons with a gift over on breach of condition. The son married, but none of the two named persons. It was held that the condition was not impossible of fulfilment so long as the plaintiff and either of the two ladies survived and, therefore, the bequest took effect subject to defeasance on breach of the condition at any time (*w*).

Exemption.—A condition subsequent was that each of the daughters of the settlor should settle her interest under her mother's marriage settlement upon certain trusts. The daughters who executed settlements in the testator's lifetime with his concurrence were held exempt from the performance of the condition though the trusts of the settlement were not absolutely identical with the trusts of the will, and in one particular were opposed to the provisions of the will of the testator, their father (*x*). The true principle in this class of cases where conditions are dispensed with, is not that of considering that the condition has been fulfilled but that the child or other persons entitled under the will are exempt from the condition altogether, so that the will must be read as if there was no condition.

(*n*) *Clavering v. Ellison* (1859) 29 L. J. Ch. 761, 11 E. R. 282; *Jeffreys v. Jeffreys* (1901) 84 L. T. 417; *Re Moore's Trusts*, *Lewis v. Moore* (1906) 96 L. T. 44; *Re Sandbrook*, *Noel v. Sandbrook* (1912) 2 Ch. 471; *Re Lanyon*, *Lanyon v. Lanyon* (1927) 2 Ch. 264.
 (*o*) *In re Viscount Exmouth*, *Viscount Exmouth v. Praed* (1883) 23 Ch. D. 158.
 (*p*) *Peyton v. Bury* (1731) 2 P. Wms. 626, 24 E. R. 889; *Greydon v. Hicks* (1739) 2 Atk. 16, 26 E. R. 407; *Dwason v. Oliver Massey* (1876) 2 Ch. D. 753.
 (*q*) *Collett v. Collett* (1866) 35 Beav. 312, 55 E. R. 916; *Booth v. Meyer* (1877) 38 L. T.

125; *In re Greenwood*, *Goodhart v. Woodhead* (1903) 1 Ch. 749; *Peyton v. Bury* (1731) 2 P. Wms. 626, 24 E. R. 889.
 (*r*) *Re Brown's Will*, *Re Brown's Settlement* (1881) 18 Ch. D. 61.
 (*s*) *Franco v. Alvarez* (1746) 3 Atk. 342, 26 E. R. 998.
 (*t*) *Re Bird*, *Bird v. Cross* (1894) 8 R. 326.
 (*u*) *Strange (Lord) v. Smith* (1755) Amb. 263, 27 E. R. 175.
 (*v*) *Re Brown*, *Ingall v. Brown* (1904) 1 Ch. 120.
 (*w*) *In re Bathe*, *Bathe v. Public Trustee* (1925) 1 Ch. 377.
 (*x*) *In re Grove*, *Public Trustee v. Dixon* (1919) 1 Ch. 249; *In re Park* (1910) 2 Ch. 322.

S. 28

Indian Succession Act, 1925.—Section 28 corresponds to section 131 of this Act except that in the Transfer of Property Act the dispositions are subject to certain rules enumerated in section 28, while under the Indian Succession Act it is only the ulterior bequest that is subject to the parallel rules contained in section 131 of the Indian Succession Act.

Condition of residence.—Residence must be personal (*y*). Residence has been decided not to require that a man shall actually sleep there every night (*z*). Although the words of the will were not fulfilled literally, it was held that there was no forfeiture where the tenant for life was directed to reside upon the messuage at least every six calendar months in a year, and on his failure to do so there was a gift over. The tenant for life did not reside as directed, but had in the house a staff and servants, paid the rates and kept horses and poultry, and his son stayed in the house on an average on every alternate Saturday till Monday (*a*). In a later case, “residing” was held to mean “personally residing.” By his will a testator gave his leasehold house to trustees to permit his niece C to hold and occupy the same free of rent on the express condition that after his decease his niece C should “remain single and unmarried,” and in the event of her marriage she was to forfeit the bequest and it was to fall in the residue. C resided until marriage and ten years thereafter and then her husband took another house in the neighbourhood and she moved into it with him. She let all the rooms but kept one for herself and in it she kept a bed, her books, some clothes, writing materials, etc., and retained the key. She went there two or three times a week and occasionally had meals and slept there. It was held that what C had done did not amount to residing within the meaning of the will, but reading the subsequent void condition in restraint of marriage into the condition as to residence on marriage, the latter condition did not apply and there was no forfeiture (*b*). But where a direction in a will “provided, that in the event of my said niece voluntarily ceasing to make the said dwelling house her permanent home as aforesaid, I direct the said sum of £7,000 and the investment representing the same shall fall in the residue,” it was held that there was no forfeiture where the niece on marriage, in pursuance of her husband’s injunction and because he wished to make another house the matrimonial home, complied with his instructions. It was there held that voluntarily meant “freely without compulsion” and “not under any obligation” and that having acted in pursuance of a legal duty to her husband, she would not cease to use the dwelling house, her permanent home, voluntarily (*c*). There are many authorities, ancient and modern, showing that the Courts abhor provisions in instruments of whatever kind contemplating the interruption of conjugal relations and hold such provisions void as against the policy of the law. One of the terms of a will was that if any female member of the testator’s family should live in any other than a holy place for more than three months she should forfeit her rights under the will. The plaintiff, a minor daughter-in-law, was forcibly removed from her house with the aid of the police, and resided for more than three months with her mother. It was held that absence under duress did not work a forfeiture (*d*). Reference was made to a passage in the judgment of Lord Campbell in *Clavering v. Ellison* (*e*): “Had the children been included in the arrest I conceive that their residence abroad

(*y*) *Walcot v. Botfield* (1854) Kay 534, 69 E. R. 226.

(*z*) Per Jessel, M. R., in *Astley v. Essex (Earl)* (1874) 18 Eq. 290.

(*a*) *In re Moir, Warner v. Moir* (1884) 25 Ch. D. 605.

(*b*) *In re Wright, Mott v. Issott* (1907) 1 Ch. 231.

(*c*) *In re Wilkinson, Page v. Public Trustee* (1926) 1 Ch. 842.

(*d*) *Tin Couri Dassee v. Krishna Bhabini* (1893) 20 Cal. 15.

(*e*) (1859) 7 H. L. Cas. 707, 11 E. R. 282.

under continued duress would not have worked a forfeiture, and if their residence abroad may be fairly ascribed to the imprisonment of their father by Napoleon, the forfeiture might be saved on this ground, were there a necessity to resort to it." This case could have been decided equally in the plaintiff's favour on the ground of infancy.

But maintenance of an establishment was held insufficient and personal residence considered necessary where trustees were directed by a testator to pay the income of the residuary estate to the tenant for life of a certain property during such period of his life as he should reside on the property for a limited period in every year, there being a gift over of the income in the event of his ceasing or declining so to reside (*f*). A Hindu testator directed that his two wives should live in the family dwelling house or, according to the rules of Hindu religion, in some holy place, and each should receive a monthly allowance of Rs. 10 for maintenance, with a gift over. If either acted contrary to the will, she should be deprived of all interest. The younger widow who broke the condition relating to residence forfeited her interest (*g*).

Infancy.—An infant is not bound by a condition subsequent requiring residence inasmuch as he has no power to choose his own place of residence (*h*).

Repugnant conditions.—If a condition subsequent which is to defeat an estate is against the policy of the law, the gift is absolute, but if the illegal condition is precedent, there is no gift.

A condition against alienation is void.—The difference between a condition properly so called and a conditional limitation or an executory devise is that in the case of a condition, the estate is to revert to the grantor or his heirs, and in other cases it is limited over to other persons. A limitation to the use of A and his heirs till C returns from London and after the return of C, to the use of B in fee, is in a deed a conditional limitation, in a will an executory devise. A limitation which defeats a portion of the estate previously given is a conditional limitation as distinguished from condition, of which only the grantor or his heirs can take advantage. If an estate is given to A for life with remainder to B absolutely with a proviso that if A should attempt to assign, his life estate should cease, such a proviso is read as a limitation to A during his life or until he should attempt to assign, and upon that event or after his death, such a limitation is held to be valid.

The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest (*i*). An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor or by conditional limitation or executory devise which would cause it to shift to another person. A testatrix gave certain estates to her son, but if he did or suffered any act, in consequence whereof he would be deprived of the personal beneficial enjoyment thereof, then the trust was to cease and the estate held in trust for his wife, or, if no wife then living, for his children equally. The son survived his mother, and was a bachelor.—Held that he took an absolute

(*f*) *Vivian, Vivian v. Swansea* (1920) 36 T. L. R. 657.

(*g*) *Bhoba Tarini v. Peary Lall* (1897) 24 Cal. 646

(*h*) *Partridge v. Partridge* (1894) 1 Ch. 351.

(*i*) *In re Dugdale, Dugdale v. Dugdale* (1888) 38 Ch. D. 176; *Webb v. Grace* (1848) 2 Ph. 701, 41 E. R. 1114; *Rochford v. Hackman*, (1852) 9 Hare 475, 68 E. R. 597; *Joel v. Mills* (1857) 3 K. & J. 458, 69 R. E. 1189.

S. 28 interest under the gift, and that the attempted executory gift over was void for repugnancy (*j*). The general principle as enunciated above is subject to many important exceptions, one of them being an executory devise defeating or abridging an estate in fee by altering the course of its devolution which is to take effect at the moment of devolution and at no other time. Another exception is that any executory devise which is to defeat an estate and which is to take effect on the exercise of any of the rights incident to that, is void. It is clear that under the extreme freedom of disposition allowed to testators, a gift by will which is absolute in the first instance may in general be modified by subsequent words cutting down or divesting the gift on any contingency the testator may think fit to select. B died leaving a certain immoveable property to his son R. under a will with the words, "should my son R. die, which God forbid, and should he then leave a son, such his son shall afterwards be the owner thereof." It was held that R. took only a life-interest (*k*).

But the contingency must not be so selected as to run counter to the general policy of the law. Thus gifts over on any of the following contingencies, amongst others, are bad, namely, (a) any contingency that is too remote, (b) the contingency of any marriage whatsoever, (c) the contingency of alienation, (d) the contingency of bankruptcy, or (e) the contingency of intestacy. The same principle is affirmed in India and there is a large number of decisions of the Indian Courts which supports this principle. A gift over is void for repugnance where the estate conferred is of an absolute nature. Where it was found that a testator had intended to give an absolute estate and attempted to limit the rights of the holder owing to an erroneous view of his powers, the attempt to limit the rights must be rejected on the ground of repugnance (*l*). The same principle has been followed by the Courts of Bombay (*m*), Calcutta (*n*) and Lahore (*o*).

Gift over.—It is clearly settled that a gift over upon an attempt to alienate an absolute interest previously given is as void as a condition (*p*).

Change of religion.—A testatrix limited to a daughter an exclusive power of appointment by will amongst her children. The daughter appointed among the objects of the power and declared that if either during her life or after her death any son or daughter should marry a person not professing the Jewish religion or should forsake the Jewish and adopt the Christian or any other religion, such son or daughter should forfeit all share in the fund, which was to accrue and go over to the other children living at the date of forfeiture. A son of the testatrix married a Christian without her consent. A daughter embraced Christianity after her mother's death. Both children were born after the death of the creator of the power. Held, the forfeiture clause was not void against public policy. The share of the son was forfeited, but as regards the daughter, so far as it affected after the death of the appointor the share of a child born after the death of the creator of the

(*j*) *In re Dugdale, Dugdale v. Dugdale* (1888) 38 Ch. D. 176; *Re. Moore, Trafford v. Maconochie* (1888) 39 Ch. D. 116; *Re. Hope Johnstone, Hope Johnstone v. Hope Johnstone* (1904) 1 Ch. 470; *Re. Wilkinson, Page v. Public Trustee* (1926) Ch. 842.

(*k*) *In re Ashton, Ballard v. Ashton* (1920) 2 Ch. 481; *Gulbaji Ajisji v. Rustomji* (1925) 49 Bom. 478; *Mafatlal v. Kanialal* (1915) 17 Bom. L. R. 755.

(*l*) *Jagmohan Singh v. Sheoraj Kuar* A. I. R. (1928) Oudh 49.

(*m*) *Anandrao Vinayak v. Administrator General*

of Bombay (1896) 20 Bom. 450.

(*n*) *Sures Chandra v. Lalit Mohun* (1916) 20 C. W. N. 463; *Tripurari Pal v. Jagat Tarini* (1912) 40 Cal. 274, 40 I. A. 37.

(*o*) *Mohan Lal v. Niranjani Das* (1921) 2 Lah. 175; *Karan Singh v. Mr. Rupawanti, A. I. R.* (1925) Lah. 122.

(*p*) *Bradley v. Peixoto* (1797) 3 Ves. 324, 30 E. R. 1034; *Ross v. Ross* (1819) 1 Jac. & W. 154, 37 E. R. 334; *Holmes v. Hodson* (1856) 8 De M. & G. 152, 44 E. R. 347; *Shaw v. Ford* (1877) 7 Ch. D. 66.

power, it was void for remoteness and consequently the daughter had not forfeited her share (q). Ss. 28-29

Marriage.—All general restraints upon marriage are void (r). But not if the restraint is with a view to protect a child or in cases where marriage of a woman is prohibited on the ground that it would lead to the neglect of the testator's child or might result in another man's spending his hard-earned money (s). Or where a condition subsequent is in restraint of a marriage of a single woman on the ground of health, or provision being only intended until marriage (t). A condition subsequent in partial restraint of marriage is valid if accompanied by a gift over (u).

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fulfilment of condition subsequent.

•
Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

The section.—This section is supplemental to section 28.

Condition is strictly fulfilled.—Unlike a condition precedent, the law demands, in the case of a condition subsequent, literal compliance. The reason is that the law favours vesting and abhors divesting and as clauses dealing with condition subsequent are in defeasance of estates vested, they are to be construed more stringently (v). In a subsequent case (w) Kindersley, V. C., said "that the contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate" (x).

Indian Succession Act, section 132.—This section corresponds with section 29 of the Transfer of Property Act. Illustration (i) to this section and illustration (ii) to section 128 as well as illustration (a) to section 26 of the Transfer of Property Act point out the distinction between the fulfilment of a condition precedent and a condition subsequent.

Defeasance must "fit" the condition.—Usually in a clause containing a condition subsequent there is a gift over in default of performance when the condition is not fulfilled and where there is a default, the gift over takes effect. For this purpose, residue is a gift over but it is doubted if a residuary bequest is such (y). A gift over cannot be implied (z).

In construing clauses of defeasance, two rules are to be observed, the first rule is to construe the clause most strictly. The next rule is that the cesser, and the limitation over must fit in with one another, otherwise the gift is absolute. Such

(q) *Hodgson v. Halford* (1879) 11 Ch. D. 959; *Warrington v. Miller* (1897) 2 Ch. 255; *Re. Lanyon, Lanyon v. Lanyon* (1927) 2 Ch. 264.
(r) *Godfrey v. Hughes* (1847) 1 Rob. Eccl. 593, 163 E. R. 1147.
(s) *Potter v. Richards* (1855) 24 L. J. Ch. 488.
(t) *Re. Hewell, Eldridge v. Hles* (1918) 1 Ch. 458; *Jones v. Jones* (1876) 45 L. J. Ch. Q. B. 166.
(u) *In re Whiting's Settlement, Whiting v. De Rutzen* (1905) 1 Ch. 96; *Dashwood v. Bulkeley (Lord)* (1804) 10 Ves. 230, 32

E. R. 832; *Lloyd v. Branton* (1817) 3 Mer. 108, 36 E. R. 42.
(v) *Egerton v. Brownlow* (1853) 23 L. J. Ch. 348, 10 E. R. 359.
(w) *Clavering v. Ellison* (1859) 29 L. J. Ch. 761, 11 E. R. 282.
(x) *Clavering v. Ellison* (1859) 29 L. J. Ch. 761, 11 E. R. 282.
(y) *Lloyd v. Branton* (1817) 3 Mer. 108, 36 E. R. 42.
(z) *In re Evans's Contract* (1920) 2 Ch. 469; *Gulliver v. Ashby* (1766) 4 Burr. 1929, 98 E. R. 4.

Ss. 29-30

was the opinion expressed in *Catt's Trusts* (a). In that case the limitation was in fee and the gift over was that it should cease and be void to all intents and purposes, and was to go over in the same manner as if they were dead. In a subsequent case the gift was in fee simple and was to go over to those entitled in remainder. As there could be none such, the clause was held to be absolutely void (b).

Revocation clause.—It is quite clear that if a testator desires a gift to be revoked the mere fact that there is no gift over will not prevent the revocation from taking effect. For this purpose it is not necessary to consider whether the condition is precedent or subsequent. If the clause for cesser and the gift over do not fit in with each other, the whole clause would be ineffectual and the gift would be absolute, on the ground that defeasance does not fit the condition (c). In an earlier case a testator gave a legacy to his daughter for life and the remainder in trust for her children. By a codicil he revoked the bequest to the daughter in case she became a nun. The daughter took the veil. Held, the condition was a lawful one although there was no gift over. On breach of the condition, her interest under the bequest ceased (d).

Effect of a void condition.—If a condition be void in its inception, the gift itself is void if the condition is a condition precedent. It is absolute if the condition is a condition subsequent.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she does not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

Gift over void.—Section 30 enacts that if a gift over be void the original disposition is not affected. A Hindu executed a Deed of Settlement excluding his son from inheritance as he was of bad character and made a gift of his property to his wife (the Rani) appointing her successor and representative subject to conditions, of which condition 6 was that if during the succeeding years a lawful son was born to his son who was excluded, he should take the property on attaining majority. It was held that the grandson took the estate by virtue of a condition subsequent terminating the estate limited to the Rani and her successors in the event of his attaining majority and that this condition of defeasance being illegal and void under Hindu Law as being in favour of an unborn person, it was inoperative and void and left the Rani's estate unaffected (e).

Prior disposition not enlarged.—This section does not enlarge the nature of the interest created in the first instance by reason of the subsequent disposition being invalid.

Prior disposition void.—This section enacts that if an ulterior disposition is not valid the prior disposition is not affected by such invalidity. The converse is

(a) (1864) 33 L. J. Ch. 495, 71 E. R. 377.

(b) *Musgrave v. Brooke* (1884) 26 Ch. D. 792;
In re Cornwallis, Cornwallis v. Wykeham—
Martin (1886) 32 Ch. D. 388.

(c) *Re. Catt's Trust* (1864) 33 L. J. Ch. 495, 71 E. R. 377.

(d) *Re. Dickson's Trust, ex-parte Dickson* (1850) 1 Sim. (N. S.) 38, 61 E. R. 14.

(e) *Narsingh Rao v. Maha Lakshmi* (1928) 50 All. 375; *Gerrard v. Butler* (1855) 20 Beav. 541, 52 E. R. 712; *Ring v. Hardwick* (1840) 2 Beav. 352, 48 E. R. 1217; *Carver v. Bowles* (1831) 2 Russ & M. 301, 39 E. R. 409; *Stephens v. Gadsden* (1855) 20 Beav. 463, 52 E. R. 682.

not true as under section 16 if a prior disposition fails the ulterior disposition falls with it. Ss. 30-31

Ulterior disposition void.—Circumstances rendering ulterior dispositions void are discussed in the notes to sections 28 and 29.

Indian Succession Act, section 133.—This section corresponds with section 30 of the Transfer of Property Act.

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition super-added that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Illustrations.

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Condition superadded.—It is permissible under this section to create an estate by the addition of a condition subsequent whereby on the happening or non-happening of a specified uncertain event, such an estate is to determine. An estate so created is known in English Law as a “determinable fee simple” (*f*). Unlike section 28, there is no gift over in the case contemplated by this section. It does not originate but determines an estate. The estate created may be a qualified estate as in illustration (a) or an absolute estate as in illustration (b). Examples of conditions subsequent in defeasance of a vested estate are afforded by cases relating to residence, marriage settlements, name and arms clauses, introduced in English will settlements and leases. A clause in a deed laying down that an absolute estate was to be divested on the happening of a particular contingency is not to be treated as invalid. It is neither the law in England nor in India (*g*).

Exceptions.—The rule in the section is subject to exceptions mentioned in section 12 by which a condition that an absolute transfer is to determine on the transferee becoming insolvent or endeavouring to transfer or dispose of the property is void.

Indian Succession Act, section 134.—This section corresponds with section 31 of the Transfer of Property Act.

Hindu Law.—Provisions for defeasance on the occurrence of an uncertain event are legal and enforceable subject to two limitations, viz., that no rule of Hindu Law will be infringed and the rights of a transferee for consideration without notice will be protected. A Hindu made a gift of his property on condition that it should

(f) Williams on Real Property, 24th Ed., p. 84.

(g) *Ahmad Azim v. Safi Jan*, A. I. R. (1926) Oudh 561.

Ss. 31-32 be restored to him on his return from Port Blair. It was held that the clause of reverter was valid and enforceable against the transferee as well as his heirs (*h*).

Performance or non-performance of condition subsequent.—The performance or non-performance of a condition subsequent under this section differs from the performance or non-performance of a condition subsequent referred to in section 28. In section 31 there is no gift over but a mere cessation of the interest created. In section 28 there is a gift over on defeasance. Further, section 29 which is supplemental to and follows section 28 requires the condition subsequent to be strictly fulfilled. No such imposition is laid in case of a condition subsequent within the meaning of section 31. This section is founded on an English case (*i*).

The non-performance of a condition subsequent under section 31 can be compensated in damages but if the condition be in the nature of a penalty the Court will relieve against it (*j*).

Purchaser's failure to pay within a time fixed.—The vendor who had only received a part of the purchase-money signed an acknowledgment in the conveyance of 15th July 1925 for the entire consideration. The purchaser agreed to pay the balance to the vendor's creditors by the 30th December 1925 and on his failure the sale deed was to stand cancelled null and void. On the purchaser's failure the vendor maintained that this was a superadded condition within the meaning of section 31 and on its breach the rights of the purchaser automatically ceased. Their Lordships held that the receipt of the entire consideration by the vendor could not be taken literally, so as to contradict a clear fact, that the balance had not been paid but was to be paid by the date prescribed and that in their opinion there was nothing in section 31 which declared that a limitation upon a condition subsequent was a lawful method of grant to exclude the right of the Court to give relief to the purchaser who failed to make payment of the price or part thereof by the date agreed upon in the contract of sale, which in the present case was embodied in the same deed as the act of transfer (*k*).

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

Termination of an estate by means of the annexation of a condition.—A condition subsequent under section 31 as would effectively determine an estate created must be such, that if it were a condition precedent, it would not be invalid under section 25, that is to say, a condition void in originating an estate is equally void in determining an estate. If a condition be annexed to an estate which would otherwise be absolute, then on the happening of the condition the estate is defeated.

Effect of invalid condition subsequent.—The effect of a condition invalid under this section is not to defeat the estate but the transferee takes the estate free from the obligation to perform the condition.

(*h*) *Venkatarama v. Aiyasami*, A. I. R. (1923) Mad. 67; *Sreemathi Surjeemoney v. Deenobondo Mullick* (1862) 9 M. I. A. 136; *Kristoromani Dasi v. Narendra Krishna* (1882) 16 Cal. 383, 19 I. A. 29.
(*i*) *Popham v. Bampfseild* (1682) 1 Vern. 80, 23

E. R. 325; *Munshi Lal v. Ahmad Mirza*, A. I. R. (1933) Oudh 291.
(*j*) Secs. 73 and 74, Indian Contract Act, IX of 1872.
(*k*) *Devendra Prasad v. Surendra Prasad* (1935) 62 C. L. J. 436.

The rule against perpetuities.—In case of an estate limited as in the section the specified uncertain event may be beyond the limit of the rule against perpetuities.

Numerous decisions in America have sustained conditions violating the rule against perpetuities without any objection of remoteness occurring to anyone, thus creating an exception, arbitrary though it be, to the rule against perpetuities (*l*). There is no trace in the books of any rule which limited the period during which the determination of an estate by condition should take effect and it is abundantly clear that the modern rule could not have applied because the donor took not by way of new limitation but by the determination of the estate given (*m*).

Indian Succession Act, section 135.—This section corresponds with section 32.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the Act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

No time for performance of the Act.—Where no time is fixed for the performance of a condition on which a transfer depends, it is deemed to be broken where its performance is rendered impossible either permanently or for an indefinite period by the grantee. The condition in the section is a condition precedent.

English Law different.—A devise in the following terms, "if either of the devisees should marry into the families of Rivington or Gosling, and have a son, I give all my estate to him for life with remainders over; if not, to Randal." The devisees married, but not into the favoured families. Lord Thurlow held that till they married, nothing could vest, for marriage was a condition precedent: then could anything vest till the whole contingency became impossible? That suspends it during their lives. You suppose if they once married, they had lost all chance of marrying a Rivington or a Gosling; if he had said so, it would have been very well. Suppose the girls had married against consent, one of the husbands had died, and she had married into one of the favoured families, and had a son, and that son was here claiming the estate, the Court would not incline to refuse him" (*n*). In another case, a testator devised the estate on condition that the devisee take and use the testator's name. The devisee died without having taken the testator's name. For eighteen months previous to his death he had suffered from insanity and for six months previous to his death was in an asylum (*o*). It was held that before the plaintiff could succeed it was necessary to establish each of the two things, viz., (1) that the condition in question was not a condition precedent but subsequent, and (2) that the performance of the condition became impossible by the act of God and not by mere default of the devisee.

Indian Succession Act, section 136.—This section differs from section 33. Estates there referred to do not depend on a condition precedent but are either a

(*l*) Gray, Rule Against Perpetuities, 3rd Ed., p. 294.

(*m*) *A. G. v. Cummins* (1906) 1 I. R. 406.

(*n*) *Randal v. Payne* (1779) 1 Bro. C. C. 55, 28 E.

R. 980.

(*o*) *In re Greenwood, Goodhart v. Woodhead* (1902) 2 Ch. 198.

Ss. 33-34 determinable fee or dependent on a condition subsequent with a gift over. Illustration (i) is an example of the latter and (ii) of the former.

Indian Contract Act, section 34.—According to the rule in this section, where no time is fixed for performance of a contingent contract, it shall be deemed impossible of performance when the person on whose conduct it depends, does anything which renders it impossible within any definite time or otherwise than under further contingencies. The illustration is an example of a condition precedent.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Transfer conditional on performance of act, time being specified.

Transfers within the section.—The following are within the scope of the section.

- (1) Transfer subject to a condition precedent.
- (2) Transfer subject to a condition subsequent.

Nature of fraud.—Where time is specified, the fraud must be such as to prevent performance within the specified time. Where no time is fixed, it must be such as to render performance impossible or indefinitely to postpone it.

Essential features of fraud.—Fraud is defined in section 17 of the Indian Contract Act, 1872. To quote the words of Lord Cairns, "There must, in my opinion, be some active mis-statement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated, absolutely false" (*p*). The statement must be false to the knowledge of the person making it. "The general rule of law", said Bramwell, L. J., "is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it" (*q*). To this rule should be added what Lord Herschell said, "First in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly,

(*p*) *Peck Gurney* (1873) 43 L. J. Ch. 19.

(*q*) *Dickson v. Reuter's Telegram Co.* (1877) 37 L. T. 370.

or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states" (r).

Who must commit the fraud.—The fraud must be :

- (a) Where time is fixed
 - (i) of the person who would be directly benefited by the non-fulfilment of the condition
- (b) Where no time is fixed
 - (i) of the person interested in the non-fulfilment of the condition.

Remedy for fraud.—(a) When time is specified.

- (i) Is to allow the grantee further time as would make up for the delay caused by such fraud.

(b) Where no time is specified,

- (i) Is to consider the condition as fulfilled if the performance is rendered impossible or indefinitely postponed.

Indian Succession Act, section 137.—This section corresponds to the first half of section 34 except that in the Indian Succession Act there are three kinds of transfer enumerated instead of two as in section 34.

Election.

35. (1) Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

(r) *Derry v. Peek* (1889) 14 A. C. 337.

S. 35

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

(2) The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

(3) A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

(4) A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

(5) Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

(6) Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

(7) Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

(8) If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration

of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer. S. 35

(9) In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Parallels of election.—The Indian Succession Act, XXXIX of 1925, enacts a series of rules in sections 180 to 190 as applicable to testamentary instruments similar to the rules laid down in section 35 of this Act for the construction of deeds *inter vivos*.

Application of rule.—The rule in the section applies to interests immediate, remote, contingent (*s*) of value or not of value (*t*). It applies to persons governed by Hindu (*u*) and Mahomedan Law (*v*).

Nature of property to which the rule applies.—The rule applies to properties either or both of which are moveable or immoveable.

Election.—By the doctrine of election is understood that when a person coming to claim under an instrument says if it be a will, "pay me the legacy," or "hand over to me the particular property given to me by that instrument," the executors have the right to say "you must conform to all the provisions of the instrument." And if the instrument also disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. In short, the rule may be stated in this form, that no one can take under and against the same instrument, but taking under it such person is bound to fulfil all its provisions (*w*). By the well-settled doctrine which is termed in the Scottish Law the doctrine of "approbate" and "reprobate" and in our Courts, the doctrine of "election," where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such a person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them (*x*), the maxim being "*qui sentit commodum sentire debet et onus*."

Actual election and a duty to elect are distinct.—In all cases of election, a party having two claims has an option of either and cannot be held concluded by equivocal acts performed in ignorance of the value of the funds or properties or in ignorance of the necessity of electing. It must be collected from circumstances that there was an apprehension in his mind that he was under a duty to elect and that the particular acts relied upon to constitute election were intended by him to have that effect (*y*).

(s) See illustrations (ii) and (iii) to sec. 182 Indian Succession Act, XXXIX of 1925.
(t) *Wilson v. Townshend* (1795) 2 Ves. 693, 30 E. R. 846; *Mohammad Ali Khan v. Nissar Ali Khan*, A. I. R. (1928) Oudh 67.
(u) *Rajamannar v. Venkatakrishnayya* (1902) 25 Mad. 361; *Tribhovandas Mangaldas v. Yorke Smith* (1896) 20 Bom. 316; *Mangaldas v. Ranchhodas* (1890) 14 Bom. 438; *Shah Makhan Lal v. Srikishen Singh* (1869) 12 M. I. A. 157, 2 Beng. L. R. 44. *Forbes v.*

Ameeroonissa (1865) 10 M. I. A. 340.
(v) *Sadik Husain Khan v. Hashim Ali Khan* (1916) 38 All. 627, 43 I. A. 212.
(w) *In re Brooksbank Beauclerk v. James*, (1887) 34 Ch. D. 160; *Cooper v. Cooper* (1874) L. R. 7 H. L. 53; *Whistler v. Webster* (1794) 2 Ves. 367, 30 E. R. 676.
(x) *Codrington v. Codrington* (1875) 7 H. L. 854.
(y) *Morgan v. Edwards* (1827) 1 Bli. N. S. 401, 4 E. R. 922.

S. 35

The rule as to election is to be applied as between a gift under a will and a claim *de hors* the will and adverse to it and is not to be applied between one clause in a will and another clause in the same will (z). The same rule would apply to a deed.

Election when necessary.—In order to raise a case of election both the transfer of property belonging to a third person by the transferor and the conferring by him of a benefit on the owner of that property must be part of one and the same transaction (a).

Dispositions by separate instruments.—The dispositions which give rise to the application of the doctrine may be by the same instrument or by a separate instrument provided that in the latter case the two deeds are part of the same scheme or transaction (b).

Owner.—The word is used in a very wide sense and includes persons who have not only vested but contingent rights, reversionary and remote as well as immediate interests (c).

Benefit.—In order to raise a case of election, the owner of the property must derive some benefit thereby. If he does not obtain any benefit which is an essential basis of the rule, no question of election can arise. In such a case the question would arise whether the disappointed transferee would be entitled to compensation if the nature of the transaction is such as not to confer any benefit on the owner of the property. It is submitted that he would not be entitled to any compensation as the case would not be one within the doctrine of the rule. A transfer for a man's benefit for the purpose of election would be regarded as a transfer made to himself (d). The benefit may be moveable or immovable. Both under the rule and the illustration the property transferred to the real owner is higher in value than his own, otherwise there would be no benefit.

Both provisions.—The answer to the question whether the owner of the property can retain his own property and the benefit conferred on him by the transferor and claim to make good by way of compensation to the disappointed transferee the value of the property belonging to him, would be, that he cannot have both the provisions, for if he elects to retain his own property he is deemed to have dissented from the transfer and, therefore, he must relinquish the benefit conferred on him. The ordinary principle is clear, that if a person gives property by design or by mistake which is not his to give and gives at the same time to the real owner of it other property such real owner cannot take both. The English rule applicable to wills permits the real owner to retain both, subject to his making good the consequent loss to the disappointed legatee (e).

Equitable charge.—The section provides for compensation to the disappointed transferee according to the amount or value of the property attempted to be transferred to him. Hence the rule enunciated in the section is sometimes called the doctrine of compensation. The disappointed transferee may say to the owner that a Court of Equity will not permit him to take away the transferor's property until he allows him the benefit intended for him. The very instrument which gives him the benefit, gives him the benefit burdened with an obligation, and the maxim "*qui sentit commodum, sentire debet et onus*" applies. Thence arises the doctrine of an

(z) *Wollaston v. King* (1869) 8 Eq. 165.

(a) *Mahammad Afzal Khan v. Ghulam Kasim Khan* (1903) 30 Cal. 843, 30 I. A. 190.

(b) *Douglas Menzies v. Umphelby* (1908) A. C. 224.

(c) *Mohammad Ali Khan v. Nisar Ali Khan*, A. I. R. (1928) Oudh 67.

(d) See sec. 183, Indian Succession Act, XXXIX

of 1925.

(e) *Pickersgill v. Rodger* (1877) 5 Eq. 163. *Streatfield v. Streatfield* (1735) 1 Swan 436 n; 25 E. R. 724; *Ker v. Wauchope* (1819) 1 Bli. 1, 4 E. R. 1; *Gretton v. Haward* (1819) 1 Swan 409, 36 E. R. 443; *Re. Varden's Trusts* (1884) 28 Ch. 124.

equitable charge or right to realize out of the benefit the sum required to make the compensation. But if such property is not of sufficient value to make the compensation, is the estate of the transferor liable to make good the deficiency? The section is silent on the point. It is submitted the answer should be in the affirmative.

The amount of compensation to which the disappointed transferee is entitled.—The disappointed transferee is entitled to the amount or value of the property attempted to be transferred to him and not the amount or value of the benefit attempted to be conferred on the owner of the property whose property the transferor professes to transfer. The English rule limits compensation to the value of the benefit (f).

Compensation.—An election gives a right to compensation. The compensation provided for the disappointed transferee is not the benefit conferred on the owner of the property but the amount or value of the property attempted to be transferred to him and belonging to the owner, viz., that intended for him. Compensation is only made (1) where the transfer is gratuitous and the transferor has died before the election or otherwise become incapable of making a fresh transfer, (2) where transfer is for consideration. Neither the section nor the illustration refers to interest on the amount of compensation. Being in the nature of damages no interest, it is submitted, would be allowed. The doctrine of election can never be applied unless there is a fund for compensation or free disposable property from which compensation can be made to the disappointed transferee (g).

Election is retrospective.—In case of moveable property this question would not arise, but where the property attempted to be transferred consists of immoveable property, and as a certain amount of time must elapse between the date of the transfer and the date of election, the question arises, in case of election against the instrument, as to whether the value of the property belonging to the real owner is to be taken for the purpose of compensating the disappointed transferee as at the date of the transfer or the date of election to dissent from the transfer. The English rule applied to wills is to adopt the date of the death of the testator, that is to say, to revert to the time of the will and not the date of the election (h). The same rule, it is submitted, would apply to transfers *inter vivos*. The injustice of proceeding on any other basis is obvious when one reflects that if the liability to elect has been declared, a period is allowed for consideration and determination on the part of the person affected by such liability and the actual election is frequently not made until some date after the instrument. Under the section a period of more than a year is allowed and in case of persons under disability the election is postponed until the disability ceases or some competent authority makes the election.

Belief of transferor.—It is not necessary that the transferor must be under a belief that the property which he is disposing of is not his own. It is immaterial for the purpose of this rule what his belief was (i).

Deriving benefit indirectly.—Under the section a person who derives benefit independently of the transaction and by a separate and distinct course need not

(f) *Welby v. Welby* (1813) 2 Ves. and B. 187, 35 E. R. 290; *Codrington v. Codrington* (1875) 7 H. L. 854.
(g) *Spread v. Morgan* (1865) 11 H. L. C. 588, 11 E. R. 1461; *Bristow v. Warde* (1794) 2 Ves. 336, 30 E. R. 660; *Re. Fowler's*

Trusts (1859) 27 Beav. 362, 54 E. R. 142.
(h) *Re. Hancock, Hancock v. Pawson* (1905) 1 Ch. 16; *Re. Macartney, Macfarlane v. Macartney* (1918) 1 Ch. 300.
(i) *Coults v. Ackworth* (1870) L. R. 9 Eq. 519.

S. 35

elect. It is a principle well recognized in all cases of election that a person taking under a derivative title need not elect (*j*).

Several benefits.—Where two or more benefits are conferred on the owner of the property professed to be transferred and one of them is expressed to be in lieu of the property transferred, if the owner dissents from the transfer he is not bound to abandon any other benefit conferred upon him by the transaction besides the one conferred upon him expressly in lieu of his property.

Right to information.—A person who has to make an election is entitled to information necessary for the purpose of enabling him to arrive at a decision and is thus entitled to know the precise value of the benefit intended before election (*k*). Hence a person making an election under a misapprehension of the value (*l*) or in ignorance of the value is not bound by the election (*m*). In case of a *purdanashin* woman there is a stricter adherence to this rule (*n*).

What constitutes election.—The following rule is laid down in this behalf:—

(1) Acceptance of a benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer. But this is subject to two conditions:

- (a) he must be aware of his duty to elect, and
- (b) there must be proof of knowledge of circumstances which would influence the judgment of a reasonable man in making election or proof of waiver of inquiry into such circumstances.
 - (i) Enjoyment for two years of the benefit by the person on whom it is conferred without doing any act to express dissent raises a presumption of knowledge or waiver.
 - (ii) Such knowledge or waiver may be implied by acts when the person whose property is transferred renders it impossible to place the person interested in the property professed to be transferred in the same condition as if such act had not been done. Hence no person can be put to election unless he has knowledge of both funds or properties and the necessity of electing (*o*).

Knowledge is not to be imputed as a matter of legal obligation (*p*). Wilful abstention from inquiry into circumstances aforesaid would amount to acceptance of the benefit (*q*).

English Law.—The following rules are deducible from the English authorities:—

1. The doctrine of election is not properly a rule of positive law but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation (*r*).

2. Remaining in possession of two estates held under titles not consistent with each other affords no decisive proof of election. So that receipt of rents of both affords no proof of preference (*s*).

(*j*) *Brown v. Brown* (1866) 2 Eq. 481; *Grissell v. Swinhoe* (1869) 7 Eq. 291.
 (*k*) *Whistler v. Webster* (1874) 2 Ves. 267, 30 E. R. 676.
 (*l*) *Kidney v. Coussmaker* (1806) 12 Ves. 136 33 E. R. 53.
 (*m*) *Pusey v. Desbouvrie* (1734) 3 P. Wms. 315, 24 E. R. 1081; *Harvey v. Ashley* (1748) 3 Atk. 607, 26 E. R. 1150.
 (*n*) *Indubala v. Manmatha A. I. R.* (1925) Cal. 724; *Triguna Sundari v. Radharani Dasi* (1923) 37 C. L. J. 20; *Sadik Husain v*

Hashim Ali (1916) 38 All. 627, 43 I. A. 212.
 (*o*) *Whistler v. Webster* (1794) 2 Ves. 367, 30 E. R. 676.
 (*p*) *Spread v. Morgan* (1865) 11 H. L. 588, 11 E. R. 1461.
 (*q*) Sec. 2 of the Transfer of Property Act, IV of 1882.
 (*r*) *Spread v. Morgan* (1865) 11 H. L. 588, 11 E. R. 1461.
 (*s*) *Spread v. Morgan* (1865) 11 H. L. 588, 11 E. R. 1461.

3. A party claiming under an instrument, raising, as he contends, a case of election in equity against a party in possession under a legal right, must make out a clear and satisfactory case to entitle him to displace the legal right (*t*).

4. To constitute a settled and concluded election there must be, first, clear proof that a person was aware of the nature and extent of his rights and secondly, that having that knowledge, he intended to elect (*u*).

5. Where possession is referable to either of two inconsistent rights, the acts of a party bound to elect in order to constitute election, must imply a knowledge of the rights and an intention to elect (*v*).

6. In order to establish a case of election by conduct, it must be shewn that the person bound to elect has full knowledge of his rights and acted with an intention to elect (*w*).

Forcing the election.—If the party liable to elect does not, within one year after the date of the transfer, signify his intention to confirm or dissent from the transfer, the transferor or his representative may force the election.

Limit of time.—The rule as to time is

- (a) Election must be made within one year after the date of the transfer by the party liable to elect.
- (b) By signifying his intention to confirm or dissent from the transfer to the transferor or his representative.

On failure:

- (1) The transferor or his representative may upon the expiration of a year from the date of the transfer require him to make the election.
- (2) He shall be deemed to have elected to confirm the transfer if within a reasonable time after such requisition as in (1) he fails to comply with it.

Right to enforce is not lost by delay (*x*).

Election by persons under disability.—A minor or lunatic is a person under disability, and when election has to be made by such a person the time for election is postponed until (1) cessation of disability, or (2) election is made by some competent authority.

Minor.—A minor should elect on attaining majority (*y*). The powers conferred by section 29 of the Guardian and Wards Act (VIII of 1890) do not include the power to direct a guardian to make an election, but the section in that part of the Act being enabling, it would not prevent the Court from exercising its general jurisdiction in case of evident advantage.

Lunatic.—A lunatic being also a person under disability is not bound to elect until the disability ceases (*z*). The powers conferred under the Indian Lunacy Act (IV of 1912) do not include the power to direct the committee to make such an election but they do not prevent the exercise of the general jurisdiction of the Court in such a way.

(*t*) *Dillon v. Parker* (1833) 1 Cl. & Fin. 303, 5 E. R. 796.

(*u*) *Worthington v. Wiginton* (1855) 20 Beav. 67, 52 E. R. 527.

(*v*) *Dillon v. Parker* (1833) 1 Cl. & Fin. 303, 5 E. R. 796.

(*w*) *Wilson v. Thornbury* (1875) 10 Ch. App. 239.

(*x*) *Spread v. Morgan* (1865) 11 H. L. Cas. 588, 11 E. R. 1461; *Padbury v. Clark* (1850)

19 L. J. Ch. 533, 43 E. R. 115.

(*y*) *Streatfield v. Streatfield* (1735) Cas. temp. Talb. 176, 25 E. R. 724; (six months after attaining majority were allowed); *Whistler v. Whistler* (1794) 2 Ves. 367; *Cooper v. Cooper* (1874) 7 H. L. 53; *Re. Varen's Trusts* (1884) 24 Ch. D. 124; *Re. Hancock Hancock v. Pawson* (1905) 1 Ch. 16.

(*z*) *Re. Sefton (Earl)* (1898) 2 Ch. 378.

S. 35

Unsound mind.—Where a person is not found so by inquisition still the rule would operate and the Court would make the election when it was for the advantage of such a person (a).

Court may elect.—In cases of disability the election is not bound to stand over till the disability ceases but the person interested may compel the election. In cases of infants the Court in England makes the election by reference to the Master (b) or when there are sufficient data before it by making the election itself (c).

Within what time should election be made in cases of disability.—The section is silent as to the time within which election should be made by a person after his disability has ceased. It is submitted that the one year time generally given by the Act would apply in such cases so that he would have a year after the disability has ceased. In England, where no time is fixed, a minor was given six months after coming of age to make his election (d).

Cancellation of deed.—In case of election against the instrument the Court will not order the deed to be delivered up for cancellation (e).

Claim of disappointed transferee.—A disappointed transferee is entitled to the value of the property attempted to be transferred to him and not the value of the benefit sought to be conferred by the transferor on the real owner.

Co-owner.—Under English Law, in case of wills it has been held that co-owners may elect separately, the majority having no right to bind the minority (f).

Dealing with both properties.—If a party being bound to elect between two properties, not being called upon to do so, continues in the receipt of rents and profits of both, such receipt affords no proof of preference and so if the other property be under circumstances that it does not yield rent to be received by the party liable to elect, but such party, particularly if with the knowledge and concurrence of the party entitled to call for such election, deal with this property as his own, it would seem that such acts ought to be equally unavailable to prove an actual election for in both cases there is an equal dealing with the two properties and, therefore, an absence of proof of any intention to elect the one and reject the other (g).

Death of transferor.—The death of the transferor will not affect an election made after his death when the real owner elects to confirm the transfer, but if he dissents from it the benefit relinquished by him shall revert to the transferor's representative as if it had not been disposed of, subject to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Death of transferee.—If a transferee dies before election his representative would be entitled to take the benefit under the transfer for there is nothing so far as the rule is concerned which requires his active part.

Death of owner of property : before election.—There is no provision in the section when a party bound to elect has died before election. It is submitted that no election in that event can be made. In England, where a husband devised the wife's jewels to the wife for life, the remainder to his son, and the wife made no

(a) *Wilder v. Pigott* (1882) 22 Ch. D. 263.

(b) *Bigland v. Hudestone* (1789) 3 Bro. C. C. 285n, 29 E. R. 539; *Ebrington v. Ebrington* (1820) 5 Mad. 117, 56 E. R. 839.

(c) *Lamb v. Lamb* (1857) L. T. O. S. 372; *Re. Montagu, Faber v. Montagu* (1896) 1 Ch. 549.

(d) *Streatfield v. Streatfield* (1735) Cas. temp. Talb. 176, 25 E. R. 724.

(e) *Weale v. Rice* (1834) 4 L. J. Ch. 39.

(f) *Fytche v. Fytche* (1868) 7 Eq. 494.

(g) *Padbury v. Clark* (1850) 19 L. J. Ch. 533, 42 E. R. 115.

election or to have the jewels as her paraphernalia, it was held that her administrator could not make this claim (*h*).

Distinguished from this is the case of a son who died before his mother under whose deeds of appointment and will an election had to be made by him, where it was held that as between his estate and the disappointed legatees of his mother's will the latter were entitled to put the son's estate to election or, in other words, require the estate to make good the benefits intended for them by the will (*i*). In this case the son had left a will the effect of which, under section 33 of the Wills Act, was that his estate was in the same position as if he had survived his mother.

Double portions.—The cases of double portions have no analogy to election. It is true they involve election but they do not depend upon election (*j*).

Forfeiture.—There is both a forfeiture and compensation involved in the doctrine. In case of dissent by the real owner there is a forfeiture as regards him of the benefit conferred upon him by the instrument and out of the benefit so forfeited compensation is payable to the disappointed transferee.

Power.—The principle has been applied where the first gift is made purporting to be in execution of a power; so that if under a power to appoint children, the donee of the power appoints grandchildren but the children are entitled under the instrument to other property, the grandchildren are entitled to put them to an election. But to this rule, so far as regards appointments a notable exception is taken, viz., that when there is an appointment to an object of the power with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust, or condition is void, and not only void, but inoperative to raise any case of election (*k*).

Remainderman.—A remainderman is not bound by the election of the tenant for life (*l*).

Reversionary interest.—The liability of a party to be called upon to elect will not be affected by lapse of time so long as his interest in either of the subject-matters or election is reversionary (*m*).

Undivided moieties.—J. C., being entitled in fee to undivided moieties of two freehold houses and an undivided moiety in a leasehold house, devised by his will "all that freehold messuage tenement or garden," etc., referring to one of the houses only. The other moiety in the other house was devised to his co-owner who was entitled to a moiety in the house devised as aforesaid. Held that the words were a gift of the entirety of the house referred to, and raised a case of election as against the party entitled to the other moiety and who took beneficially under the will (*n*).

Void disposition.—When one of the dispositions in a will is void the Court will not aid such an attempt at disposition either by the application of the doctrine or election or otherwise (*o*). The same rule would apply to a deed.

(*h*) *Clarges v. Albemarle* (1691) 2 Vern 245, 23 E. R. 758.

(*i*) *Pickersgill v. Rodger* (1877) 5 Ch. D. 163.

(*j*) *Pulteney v. Darlington (Lord)* (1776) cited in 3 Ves. at p. 529, 30 E. R. 1141.

(*k*) *Wollaston v. King* (1869) 8 Eq. 165; *Whistler v. Webster* (1794) 2 Ves. 367, 30 E. R. 676; *In re Brooksbank, Beauclerk v. James* (1887) 34 Ch. D. 160.

(*l*) *Ward v. Baugh* (1799) 4 Ves. 623, 31 E. R. 321; *Long v. Long* (1800) 5 Ves. 445, 31 E. R. 674.

(*m*) *Padbury v. Clark* (1850) 19 L. J. Ch. 533, 42 E. R. 115.

(*n*) *Padbury v. Clark* (1850) 19 L. J. Ch. 533, 42 E. R. 115; *Fitzsimons v. Fitzsimons* (1860) 28 Beav. 420, 54 E. R. 426.

(*o*) *Wollaston v. King* (1869) 8 Eq. 165.

Ss. 35-36

When not put to election.—A person is not put to election :

- (a) When he derives a benefit indirectly and not directly under the transaction.
- (b) When he fulfils two capacities and if under one he takes a benefit he may in another dissent therefrom.
- (c) When a benefit other than the one expressed to be in lieu of the property transferred is conferred upon him by the transaction.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

Apportionment.—The heading “ apportionment ” under which sections 36 and 37 are grouped has been omitted from the body of the Act published by the Government of India. It appears in the contents.

Moveables.—The section applies on a transfer of property, whether moveable or immoveable, as it forms part of a chapter which has been made applicable to both.

To whom does the rule apply.—The rule applies only as between transferor and transferee. One of the parties to the transaction cannot decline to apportion. The rule is mandatory.

Payment when due and payable.—The payment of the items mentioned in the rule is deemed to accrue from day to day and to be apportionable accordingly, but payable on the days appointed for that purpose and not on the day the apportionment is made.

Extent of the rule.—The right to receive such periodical payments as are mentioned in the rule and not the liability to pay is apportionable (p).

Entitled to receive.—The rule comes into operation on a transfer by act of parties of the interest of the person entitled to receive payments of the description enumerated in the section.

Other periodical payments in the nature of income.—These words also occur in the English Apportionment Act, 1870 (q) which applies to deeds testamentary and *inter vivos* to rights as well as liabilities (r). The English Courts in construing wills have held that these words do not include partnership profits which are ascertained and payable at the discretion of certain individuals. They must become

(p) *Satyendra v. Nilkantha* (1894) 21 Cal. 383.

(q) 33 and 34 Vict., C. 35, s. 2.

(r) *Re. Wilson, ex-parte Hastings* (1893) 62 L.

J. Q. B. 628; *Rochester v. Le Fann* (1906) 2 Ch. 513; *Re. Howell, Ex-parte Mandleberg* (1895) 1 Q. B. 844.

due at fixed periods and not depend upon the state of the business and the discretion of the managing partner. Such a payment is never apportionable (s).

S. 36

Deposit for redemption.—On the date of deposit the property is deemed to have been transferred to the mortgagor and he is entitled to the rents from such date (t).

Time limit in apportionment.—The general principle of apportionment of income is to deem that as between the transferor and transferee rents are to accrue due from day to day and to be apportionable accordingly but the payment is to be made on the day appointed for the payment thereof (u). In case of crops, payments have been apportioned by the season (v). There is no warrant for the view taken by the Calcutta High Court that section 36 does not apply to agricultural leases (w).

Exceptions to the rule.—The rule in the section has no application when parties are governed by their contract or there is a law (x) or local usage to the contrary. A stipulation to pay rent of a year's lease at a particular date is a contract to the contrary nor does the rule apply to (y) transfers by operation of law (z) or by or in execution of a decree or order of a Court of competent jurisdiction (a).

Dividend on shares declared subsequent to the date of the purchase.—Ordinarily, in the absence of a contract to the contrary a purchaser is entitled to all dividends declared after the date of his purchase. This general rule may be modified by special stipulation. Where shares are sold, whether by private treaty or by public auction, and it is definitely understood that the shares and not the dividends thereon are the subject of bargain, the purchaser cannot deprive the original owner of his right to the dividend of a period anterior to the sale even though the dividend may have been declared subsequent to the date of the purchase (b). This is contrary to the decision in *Black v. Homersham* (c) where certain shares were sold by public auction on the 1st of August and the deposit paid. Transfers were signed on the 29th August. The conditions of sale were silent as to dividends. On 24th August a dividend was declared in respect of a period antecedent to the sale by auction. It was held that the dividend belonged to the purchaser on the ground that the completion of the sale had relation back to the time when the contract was made.

Rent paid in advance.—The section has no application to rent paid in advance for no rent can be paid in advance, such a payment being regarded as a loan. The parties may, however, stipulate that the rent shall be paid monthly or quarterly and in advance. It has been held that the Apportionment Act, 1870, does not apply to rents, annuities, dividends and other payments in the nature of income which have accrued due before happening of the event by reason of which it is proposed to apply the Act: the Act, therefore, does not apply to rent payable in

(s) *In re Cox's Trust* (1878) 1 Ch. D. 159; *Jones v. Ogle* (1872) 8 Ch. App. 182.

(t) *Lala Ganga Ram v. Mewa Ram Singh*, A. I. R. (1922) All. 275.

(u) *Mohammad Ashkar v. Mohammad Abul*, A. I. R. (1927) Oudh 605.

(v) *Nand Kishore v. Ram Sarup* (1928) 50 All. 18; *Ma Hawa v. Sein Kho*, A. I. R. (1928) Rang. 67.

(w) *Satya Bhupal v. Rajnandini*, A. I. R. (1924) Cal. 1069.

(x) *Ram Ranbijaya v. Harihar Prasad* (1937) 16 Pat. 184.

(y) *Subbaraju v. Seetharamaraju* (1916) 39 Mad.

283.

(z) Sec. 2 (d), Transfer of Property Act, IV of 1882; *Mathewson v. Shyam Sunder* (1906) 33 Cal. 786; *Aparna Debi v. Shri Shri Shiva Prasad*, A. I. R. (1924) Pat., 451 *contra*.

(a) Sec. 2 (d), Transfer of Property Act, IV of 1882; *Satyendra v. Nilkantha* (1894) 21 Cal. 383; *Subbaraju v. Seetharamaraju* (1916) 39 Mad. 283; *U. Kyaw v. Ah Dos*, A. I. R. (1924) Rang. 365.

(b) *Co-operative Co., Ltd. v. Bhugwan Das & Co.*, A. I. R. (1930) All. 615.

(c) (1878) 4 Ex. D. 24.

Ss. 36-37

advance and the landlord re-entering on breach was entitled to recover the whole amount (*d*).

The Apportionment Act which provides that rent shall be considered as accruing from day to day does not alter the date on which it becomes due (*e*).

Garnishee.—Rent cannot, before it is payable, be attached under a garnishee-order as a debt owing or accruing due (*f*).

Apportionment of annuities given by will.—These are regulated by the Indian Succession Act (*g*).

The older English Law.—Cases, however, are met with where the strict application of the rule enunciated in the section not being applicable, the Courts have resorted to the English Law as it existed prior to the Statute Law. The English Apportionment Act of 1870 provides that after its passing all rents, annuities and other periodical payments in the nature of income are, unless it is expressly stipulated that no apportionment is to take place, to be considered as like interest on money lent, accruing from day to day, and shall be apportionable in respect of time accordingly. But this Act does not apply in India, nor do any of the earlier English Apportionment Acts. The principle, therefore, applied in such cases has been the original English Law as it stood apart from statute. The older English Law on the subject has been stated by Lord Eldon in *Ex-parte Smyth* (*h*). It was applied by the Privy Council where a question arose of an apportionment between the settlors, executors and successive beneficiaries. There under a deed of settlement dated 1913 the question arose whether income derived from rents and shares was apportionable *de die in diem*, (1) between the estate of the deceased settlor (who had retained a life-interest) and persons beneficially entitled for a period of 13 months after death, and (2) between those persons and persons beneficially entitled after that period. The Judicial Committee held that the income was not so apportionable since an intention to that effect was not expressed clearly and unambiguously in the deed (*i*). The Madras High Court, on the ground that the section embodies a rule of justice, equity and good conscience, apportioned rent between a lessor and the transferee of his right in execution (*j*) and between an assignee from the lessee and the lessor of rent accruing due after the date of assignment to him upto the time of transfer of his interest as assignee to a third person (*k*), and held that an assignee of a tenant for life was entitled to an apportionment of the rent due upto the date of the death of the tenant for life (*l*). The section applies only to transfers *inter vivos* and not to cases of devolution of interest on death (*m*).

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract

Apportionment
of benefit of obligation
on severance.

- (*d*) *Ellis v. Towbootham* (1900) 1 Q. B. 740.
(*e*) *Re. United Club & Hotel Co.* (1889) 60 L. T. 665.
(*f*) *Barnett v. Eastman* (1898) 67 L. J. Q. B. 517.
(*g*) XXXIX of 1925, secs. 338 to 340.
(*h*) (1818) 1 Swans 337, 36 E. R. 412.
(*i*) *Phirozshaw v. Bai Goolbai* (1923) 47 Bom. 790, 50 I. A. 276.
(*j*) *Rangiah Chetty v. Vairavelu* (1918) 41 Mad.

370.
(*k*) *Kunhi Sou v. Mulloli Chattu* (1915) 38 Mad. 36.
(*l*) *Lakshminaranappa v. Melothraman* (1903) 26 Mad. 540.
(*m*) *Pandia Chinna Thambiar v. Veerappa Pandian* (1937) 1 M. L. J. 77; *Shiba-prasad v. Prayag Kumari* (1933) 61 Cal. 711; *Aparna Debi v. Sree Sree Shiva Prasad* (1924) 3 Pat. 367.

to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation ; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duties shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official *Gazette* so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep. B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

The section.—Performance of duty on apportionment of estate. When as a consequence of transfer a property

- (1) is divided and held in several shares and
- (2) therefore passes from one to several owners

The corresponding duty shall be performed

in favour of each such owner

in proportion to the value of his share.

Provided :

- (a) Duty can be secured
- (b) Severance does not substantially increase the burden of the obligation.

See the first part of illustration (a)

Otherwise

- (c) for the benefit of such one of the several owners as they shall jointly designate for that purpose.

S. 37

See illustration (b) and the second part of illustration (a)

Provided further :

No person shall be liable for failure to discharge such duty unless he has had reasonable notice of the severance.

Exception.—Agricultural leases are not within the above rule.

Exception.—The section has no application

- (1) When there is a contract contrary to that specified in this rule amongst the co-owners. Under section 37 a tenant liable to pay rent need not be consulted, provided his burden does not increase, whereas under section 109 a right is given to the tenant in determination of the rent payable on a transfer.
- (2) To agricultural leases excluded by para 3 of this section.
- (3) To transfers by operation of law or by or in execution of a decree or order of a Court of competent jurisdiction according to section 2 (d) of the present Act.

Severance of benefit of obligation.—As section 36 deals with apportionment of interest by time this section deals with apportionment of benefit of obligation to which a transferee is entitled on disruption of the estate.

Apportionment of obligation.—Section 82 deals with apportionment of obligation.

Moveables.—The section applies to a transfer of property, whether moveable or immoveable.

Notice.—One of the obligations contemplated by this section is the payment of rent by a tenant. There are various provisions of the Act which deal with the liability of a tenant for payment of rent to the transferor. He is not liable unless and until

- (a) under section 37 he has had reasonable notice of the severance,
- (b) under section 50 if he in good faith pays such rent to the person of whom he in good faith held such property,
- (c) under section 109 not having reason to believe that such transfer has been made, pays rent to the lessor.

Notice under (a) must be actual. It need not be in writing. It may be acquired by the agent of the person sought to be charged.

Apportionment prior to the Act.—A sale of a share in a tenure, let out to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but if a purchaser of the share desires to have such a severance, he is entitled to enforce it. If he takes no steps for that purpose, then the tenant is justified in paying the rent to all the parties jointly entitled to it. But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then if the parties cannot agree to an apportionment, the purchaser may sue the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit (n).

How rent apportioned.—Under section 37 the rent is apportioned in proportion to the value of shares of the transferees provided it can be severed and the

(n) *Ishwar Chunder v. Ram Krishna* (1880) 5 Cal. 902.

severance does not increase the burden of the tenant's obligation. No such proviso has, however, been appended to section 109 dealing with the right of lessor's transferee which provides that the lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and in case they disagree such determination may be made by any Court having jurisdiction to entertain a suit for possession of the property leased. When the lessor recognizes the right of another in the premises demised the tenants are bound to pay to each of the owners his proportionate share of the rent (o).

Assignee of a lessee.—The title of the assignee of a lessee is complete upon execution and where necessary registration of the deed. On completion he becomes entitled to claim rent. The tenant is discharged on proof of payment to the assignor without notice. If he has paid after notice, actual or constructive, he cannot escape liability merely by proof that the notice he received was from the assignee and not the assignor (p).

Value of his share.—The duty which a person is under an obligation to perform under this section varies on a transfer towards each of the transferees in proportion to the value of his share in the property determined according to the rule laid down in section 45 of this Act.

Enhancement.—One co-sharer cannot enhance the rent of his share, such an enhancement being inconsistent with the continuance of the lease of the entire tenure (q).

Frame of suit for apportionment of rent.—On the principle that creditors could sever their mutual relations and sue their debtors separately for their shares of the debt provided this be done in such a manner as to free the debtor from all further liability to any of them, it has been held that in a suit for apportionment of rent where other parties interested have been made parties to the suit the rent could be apportioned and the apportionment may take place in respect of both the arrears alleged to be due and the future rent (r). In the absence of special agreement between a tenant and co-sharer to pay their rateable proportion of the rent, a suit by one of the co-sharers must be for the entire rent due making his co-sharers defendants if they refuse to join as plaintiffs (s).

Co-sharers.—It is impossible upon principle to distinguish cases where a tenure is severed by different portions of the area being sold to different persons, from those where it is sold to different persons in undivided shares. In all such cases the entirety of the joint interest should be considered as severable at the option of the purchaser (t).

Arrangement for separate payment of rent.—Where, on the consent of all the shareholder landlords a tenant in an undivided property has agreed to pay the different sharers the rent of the tenure in proportion to their respective shares, it is not open to him to cease from paying the proportionate fraction of the rent due in accordance with his agreement, except on the consent of the owner of that particular share (u).

(o) *Sri Raja Simhadri v. Prattipati* (1906) 29 Mad. 29.

(p) *Peary Lal v. Madhoji* (1903) 17 C. L. J. 372.

(q) *Guni Mahomed v. Moran* (1879) 4 Cal. 96.

(r) *Rajnarain v. Ekadasi* (1900) 27 Cal. 479.

(s) *Pergash Lal v. Akhowri Balgobind* (1892) 19 Cal. 735; *Prem Chand v. Mohshoda Debi*

(1887) 14 Cal. 201; *Sri Raja Simhadri v. Prattipati Ramayya* (1906) 29 Mad. 29.

(t) *Ishwar Chunder v. Ram Krishna* (1880) 5 Cal. 902.

(u) *Lootfulhuck v. Gopee Chunder* (1880) 5 Cal. 941.

Ss. 37-38

Liability of tenant acquiescing in arrangement for separate payment.—Where co-sharers in an undivided property acquiesce in a decision declaring one of their number the owner of a recognized share in such property, it is not open to a tenant (who had previously agreed to pay his rent in accordance with the shares of the respective part-owners) to refuse payment of the proportionate share of the rent claimed by such co-sharer as the owner of the recognized share, simply on the ground that he had never before paid rent so proportioned to such co-sharer (v).

(B) *Transfer of Immoveable Property.*

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer by person authorized only under certain circumstances to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Limited owners.—The statutory provision contained in this section is substantially a statement of the principles deducible from the cases on this point. But this principle obviously has no application where the transaction is still incomplete; the essential basis of the rule is an actual transfer for consideration (w). The section deals with the qualified power of disposition possessed by persons whose rights of alienation vary with circumstances which in their turn are variable. It enacts a rule of presumption as to existence of circumstances between the transferor and transferee and other persons affected by the transfer and protects the transferee against impeachment of such alienation if after using reasonable care to ascertain the existence of such circumstances he has acted in good faith. The opening words of the section refer to persons having a limited power of alienation dealt with in section 7.

Other persons.—These are, besides the transferor, persons who would be interested in impeaching the alienation, as the illustration shows. If such a person is a consenting party to the alienation he would, under section 115 of the Evidence Act, 1872, be estopped from disputing the validity of the alienation and on that ground no inquiry as required by the section would be necessary (x).

(v) *Lootfulhuck v. Gopee Chunder* (1880) 5 Cal. 941.

(w) *Jamsetji v. Kashinath* (1902) 26 Bom. 326.

(x) *Sarat Chandra Dey v. Gopal Chunder Laha* (1893) 20 Cal. 296, 19 I. A. 203.

Rights acquired by the transferee.—A mortgage of the joint family property of a Mitakshara family by its *karta*, unless necessity or antecedent debt is proved, is void; the transaction itself gives to the mortgagee no rights against the *karta's* interest in the joint family (*y*). There is, however, a Calcutta case (*z*) discussed by the Judicial Committee in *Narain Prasad v. Sarnam Singh* (*a*) where a charge was created on the shares of the persons making the representation that they had power to alienate although there was very little evidence of such representation, their Lordships observing that that was not the general law. Where the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent of the necessity proved (*b*).

Does an order of the Court discharge a transferee.—It is not uncommon to obtain orders from the Court when a transfer is made by a limited owner authorizing him to do so. Such orders, however, do not discharge transferees from their liabilities under the section.

Gifts.—The section has no application to voluntary transfers, as consideration is an essential element.

Transferor's liabilities.—See further as to seller's liabilities, section 55 (1), sub-clause (a) and section 55 (2), and as to a mortgagor's liabilities, section 65 (a) of this Act.

39. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

The section.—The section is enacted to protect, on a transfer of immoveable property, the right of a third person (other than the transferor and transferee) entitled to receive out of the profits of such property—

- (1) Maintenance, or
- (2) Advancement, or
- (3) Marriage expenses.

The transferee with notice of the right takes subject to these liabilities and so does a gratuitous transferee.

But neither a transferee for value without notice nor such property in his hands is liable.

The right may be created by act of parties or by law. Only three items are protected, namely, maintenance, advancement and marriage expenses.

The old and the amended sections.—The decisive factor, under the new section, is the transferee's knowledge of the right of the third person, while under the old

(y) *Anant Ram v. The Collector of Etah* (1918) 40 All. 171, 20 Bom. L. R. 524; *Narain Prasad v. Sarnam Singh* (1917) 39 All. 500, 44 I. A. 163; *Madho Parshad v. Mehrban Singh* (1890) 18 Cal. 157, 17 I. A. 194; *Ram Sahai v. Parbhu Dayal* (1921) 43 All.

655.
(z) *Mahabir Persad v. Ramyad Singh* (1873) 12 Beng. L. R. 90.
(a) (1917) 39 All. 500, 44 I. A. 163.
(b) *Anant Ram v. The Collector of Etah* (1918) 40 All. 171, 20 Bom. L. R. 524.

S. 39

section it was his knowledge of intention on the part of the transferor to defeat the right of such third person. As the section originally stood, proof of intention on the part of the transferor and notice of intention of the transferee were necessary (c).

In actual practice it was difficult to adduce proof of intention (d). As it was thought desirable to protect persons, entitled to benefit of items mentioned in the section from improvident holders of property, the reference to the transferor's intention has been omitted and the section amended accordingly. The words "with the intention of defeating such right" have been omitted and for the words "of such intention" the word "thereof" has been substituted. The illustration to the old section was not explanatory of the section and, therefore, omitted.

Illustrations are no part of the section but they are helpful in the working and application of the statute (e). Under the old section, if the intention of the transferor was in defeasance of the right of the third person entitled to the profits of the immoveable property for maintenance, advancement or marriage, the transferee was liable, on proof of such intention, to the enforcement of such right of the third person. The amendment has dispensed with the proof of intention; consequently the intention of the transferor is immaterial and if the transferee could be fastened with notice of the third person's right he would be liable. To a gratuitous transferee the amendment has made no difference. His liability remains unchanged.

Maintenance.—Maintenance to operate as a bar to transfer of immoveable property must not amount to a personal obligation but must be payable out of the profits of such property. The principal application of this rule is in the case of Hindu females, chief among them being the widow. Her maintenance is not a charge upon the property (f), unless created by deed (g) or made such by a decree of a competent Court (h). A Hindu widow is on the death of her husband entitled to maintenance out of the property of her husband if self-acquired (i) or out of the joint family property if the husband at the time of his death was joint (j). An unchaste widow's rights, while leading an immoral life, are suspended and she forfeits her right of maintenance (k), but can claim a starving maintenance if she reverts to a life of chastity (l). On remarriage the claim to maintenance is lost (m) but not on excommunication (n). Arrears of maintenance within the statutory period (o) would be within the scope of the section. The mother of a coparcener is entitled to have a provision made for her maintenance out of the entire family

- (c) *Ram Kunwar v. Ram Dai* (1900) 22 All. 326; *Bharatpur State v. Gopal* (1902) 24 All. 160.
 (d) *Yamnabai v. Nanabhai Sadanand* (1910) 12 Bom. L. R. 1075.
 (e) *Hemchandra v. Narendranath* (1934) 61 Cal. 148.
 (f) *Lakshman v. Satyabhamabai* (1877) 2 Bom. 494; *Behari Lalji v. Bai Rajbai* (1899) 23 Bom. 342; *Bharatpur State v. Gopal* (1901) 24 All. 160; *Ram Kunwar v. Ram Dai* (1900) 22 All. 326; *Ramanajdan v. Rangammal* (1889) 12 Mad. 260; *Jayanti v. Alamelu* (1904) 27 Mad. 45; *Soora Koer v. Nath Baksh* (1884) 11 Cal. 102; *Soubagia v. Manicka* (1917) 33 M. L. J. 601; *Bhagat Ram v. Mst. Sahib* (1922) 3 Lah. 55; *Digambari Debi v. Dhan Kumari Bibi* (1906) 10 C. W. N. 1074.
 (g) *Bharatpur State v. Gopal* (1901) 24 All. 160; *Yamnabai v. Nanabhai Sadanand* (1910) 12 Bom. L. R. 1075; *Sham Lal v. Banna* (1882) 4 All. 296.
 (h) *Lakshman v. Satyabhamabai* (1877) 2 Bom. 494; *Bharatpur State v. Gopal* (1901) 24 All. 160; *Yamnabai v. Nanabhai Sadanand*

- (1910) 12 Bom. L. R. 1075; *Sham Lal v. Banna* (1882) 4 All. 296.
 (i) *Narbadabai v. Mahadeo* (1881) 5 Bom. 99; *Srimati Bhagabati v. Kanailal* (1872) 8 Beng. L. R. 225; *Brinda v. Radhica* (1885) 11 Cal. 492 (494).
 (j) *Adhibai v. Cursandas* (1887) 11 Bom. 199; *Devi Persad v. Gunwanti* (1895) 22 Cal. 410; *Jayanti v. Alamelu* (1904) 27 Mad. 45; *Becha v. Mothina* (1901) 23 All. 86.
 (k) *Vishnu v. Manjamma* (1885) 9 Bom. 108; *Romanath v. Rajonimoni* (1890) 17 Cal. 674; *Valu v. Ganga* (1882) 7 Bom. 84.
 (l) *Bhikubai v. Hariba* (1925) 49 Bom. 459; *Satyabhama v. Kesavacharya* (1916) 39 Mad. 658.
 (m) Sec. 2, Hindu Widow Remarriage Act, XV of 1856; *Vittu v. Govind* (1898) 22 Bom. 321; *Rasul v. Ram Suran* (1895) 22 Cal. 589; *Suraj v. Attar* (1922) 1 Pat. 706; *Santala v. Badaswari* (1923) 50 Cal. 727.
 (n) The Caste Disabilities Removal Act, XXI of 1850.
 (o) Art. 128, Schedule 1, Limitation Act, IX of 1908.

property (p). Although a Hindu governed by the Bengal school is under only a moral liability to maintain the widow of his deceased son, the liability, when transmitted on his death to his surviving sons, becomes a legal liability, the measure of which, however, is restricted to the amount of the estate to which they have succeeded from their father. The widow has the above right to maintenance although her husband, when *sui juris*, has been party to a deed invalidly adopting him out of his natural father's family; nor does she forfeit the right by ceasing to reside with her husband's family, otherwise than for unchaste or improper purposes.

The Judicial Committee will not interfere with the amount decreed by the High Court for maintenance unless the Court has proceeded upon inadmissible evidence or upon an erroneous principle (q). When the alienation was the result of debts contracted for a family necessity (r) it will take precedence over the widow's claim to maintenance. Also where the debt was contracted for joint family trading and the purchaser bought the property from the Official Assignee (s). But a charge *bona fide* created for maintenance takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family (t). The dicta to the contrary of the Allahabad High Court (u) are not supported by any text of Hindu Law. Section 39 of the Transfer of Property Act does not protect a transferee for consideration, when the immoveable property transferred has already been declared by decree of Court subject to a charge in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued due subsequent to the transfer, does not affect the liability of the property transferred to be sold in execution of a decree for the maintenance so claimed (v).

Liability of transferee—where the Act does not apply.—Even before the passing of the Act it was held that a widow could follow the property for her maintenance into the hands of one who takes it as a volunteer with or without notice of her having set up her claim for maintenance but not when the property passes into the hands of a *bona fide* purchaser without notice (w).

Advancement.—A creature of English Law, its applicability is confined to those to whom the English Law applies. In India as in England, owing to the practice which prevails among Mahomedans and Hindus to make grants and transfers *benami*, there is no presumption of an intended advancement in favour of a wife (x) or child (y) or mistress (z). "The criterion in these cases is to consider from what source the money comes from which the purchase-money is

(p) *Srinivasa v. Thiruvengadathaiyangar* (1915) 38 Mad. 556.

(q) *Rajanikanta Pal v. Sajanisundaree Dasee* (1934) 51 Cal. 221 (P. C.); *Ekradeshwar Bahuasin v. Homeshwar Singh* (1929) 8 Pat. 840, 56 I. A. 182 followed.

(r) *Lakshman v. Satyabhamabai* (1877) 2 Bom. 494; *Yamnabai v. Nanabhai Sadanand* (1910) 12 Bom. L. R. 1075; *Soorja Koer v. Nath Buksh* (1885) 11 Cal. 102; *Adhiranee Narain v. Shona Malee* (1876) 1 Cal. 365; *Jamnabai v. Balakrishna*, A. I. R. (1927) Mad. 1092.

(s) *Johurra Bibee v. Sree Gopal* (1876) 1 Cal. 470.

(t) *Somasundaram v. Unnamalai* (1920) 43 Mad. 800.

(u) *Sham Lal v. Banna* (1882) 4 All. 296; *Gur Dayal v. Kaunsila* (1883) 5 All. 367.

(v) *Kuloda Prosad Chatterjee v. Jageshwar Koer*

(1900) 27 Cal. 194.

(w) *Srimati Bhagabati v. Kanailal* (1872) 8 Beng. L. R. 225.

(x) *Guran Ditta v. Ram Ditta* (1928) 55 Cal. 944, 55 I. A. 235; *Lakshmiah v. Kothandarama* (1925) 48 Mad. 605, 52 I. A. 286; *Mollayya v. Krishnaswami*, A. I. R. (1925) Mad. 95; *Motivahu v. Purshotam Dayal* (1905) 29 Bom. 306.

(y) *Jhonstone v. Gopal Singh*, A. I. R. (1931) Lah. 419; *The Dharwar Bank, Ltd. v. Mahomed Hayat* (1931) 33 Bom. L. R. 250; *Mollayya v. Krishnaswami*, A. I. R. (1925) Mad. 95; *Gopee Krist v. Gungapersaud* (1854) 6 M. I. A. 53; *Uzhur Ali v. Bebee Ulfat Fatima* (1869) 13 M. I. A. 232.

(z) *Bilas Kunwar v. Deshraj Ranjit Singh* (1915) 37 All. 557, 42 I. A. 202.

S. 39

paid" (a). In case of parties born in India of English parents with permanent residence in India, there is a rebuttable presumption of an intended advancement. The evidence necessary to rebut such a presumption must be adduced by the party contending against the advancement. It is not sufficient to state that he did not intend to confer any beneficial interest on the party claiming as an advancement but he must establish, with reasonable clearness, that he had other and different motives for the action he took and this, whether the person in whose name the property stands, be the wife (b) or child (c). Declarations by the parent, if contemporaneous with the purchase, are admissible to prove such an intention, but declarations subsequent are to be rejected (d).

Marriage expense.—According to Hindu Law, a debt contracted for the marriage of a coparcener in a joint Hindu family is binding on the other coparceners as a debt contracted for a family purpose and, therefore, for the benefit of the family (e). In order to deprive a gratuitous transferee or a transferee with notice of the defence under the section, the right to receive marriage expenses out of profits must be one to which the claimant is entitled by virtue of special provisions of the law. A mere personal obligation will not suffice. Marriage being obligatory amongst the Hindus, expenses incurred, whether for the marriages of males (f) or females (g), are binding on the family properties. The ceremonies of *Griha Pravesanam* and *Ruthusanti* are essentially connected with the disposal in marriage of a girl of the Brahmin caste and form a part of the marriage ceremonies (h). Alienation for the first marriage is justified. Every second marriage is not a legal necessity (i).

Notice.—Notice under the section, if constructive, will bind the purchaser. A gratuitous transferee is bound independently of the question of notice. A purchaser with notice is not bound, as has already been seen, if the alienation be for a family necessity or the debts bind the joint family. A transferee for consideration and without notice of the right is protected. In order to succeed in such a defence he must prove both payment and want of notice. The onus is on him (j).

Against such property in his hands.—A purchaser without notice being protected, property in his hands is entitled to the same protection. Consequently a purchaser with notice from a purchaser without notice can take advantage of the want of notice of his intermediate purchaser or purchasers.

Residence.—This right is not treated by the Act but it is submitted that it is analogous to the right of maintenance under this section. Where the sale of ancestral property is necessary in the interest of the family as a whole, then a bona

(a) *Dhurm Das v. Shama Soondri* (1843) 3 M. I. A. 229.

(b) *Kerwick v. Kerwick* (1921) 48 Cal. 260, 47 I. A. 275; *Paul v. Nathaniel Gopal*, A. I. R. (1931) All. 596 *contra* (it does not appear whether the parties were Europeans).

(c) *Paschand v. Paschand*, A. I. R. (1930) Oudh 441.

(d) *Paschand v. Paschand*, A. I. R. (1930) Oudh 441; *Gopee Krist v. Gungapersaud* (1854) 6 M. I. A. 53.

(e) *Sunchabai v. Shivanarayana* (1908) 32 Bom. 81; *Gopala Krishna v. Venkatanarasa* (1914) 37 Mad. 273; *Govindarazulu v. Devarabhotla* (1904) 27 Mad. 206 overruled; *Kameswara v. Veeracharu* (1911) 34 Mad. 422; *Debi Lal v. Nand Kishore*, A. I. R. (1922) Pat. 22.

(f) *Srinivasa Iyengar v. Thiruvengadathaiyangar* (1915) 38 Mad. 556; *Gopalakrishnam v. Venkatanarasa* (1914) 37 Mad. 273; *Govindarazulu v. Devarabhotla* (1904) 27 Mad. 206 overruled; *Sundrabai v. Shivanarayana* (1908) 32 Bom. 81; *Kameswara v. Veeracharu* (1911) 34 Mad. 422; *Bhagirathi v. Jokhu Ram* (1910) 32 All. 575; *Debi Lal v. Nand Kishore*, A. I. R. (1922) Pat. 22.

(g) *Ranganaiiki v. Ramanuja* (1912) 35 Mad. 728; *Srinivasa Iyengar v. Thiruvengadathaiyangar* (1915) 38 Mad. 556.

(h) *Vaikuntam v. Kallipiram* (1903) 26 Mad. 497.

(i) *Bhagirathi v. Jokhu Ram* (1910) 32 All. 575.

(j) *Bhup Narain Singh v. Gokhul Chand* (193) 13 Pat. 242, 61 I. A. 115.

fide purchaser for value would acquire a right paramount to that of the widow's either to maintenance or residence (*k*).

Ss. 39-40

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment *in a particular manner of the latter property*, or

Burden of obligation imposing restriction on use of land

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property but not amounting to an interest therein or easement thereon,

or of obligation annexed to ownership, but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

The section.—The phrases in clause one “independently of any interest” and “or of any easement thereon” and in clause two “but not amounting to an interest therein or easement thereon” should be read as if in parenthesis, to render the meaning of the section more lucid. The words “third person” in paragraph one do not necessarily mean a person who is not a contracting party with the transferor as the illustration shows. Reference may be made to section 6, clauses (c) and (d) of this Act.

Amendment of the section.—The words “in a particular manner of the latter property” at the end of para 1 have been substituted for the words “of the latter property or to compel its enjoyment in a particular manner” by section 12 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929). The reasons for the amendment will be found in notes to section 11 of the present Act. Although an affirmative covenant is not by itself invalid as between a transferor and transferee (section 11), negative or restrictive covenants alone can be specifically enforced against third persons under the first para of this section.

Generally.—The section deals with covenants for the beneficial enjoyment of property unconnected with any interest in that property or with any easement

(k) *Yamnabai v. Nanabhai Sadanand* (1910) 12 Bom. L. R. 1075; *Ramanadan v. Rangam-*

mal (1889) 12 Mad. 260.

S. 40

on that property. It is founded on the principle of English Law dealing with the equitable doctrine of burden of a covenant which runs with the land (*l*). In law, except between landlord and tenant the burden of a covenant never runs with the land though the benefit may (*m*). The covenant to create a permanent restraint upon the use of the land must not be vague and indefinite (*n*) and must be sufficiently precise to create a real burden (*o*). It must be capable of being ascertained with reasonable definiteness (*p*) and must not be *ultra vires* (*q*). A restrictive covenant is construed strictly and not so as to create a wider obligation than is imported by the actual words (*r*). In India, restrictive covenants based on equitable principles of English Law are dealt with in section 40 of the Transfer of Property Act while covenants at law which run with the land are treated in sections 55(2), 65 and 108(c) of the same Act, as implied covenants. The former cannot be enforced against a transferee for consideration without notice nor against such property in his hands while the latter are not dependent for their enforcement on the question of notice.

Varieties of covenants.—Covenants are of several varieties. Amongst them are covenants affirmative, that something is already performed or shall be performed hereafter, or negative, that the party has not performed or will not perform a certain act. In this section we are concerned with the latter class of covenants (*s*).

Form of covenants.—A covenant is an agreement between two or more persons in writing whereby some of the parties or one of them agrees with the other or others for the performance or non-performance of some specified duty. A covenant implies a deed (*t*). The party entering into the covenant is called the covenantor and he with whom it is made the covenantee (*u*). In practice the purchaser is the covenantor and the vendor the covenantee. Words in the form of an exception may also amount to a covenant (*v*). Words of recital also may when joined and considered with the rest of the instrument, be the foundation of an action of covenant (*w*).

Cases in which restrictive covenants are not enforced.—There are certain classes of cases in which restrictive covenants are not enforced. One is where the covenant is personal to the vendor, i.e., where no land is retained to which the benefit of the covenant can attach (*x*). The other is where there is a total change in the character of the locality (*y*). So are covenants collateral such as concern some collateral thing and not the thing granted (*z*) or positive covenants. A covenant to pay one-fourth of the sale price received on the sale of property is not a restrictive covenant but merely a personal obligation of the transferor arising out

(*l*) *Tulk v. Moxhay* (1848) 1 H. & Tw. 105, 47 E. R. 1345.

(*m*) *Rogers v. Hosegood* (1900) 2 Ch. 388.

(*n*) *Murray v. Dunn* (1907) A. C. 283; *Taylor v. Gilbertson* (1854) 2 Drew. 391, 61 E. R. 770.

(*o*) *Anderson v. Dickie* (1915) 84 L. J. P. C. 219.

(*p*) *Torbay Hotel, Ltd. v. Jenkins* (1927) 2 Ch. 225.

(*q*) *London and South Western Railway Co. v. Gomm*. (1882) 20 Ch. D. 562; *Re. South Eastern Railway Co. and Wiffin's Contract* (1907) 2 Ch. 366; *Stourcliffe Estates Co. v. Bournemouth Corporation* (1910) 2 Ch. 12.

(*r*) *Briggs v. Thornton* (1904) 1 Ch. 386; *Kemp v. Bird* (1877) 5 Ch. D. 974.

(*s*) *Platt on Covenants*, p. 19.

(*t*) *Platt on Covenants*, p. 3.

(*u*) *Platt on Covenants*, p. 4.

(*v*) *Platt on Covenants*, p. 31.

(*w*) *Platt on Covenants*, p. 33.

(*x*) *Tulk v. Moxhay* (1848) 2 Ph. 774, 47 E. R. 1345; *Renals v. Cowlishaw* (1879) 11 Ch. D. 866; *Formby v. Barker* (1903) 2 Ch. 539; *Osborne v. Bradley* (1903) 2 Ch. 446; *Elliston v. Reacher* (1908) 2 Ch. 665; *Milboun v. Lyons* (1914) 1 Ch. 34; *London County Council v. Allen* (1914) W. N. 255.

(*y*) *German v. Chapman* (1877) 7 Ch. D. 271; *Sages v. Collyer* (1884) 28 Ch. D. 103; *Knight v. Simmonds* (1896) 2 Ch. 294; *Sobey v. Samsbury* (1913) 2 Ch. 513.

(*z*) *Spencers Case* 5 Co. 16; *Platt on Covenants*, p. 69; *Formby v. Barker* (1903) 2 Ch. 539; *re. Fawcett and Holmes Contract* (1889) 42 Ch. D. 150; *Groves v. Loomes* (1885) 55 L. J. Ch. 53.

of the contract (a). There is no such thing between a vendor and purchaser as a covenant to pay money running with the land (b). A covenant for indemnity is not a covenant for title to land and is so remote as not to touch it (c). A covenant that runs with the land is something which restricts the user of the land. A positive covenant never runs with the land either in law or in equity (d). A covenant involving the expenditure of money is affirmative and the Court will not enforce it against the assignee of the covenantor whether such assignee takes with or without notice (e). The above principles do not apply to covenants in leases.

Benefit annexed to the land.—The more modern view is that the right arising out of restrictive covenants entered into by the former owner of the land was, as Sir George Jessel, M. R., considered it, analogous to a negative easement creating a paramount right, in the person entitled to it, over the land to which it relates. That view, taken in *Gomm's* case (f), stands not only on the great authority of Sir George Jessel but also upon the authority of other recent cases.

Restrictive covenants are sinews of the land.—When the benefit of a restrictive covenant has been once clearly annexed to one piece of land there is presumption that it passes by an assignment of that land and it may be said to run with the land in equity as well as at law without proof of special bargain or representation on the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or is annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption though it may be rebutted by proof of facts inconsistent with it (g).

Covenant running with the land.—In order to make a covenant run with the land it must in its inception bind the land. It must also affect the nature, quality or value of the land conveyed, independently of collateral circumstances, which latter are sometimes proposed as a test to determine whether a covenant runs with the land or not. It is said to affect the nature when it tends to prevent the disturbance on the surface and thus to preserve the natural state and condition of the land. It affects the value, for example, in the case of land properly drained and let for agricultural purposes. A tenant would be more likely to take it and probably give more for it, if he were assured that compensation would be payable in the event of the drainage system being dislocated by a subsidence (h). It is not sufficient that a covenant is concerning the land; to make it run with the land there must be privity of estate between the contracting parties (i).

Restriction on use of land for the beneficial enjoyment of the property of a third person having no property therein.—On this subject, apart from the question

- (a) *Haji Abdul Shakur v. Nandlal*, A. I. R. (1931) All. 552; *Prabhu Narain Singh v. Ramzan* (1919) 41 All. 417 not approved (case of a lease).
 (b) *Mohini Mohan Roy v. Ramadas Paramhansa*, A. I. R. (1924) Cal. 487.
 (c) *Natesa Vanniyar v. Gopalaswami* (1928) 51 Mad. 688; *Doughty v. Bowman* (1848) 11 Q. B. 444, 116 E. R. 548; *Mt. Banti v. Mandu* (1928) 9 Lah. 659.
 (d) *Jogesh Chandra Roy v. Asaba Khatun*, A. I. R. (1927) Cal. 41; *Maharaj Bhadur Singh v. Bal Chand Chowdhury* (1920) 25 C. W. N. 770.
 (e) *Chaturbhuj v. Mansukhram* (1925) 27 Bom.

- L. R. 73.
 (f) (1882) 20 Ch. D. 562; *Rogers v. Hosegoods* (1900) 2 Ch. 388; *Hall v. Ewin* (1887) 37 Ch. D. 74; *Haywood v. Brunswick Permanent Benefit Building Society* (1881) 8 Q. B. D. 403; *In re Nisbet and Potts Contracts* (1906) 1 Ch. 386.
 (g) *Rogers v. Hosegood* (1900) 2 Ch. 388; *Re Nisbet and Potts (Contracts)* (1906) 1 Ch. 386.
 (h) *Dyson v. Foster* (1909) A. C. p. 98; *Rogers v. Hosegood* (1900) 2 Ch. 388; *Mathewson v. Ram Kanai* (1909) 36 Cal. 675.
 (i) *Platt on Covenants*, p. 461.

S. 40 of the equitable doctrine of notice which was brought to a focus in *Tulk v. Moxhay*(j), which is the leading case on that subject, the authorities clearly lay down that the benefit of a covenant at law imposing restriction on land may run with the land but the burden can never do so, except as between landlord and tenant (k). In equity the burden of a covenant, however, runs with the land. It has never been disputed that the Court has jurisdiction to enforce a contract between the owner of a land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using it in a particular way. In *Tulk v. Moxhay* (j), a purchaser of land covenanted for himself, his heirs, executors, administrators and assigns, with the vendor, his heirs, executors and administrators, that the land shall be used as a pleasure garden for the benefit of occupiers of houses in the neighbourhood which belonged to the vendor. Although the character of the neighbourhood had altered and its privacy as a place of residence considerably diminished and the occupiers of the vendor's house had ceased to use the garden, it was held that he was entitled to an injunction against the assignees of the purchaser to restrain them from building upon the land.

In *Haywood v. Brunswick Building Society* (l), the dictum of Lord Cottenham in *Tulk v. Moxhay* (m), "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation than the party from whom he purchased" was referred to as laying down the real principle that an equity attaches to the owner of the land.

The result of the cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice. In *Haywood v. Brunswick Building Society* (n) the Court in deciding that the assignee of a grantee was not liable on the covenant to repair, refused to apply the doctrine of *Tulk v. Moxhay* to affirmative covenants compelling a man to lay out money or to do any other act which may be said to be of an active character. There is not a single case in which it has been held that the burden and benefit of a covenant both run. In order that the benefit may run with the land the covenant must be one which relates to or touches and concerns the land of the covenantee. It was pointed out that the doctrine of *Tulk v. Moxhay* (o) was restricted to limited stipulations and could not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or to do something of that kind and that such a covenant did not run with the land as to bind those who acquired it (p). The doctrine of *Tulk v. Moxhay* (q) was considered by Jessel, M. R., to be either an extension in equity of the doctrine of *Spencer's case* (r), to another line of cases or else an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk v. Moxhay* (q) was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant, expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine establishing an exception to the

(j) (1848) 1 H. & TW. 105, 47 E. R. 1345.
 (k) *Austerberry v. Corporation of Oldham* (1885) 29 Ch. D. 750; *Bailey v. Stephens* (1882) 12 C. B. (N. S. 91), 142 E. R. 1097; *Richards v. Harper* (1886) L. R. 1 Ex. 199; *Dennett v. Atherton* (1872) 7 Q. B. 316.
 (l) (1881) 8 Q. B. D. 403.

(m) (1848) 1 H. & TW. 105, 47 E. R. 1345.
 (n) (1881) 8 Q. B. D. 403.
 (o) (1848) 1 H. & TW. 105, 47 E. R. 1345.
 (p) *Austerberry v. Corporation of Oldham* (1885) 29 Ch. D. 750.
 (q) (1848) 1 H. & TW. 105, 47 E. R. 1345.
 (r) (1583) 5 Co. Rep. 16a, 77 E. R. 72.

rules of Common Law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or analogy to an easement (*s*).

Inter-dependent covenants.—Restrictive covenants treated under para 1 of the section become important when considered with reference to general building schemes or as to how far they bind the covenantor or the covenantee and their assigns. The whole theory of inter-dependent covenants appears to point to an arrangement made once and for all, either on a sale by auction, by conditions of sale stating the covenants and that other persons will enter into similar covenants, and a plan exhibited at the sale, or by a scheme entered into already by an antecedent sale, the particulars of which are stated to the purchaser and which are displayed upon a plan drawn by the purchaser's deed. "To enable an assignee to take the benefit of the restricted covenants there must be something in the deed to define the property for the benefit of which they were entered into" (*t*). The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendant's predecessor in title, who entered into covenants with the vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiff's predecessors in title. The conveyance contained no reference to the restricted covenants nor was there any contract or representation that the purchasers were to have the benefit of them. Held, the plaintiffs were not entitled to restrain the defendants from building in contravention of the restricted covenants entered into by their predecessors in title.

The law on the subject has never been stated more clearly than in *Renals v. Cowlshaw* by Hall, V. C. (*u*), whose opinion was emphatically confirmed in the Court of Appeal (*v*) and was also approved and followed in the Queen's Bench Division (*w*). It was there stated by him that it was well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being in equity, having notice thereof. From the cases of *Mann v. Stephens* (*x*), *Western v. Macdermott* (*y*) and *Coles v. Sims* (*z*), it must be considered as determined that anyone, who has acquired land, being one of the several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where several parties execute a mutual deed of covenant but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express but may be collected from the transaction of sale or purchase. In considering this, the expressed or otherwise apparent

(*s*) *London and South Western Railway Co. v. Gomm* (1882) 20 Ch. D. 562.
 (*t*) *Renals v. Cowlshaw* (1879) 11 Ch. D. 866.
 (*u*) (1878) 9 Ch. D. 125.
 (*v*) (1879) 11 Ch. D. 866.

(*w*) *Nottingham Patent Brick & Tile Co. v. Butler* (1885) 15 Q. B. D. 261.
 (*x*) (1846) 15 Sim. 377, 60 E. R. 665.
 (*y*) (1866) 2 Ch. App. 72.
 (*z*) (1853) Kay 56, 69 E. R. 25

S. 40 purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is a purchaser of all the land retained by his vendor when the covenant was entered into, is also important.

To the same effect is *Spicer v. Martin* (a). There Martin took his lease last of all. There were seven plots altogether conveyed to the superior lessor. They were all subject to restrictive covenants. Each conveyance contained a ground plan showing all seven lots. When the lease was taken by Martin the ground plan containing all the seven lots was exhibited on the lease and Martin was told that all the other six lots had already been leased subject to similar covenants. That was held by the House of Lords to be a sufficient statement of the building scheme.

Farewell, J., in *Osborne v. Bradley* (b), divided restricted covenants into three classes.

“Negative covenants in conveyances in fee restricting the right of the purchaser to use the land purchased may be considered as falling under three classes: (1) where the covenant is entered into simply for the vendor’s own benefit; (2) where the covenant is for the benefit of the vendor in his capacity of owner of a particular property; and (3) where the covenant is for the benefit of the vendor, in so far as he reserves unsold property, and also for the benefit of other purchasers, as part of what is called a building scheme.” To all three classes the rule enunciated by Lord Cairns in *Doherty v. Allman* (c) applies—that is to say, where there are negative covenants which are binding on the defendant the Court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue. Contractual obligations do not disappear as circumstances change, but a person who is entitled to the benefit of a covenant may, by his conduct or omission, put himself in such an altered relation to the person bound by it, as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction.

The principle was considered in an elaborate judgment by Parker, J., in *Elliston v. Reacher* (d). He enunciated the four requisites for enforcing restricted covenants as between different purchasers as under:—

“In my judgment, in order to bring the principles of *Renals v. Cowlishaw* (e) and *Spicer v. Martin* (f) into operation, it must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled, the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively) for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the

(a) (1888) 14 A. C. 12
(b) (1903) 2 Ch. 446
(c) (1878) 3 A. C. 709.

(d) (1908) 2 Ch. 374.
(e) (1878) 9 Ch. D. 125.
(f) (1888) 14 A. C. 12.

vendor; (4) that both the plaintiff and defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors."

Where these four points are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase.

The above statement of the law was approved by the Court of Appeal (g).

Power reserved to vendor to vary stipulations.—The liability of a vendor, to whom power was reserved to vary the stipulations, was considered in the case where building land was sold in a number of lots subject to certain conditions as to fencing, repairing the roads, and to restrictions as to the class of houses to be built. The conditions also provided that a statement to this effect should be inserted in the conveyance. By the 15th condition the vendor reserved the right of selling the unsold lands under different arrangements "and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars of the conditions." It was held as to the unsold lot, the vendor was subject to none of the restrictions (h).

For further reference see (i).

Benefit annexed to land dedicated to the public.—The benefit of restrictive covenants relating to the mode of building on an estate through which a road runs can be validly annexed to the site and soil of the road so as to run with it, even after it has been dedicated to the public; but if the road is subsequently taken over by a local authority a successor in title of the original owner of the road ceases to have such an interest in it, as will entitle him to enforce the covenants. The surface of the road is no longer vested in him and the restrictions do not touch or concern such interest in the road as he retains (j).

Covenant "ultra vires."—Where land is acquired under a Special Act the purchaser has no power in law to preclude himself or his successor from the exercise of his statutable power over it.

By a Special Act a railway company were authorized to acquire certain land for the purpose of enlarging their stations "and for other purposes of and connected with their undertaking." Under this power the railway company acquired the land by voluntary agreement and covenanted in their conveyance that they and their assigns would at all times thereafter use the land for a passenger station "and for no other purpose." Afterwards the railway company contracted to sell part of the land that they did not require, and the purchaser required the covenant to be released. Following the principle of *Ayr Harbour Trustees v. Oswald* (k), the covenant was held to be *ultra vires* the railway company and that they could sell free from the restrictions contained in it (l).

Scheme of mutual obligations established by common intention.—There is, however, an alternative ground unaffected by any questions which may be raised on the operation of covenants at law or their operation in equity. Where an owner

(g) *Elliston v. Reacher* (1908) 2 Ch. 665.

(h) *Sidney v. Clarkson* (1865) 35 Beav. 118
55 E. R. 839

(i) *Mayner v. Payne* (1914) 2 Ch. 555; *Kelly v. Barrett* (1924) 2 Ch. 379; *Whitehouse v. Hugh* (1906) 2 Ch. 283; *Wille v. St. John*

(1910) 1 Ch. 84; *Elliston v. Reacher* (1908) 2 Ch. 665.

(j) *Kelly v. Barrett* (1924) 2 Ch. 379.

(k) (1883) 8 A. C. 623.

(l) *In re South Eastern Railway Co. and Wiffin's Contract* (1907) 2 Ch. 366.

S. 40

of land deals with his land on the footing of imposing restrictive obligations on the use of various portions of it as and when he alienates them, for the common benefit of himself (so far as he retains any of the land) and of the various purchasers *inter se*, a Court of Equity will give effect to this common intention, notwithstanding the absence of mutual covenants, provided that an intention that there should be mutual obligation is sufficiently established (*m*) and the Court can ascertain with reasonable certainty the geographical area within which the mutual obligations are intended to operate (*n*). If no such geographical area is ascertained such restriction will be unenforceable (*o*). It is not necessary to find any express contract by the vendor or the several purchasers; it may be collected or inferred from the nature of the transaction (*p*). Therefore, if there was or is evidence from which a scheme can be found to exist, it does not fail because it is not to be found in express terms (*q*). This was the doctrine laid down in *Torbay Hotel, Ltd. v. Jenkins* (*r*), following *Renals v. Cowlshaw* (*s*) and *Reid v. Bickerstaff* (*t*), a question dependent on construction of the covenant itself. It is otherwise where the case is not one in which the benefit of the covenant was intended to be or was annexed to the houses in question so that it would pass to any purchaser from him of any one of the houses, but that the vendor was obtaining a covenant which would be of use to him for the protection of his houses in his own hands to enable him to dispose of them advantageously to anybody with whom he might deal in the future. Where a restrictive covenant had been entered into by a purchaser of land for the protection of the vendor's immediately adjoining land but not so as to annex the benefit of the covenant to that land, the covenant is not enforceable against an assign of the covenantor by the executors of the covenantee if he had disposed of the whole of the adjoining property before his death. It can make no difference even when the executors are persons to whom part of the covenantee's property had previously been assigned without an express assignment of the benefit of the covenant (*u*).

Common building scheme.—In order to establish the existence of a building scheme there must be definite reciprocal rights and obligations over a defined area. If on a sale of a part of an estate the purchaser covenants with the vendor, his heirs and assigns not to deal with the purchase property in a particular way, a subsequent purchaser from the same vendor of another part of the estate does not take the benefit of the covenant unless he is an express assignee thereof or unless the covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser. The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of land on a subsequent conveyance (*v*). Where an estate is vested in a trustee who sells plots for building subject to restrictive covenants, each purchaser has an equity against the other purchaser to compel the observance of the covenants. Such equity may be lost by acquiescence. In a suit to enforce such an equity the trustees are necessary parties and the remaining purchasers ought to be represented on the record (*w*).

(*m*) *Torbay Hotel Ltd. v. Jenkins* (1927) 2 Ch. 225 240.

(*n*) *Torbay Hotel Ltd. v. Jenkins* (1927) 2 Ch. 225; *Elliston v. Reacher* (1908) 2 Ch. 374 (384); *Renals v. Cowlshaw* (1878) 9 Ch. D. 125.

(*o*) *Reid v. Bickerstaff* (1909) 2 Ch. 305.

(*p*) *Nottingham Patent Brick and Tile Co. v. Butler* (1885) 15 Q. B. D. 261.

(*q*) *Kelly v. Barrett* (1924) 2 Ch. 379.

(*r*) (1927) 2 Ch. 225.

(*s*) (1878) 9 Ch. D. 125.

(*t*) (1909) 2 Ch. 305.

(*u*) *Chambers v. Randall* (1923) 1 Ch. 149;

Master v. Hansard (1876) 4 Ch. D. 718;

Miles v. Easter (1933) 1 Ch. 611.

(*v*) *Reid v. Bickerstaff* 1909) 2 Ch. 305

(*w*) *Eastwood v. Lever* (1863) 33 L. J. Ch. 355.

Essentials of a building scheme.—There are three or four cases which at the present time show exactly what is to be found if a scheme is to be inferred. The statement of the law is enunciated in *Renals v. Cowlshaw* (x) and accepted in *Spicer v. Martin* (y). After these two cases the same point arose in *Rogers v. Hosegood* (z), where Collins, L. J., stated :—" These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land and may be said to run with it." Then in *Elliston v. Reacher* (a), which is a conspicuous example of " building scheme " cases, Parker, J., laid down the four conditions which had to be fulfilled (b), and in *Reid v. Bickerstaff* (c), there has been superadded to that a little more, and that is, that there must be a defined area.

Repurchase.—A sold part of an estate to B who entered into restrictive covenants for himself, his heirs and assigns with A, his heirs, executors and administrators, as to buildings on the purchased property ; but A did not enter into any covenants as to the land retained. After this, A sold to other persons, various lots of the parts retained but nothing appeared as to the contents of their conveyances nor was there any evidence that they were informed of the covenants entered into by B. After this, A bought back from B what he had sold to him. Held, that the benefit of B's covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A, and that A after the repurchase could make a title to the repurchased land discharged from the covenants (d).

Sale of estate in lots.—Where a property is put up for sale by a vendor in lots and restrictive covenants are entered into with the vendor by each of the vendees, it is an inference of fact in each case whether the purchasers of the different lots are bound *inter se* by such covenants. If such was in fact their intention, the Court will enforce those covenants between the different purchasers and their assigns. The mere fact that the vendor did not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers is not material (e).

Injunction or damages.—Where a breach of a restrictive covenant causes substantial damage the Court has no discretion to award damages in lieu of a mandatory injunction (f). The real truth is that in the enforcement of restrictive covenants an assignee with notice is in the same position as a covenantor (g). That the Court has a wider discretion to award damages in lieu of injunction in respect of breaches of equitable restrictive covenants is contrary to a long chain of authorities (h). An injunction will be granted against a purchaser (i), an occupier (j), a person in possession without title (k), but not against a covenantor who has parted with all his interest and has no control over his assignee who persists in breaking the covenant (l), or against a covenantor who has himself not violated the covenant (m). It has, however, been held (the Court of Appeal expressing no opinion on this point) that the Court has a judicial discretion with regard to granting an injunction to prevent the breach of a restrictive covenant, where there is no privity

(x) (1878) 9 Ch. D. 125.

(y) (1889) 14 A. C. 12.

(z) (1900) 2 Ch. 388.

(a) (1908) 2 Ch. 374.

(b) See caption " Interdependent covenants," ante.

(c) (1909) 2 Ch. 305.

(d) *Keats v. Lyon* (1869) 4 Ch. A. 218; *Renals v. Cowlshaw* (1878) 9 Ch. D. 125.

(e) *Nottingham Patent Bricks and Tile Co. v. Butler* (1886) 16 Q. B. D. 778; *Harrison v. Good* (1871) L. R. 11 Eq. 338.

(f) *Achilli v. Tovell* (1927) 2 Ch. 243.

(g) See *Richards v. Revitt* (1877) 7 Ch. D. 224.

(h) *Western v. Macdermott* (1866) L. R. 1 Eq. 499; *Leech v. Schweder* (1874) 9 Ch. 463; *Nussey v. Provincial Bill Posting Co.* (1909) 1 Ch. 734.

(i) *John Brothers v. Holmes* (1900) 1 Ch. 188.

(j) *Mande v. Falaka* (1891) 2 Ch. 554.

(k) *Re. Nisbett and Potts Contract* (1906) 1 Ch. 386.

(l) *Clement v. Welles* (1865) 1 Eq. 200.

(m) *Powell v. Helmsley* (1909) 2 Ch. 252.

- S. 40 of contract between the parties ; and it will not grant an injunction where no damage can be proved by the person seeking to enforce the covenant and the breach is not of a kind to cause any nuisance or annoyance (n).

Who can annex the burden to the land.—It is submitted that a person cannot burden the land before he becomes the legal owner thereof (o). An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into. In such a case the doctrine of *Tulk v. Moxhay* (p) does not apply (q) and the fact of notice is irrelevant.

Enforceability of covenant against assign of covenantor.—The equitable doctrine enabling restrictive covenants to be enforced against assigns with notice ought not to be extended in derogation of the ordinary rights at common law of purchasers and it ought to be applied only where it is sought to enforce the covenant in connection with the enjoyment of land that the covenant was intended to protect. That appears to apply quite as much to a case where the original covenantee retained land at the date of the covenant and he or his successors got rid of the whole of it afterwards, as to a case where the original covenantee either had no land or had no land which he was retaining (r).

By an agreement dated the 26th day of November 1926, defendant No. 1 agreed to sell certain immoveable properties to the plaintiff. On the 22nd December 1926, defendant No. 1 sold the same properties to the respondent by a registered sale deed. The plaintiff filed a suit for specific performance of his agreement. It was held that although under section 54 of the Transfer of Property Act, 1882, the plaintiff's agreement for sale did not create by itself any interest in or charge on the property, he was entitled under section 27 (b) of the Specific Relief Act, 1877, to enforce the agreement against the respondent, the subsequent transferee of the property. Under the latter section as read with sections 103 and 106 of the Indian Evidence Act, the burden of proof lay upon the later transferee to establish ; (a) the payment of his money, (b) his good faith, and (c) the absence of notice to him of the original contract (s). The case was, however, distinguished from the somewhat analogous provision of the Insolvency Statute, namely, section 55 of the Presidency Towns Insolvency Act, 1909, and section 53 of the Provincial Insolvency Act, 1920 ; under these sections the same Board held that the burden of proof lay on the Official Assignee to prove that a conveyance which he was seeking to set aside thereunder was not made in good faith and for valuable consideration (t). The above view under the Specific Relief Act has been taken in a number of cases, *Himatlal v. Vasudev* (u), *Baburam Bag v. Madhab Chandra Pollay* (v), *Tirurenkatachariar v.*

(n) *Kelly v. Barrett* (1924) 2 Ch. 379.
 (o) *Millbourn v. Lyons* (1914) 1 Ch. 34.
 (p) (1848) 1 H. & T.W. 105, 47 E. R. 1345.
 (q) *London County Council v. Allen* (1914) 3 K. B. 642 ; *Torbay Hotel Ltd. v. Jenkins* (1927) 2 Ch. 225 ; *Kelly v. Barrett* (1924) 2 Ch. 379 ; *Chambers v. Randell* (1923) 1 Ch. 149 ; *Millbourn v. Lyons* (1914) 1 Ch. 34 ; *Formby v. Barker* (1903) 2 Ch. 539.
 (r) *Chambers v. Randell* (1923) 1 Ch. 149 ; *Formby*

v. Barker (1903) 2 Ch. 539 ; *London County Council v. Allen* (1914) 3 K. B. 642.
 (s) *Bhup Narain Singh v. Gokhul Chand* (1934) 59 C. L. J. 139 P. C. 61 I. A. 115.
 (t) *Official Receiver v. P. L. K., M. R. M. Chettyar Firm* (1930) 53 C. L. J. 373, 58 I. A. 115.
Pope v. Official Assignee (1933) 58 C. L. J. 471, 60 I. A. 362.
 (u) (1912) 36 Bom. 446.
 (v) (1913) 40 Cal. 565.

Venkatachariar (w), *Naubat Rai v. Dhaunkal Singh (x)*, *Muhammad Sadik Khan v. Masihan Bibi (y)*. Their Lordships' attention was drawn to only one decision to a contrary effect, viz., *Peerkha Lalkha v. Bapu Kashiba Mali (z)*, but their Lordships preferred the earlier Bombay decision in *Himatlal's* case.

Re-entry by covenantor on breach of covenant by his assign.—Can it be, because he has his estate thrown back upon him with a building upon it which *ex-hypothesi* was erected in breach of the covenant that he is thereby made liable to pull down the buildings so erected, but not by himself? This question was answered in the negative in *Powell v. Hemsley (a)*. There the purchaser of a part of freehold building estate covenanted with the vendor for himself and his assigns to erect no other than private residences. The purchaser granted a building lease with similar covenants. The lessee committed a breach and became bankrupt, his trustee in bankruptcy disclaimed the lease and the purchaser took possession of the land and the offending building. The vendor sold the rest of the estate to the plaintiff with the benefit of the purchaser's covenant. The plaintiff brought an action against the purchaser to compel removal of the building and for damages. It was held that the breach was committed not by the purchaser but by his assigns and that he had not by his conduct rendered himself liable for the violation of the covenant and that the plaintiff was not entitled either in law or in equity to any relief. It was there observed that there was no attempt to assign the benefit of damages for past breaches and therefore it was unnecessary to consider whether it could be done legally or not.

Stranger to the consideration.—Plaintiff and defendant held adjacent plots under agreements for a lease from the Secretary of State for India. They were on identical terms. It was admitted on behalf of the defendant that he having knowledge of the conditions, inserted for the common benefit of a group of lessees taking sites for buildings intended to be contiguous and to form a block, was bound both to the Secretary of State and the lessees of the neighbouring plots, and on whom reciprocally, he, on his part, had a claim for the fulfilment of the like terms by them for his benefit as lessee. It was held that neither the lessee nor his neighbour could be called a stranger to the consideration. Each was equitable assignee of the covenants which the lessor made for his benefit as lessee. Each consequently had an equitable right to enforce against the other the obligation stipulated for in his interest and serving as a part of his inducement to the contract (b).

Defect in title.—A restrictive covenant is a defect in title, entitling the purchaser to be relieved from the contract (c).

Trustee.—Where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into (d).

Obligation annexed to the ownership of immoveable property.—Clause 2 of section 40 deals with the burden of an obligation annexed to the ownership of immoveable property but not amounting to an interest or easement thereon. As the illustration to the section shows, an agreement for sale falls within the purview of

(w) (1914) 26 M. L. J. 218.

(x) (1916) 38 All. 184.

(y) (1930) 9 Pat. 417.

(z) (1923) 25 Bom. L. R. 375.

(a) (1909) 2 Ch. 253.

(b) *Cooverji v. Bhimji* (1882) 6 Bom. 528.

(c) *Pemsel and Wilson v. Tucker* (1907) 2 Ch. 191; *Dougherty v. Oates* (1900) 45 So. Jo.

119; *In re Cox and Neve's Contract* (1891) 2 Ch. 109.

(d) *Lloyd's v. Harper* (1880) 16 Ch. D. 290; *Master v. Hansard* (1876) 4 Ch. D. 718; *Tomlinson v. Gill*, 1756. Amb. 330; *Lamb v. Vice* (1840) 6, M.W. 467; *Cooverji v. Bhimji* (1882) 6 Bom. 528.

S. 40 this clause. Section 54 states what a contract for sale does not create, while this clause expressly affirms the first intended purchaser's right to enforce the benefit of the obligation of his intended vendor against the second purchaser with notice (e). The second purchaser is, moreover, according to the Specific Relief Act, section 3, a trustee for the first intended purchaser of the land purchased by him. See illustration (g) to that section. Again, section 91 of the Trust Act affirms the same rule as the Specific Relief Act.

This decision may appear to be inconsistent with the result arrived at in *Lalchand v. Lakshman* (f) and in *Kurri Veerareddi v. Kurri Bapireddi* (g) from which, if rightly decided, it would appear that the first intended purchaser would have no defence against a suit by his intended vendor for possession although by reason of the statutory provisions above referred to, he has a complete defence against his vendor's assignee, notwithstanding that the latter has no greater knowledge than the vendor possessed.

And where a contract was entered into before the passing of the Transfer of Property Act whereby the parties agreed that in case of any future transfer by one party of the immoveable property mentioned in the contract the transfer was to be made to the other party, although held to be binding on the parties themselves and their representatives, could not be specifically enforced against a *bona fide* transferee for value without notice of the contract. The Court observed, that whether the principles embodied in section 40 of the Act or the general principles of justice, equity and good conscience applied to the obligation of the representatives, section 27 of the Specific Relief Act must apply and the contract could not be specifically enforced against a transferee for value without notice (h).

Pre-emption.—A contract giving rise to a right of pre-emption clearly falls within the category of clause 2 of section 40 (i). Whether such a contract offends the rule against perpetuities has been much discussed by the Courts of this country. The view of the Allahabad High Court is that an agreement for pre-emption is neither void for uncertainty nor does it offend the rule against perpetuities (j), while the Bombay High Court has said that the rule of perpetuities applies to this class of contracts (k). The Calcutta High Court (l) has also adopted the rule in *London South Western Railway Co. v. Gomm* (m).

Notice.—A transferee with notice is liable under the section and so is a gratuitous transferee whether with or without notice. In order that the right or obligation under this section may not be enforceable, the transferee's defence must be that he is a transferee for consideration without notice of the right or obligation. Equity favours a transferee for value without notice. Constructive notice would be a bar to such a defence (n). Burden lies upon the transferee to establish (1) payment of money, (2) absence of notice (o), both together constituting a single

(e) *Gangaram v. Laxman* (1916) 40 Bom. 498.
 (f) (1904) 28 Bom. 466.
 (g) (1906) 29 Mad. 336.
 (h) *Shahzad Singh v. Jiachha Kunwar* (1932) 54 All. 966.
 (i) *Basdeo Rai v. Jhagru Rai* (1924) 46 All. 333.
 (j) *Aulad Ali v. Ali Athar* (1927) 49 All. 527 (F. B.); *Muhammad Jan v. Fazal-ud-din* (1924) 46 All. 514; *Basdeo Rai v. Jhagru Rai* (1924) 46 All. 333.
 (k) *Dinkarrao v. Narayan* (1923) 47 Bom. 191.
 (l) *Nobin Chandra v. Nabab Ali* (1900) 5 C. W. N. 343.
 (m) *Nobin Chandra v. Rajani Chandra* (1920) 25 C. W. N. 901 (1882) 20 Ch. D. 562.

(n) *Patman v. Harland* (1881) 17 Ch. D. 353; *Nottingham Brick Co. v. Butler* (1886) 16 Q. B. D. 778; *Parker v. Whyte* (1863) 1 H. & M. 167; *Re. Nisbet and Pott's Contract* (1906) 1 Ch. 386; *Clements v. Welles* (1865) 1 Eq. 200; *Feilden v. Slater* (1869) 7 Eq. 523; *Fleetwood v. Hull* (1889) 23 Q. B. D. 35; *Jogamaya Dasi v. Tulsa* (1926) 48 All. 12; *Kameswaramma v. Sitaramanuja* (1906) 29 Mad. 177.
 (o) *Bhup Narain Singh v. Gokhul Chand* (1934) 59 C. L. J. 139; *Wilkes v. Spooner* (1911) 2 K. B. 473; *Attorney General v. Biphosphated Guano Co.* (1879) 11 Ch. D. 327.

defence. Notice is not binding when performance of the covenant involves a transferee into expense (p).

S. 40

Against such property in his hands.—This answers the question whether the land in the hands of a transferee for value without notice is bound so that he can be restrained from using it in a manner contrary to the covenant. The lessee of premises No. 137, High Street, East Ham, carried on therein the business of a pork butcher. The lease contained a covenant by which he covenanted not to carry on therein any noisy or offensive trade other than that of a pork butcher. He was also lessee under a different landlord of premises No. 170 in the same street, upon which he carried on the business of a general butcher. He sold and assigned to the plaintiff his interest in the last mentioned premises and the goodwill of his business as a general butcher, covenanting with the plaintiff (*inter alia*) that he, his executors, administrators and assigns, would not "cut, sell or deal in fresh hind-quarter beef, mutton, veal, lamb or poultry at or upon the premises No. 137, High Street, East Ham, or in connection with the business of a pork butcher now carried on there by him." He afterwards gave up business and surrendered his lease of No. 137 to the landlord; and a new lease thereof was granted to his son by the landlord, which lease contained a covenant that the lessee would not carry on upon the premises any noisy or offensive trade other than—not "that of a pork butcher," as in the old lease, but—"that of a butcher." At the time when the landlord accepted the surrender, he had not in fact notice of the restrictive covenant entered into by the father with the plaintiff as regards No. 137, but the son, when the new lease was granted to him, knew of the existence of that covenant. The son afterwards set up the business of a general butcher on the premises No. 137, High Street.

Held, that under the circumstances of the case the landlord was not affected with constructive notice of the father's covenant, and, consequently, could grant to the son a lease free from the restriction of that covenant, and that the son therefore could not be restrained at the suit of the plaintiff from carrying on the business of a general butcher at No. 137. That is to say, a purchaser of land from one who has purchased it for value without notice, either actual or constructive, of a restrictive covenant is not bound by the covenant although he himself had notice of it (q). That is, the defendant was entitled to avail himself of those through whom he claimed being purchasers without notice whether he had notice himself or not. The only exception to this rule is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a *bona fide* purchaser without notice and has got it back again (r).

Judicial sales.—A contract for the sale of immoveable property can be specifically enforced against a purchaser of the same at a sale subsequently held in execution of a decree against the contractor only if the purchaser at the judicial sale bought with notice of the contract. "Judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title."

Assuming that section 64 of the Code of Civil Procedure has no effect and that section 40 of the Transfer of Property Act has full scope, it is only if the purchaser at the judicial sale bought with notice of the contract that it could be enforced

(p) *Hall v. Ewin* (1887) 37 Ch. D. 74; *Clegg v. Hands* (1889) 44 Ch. D. 506; *Powell v. Helmsley* (1909) 2 Ch. 252.
(q) *Wilkes v. Spooner* (1911) 2 K. B. 473; *Lowther v. Carlton* (1741) 2 Atk. 242, 26 E. R.

589; *Barrow's case* (1880) 14 Ch. D. 432; *Sweet v. Southcote* (1786) 2 Bro. C. C. 66, 21 E. R. 433.
(r) *Barrows' case* (1880) 14 Ch. D. 432.

Ss. 40-41

against him (s). The above remarks were made by the Privy Council in a case where the only notice given was by the pleader of an intending purchaser at the auction sale that the debtor had contracted to sell the property to his client which notice the Judicial Committee considered as insufficient to deprive the transferee of the protection afforded by this section.

Conflict between section 64 of the Civil Procedure Code, 1908, and section 40 of the Transfer of Property Act.—The obligation conferred by this section which is enforceable under an agreement for sale, frequently comes into conflict with a claim enforceable under an attachment restraining private alienation of the attached property under section 64 of the Code of Civil Procedure. The attachment prohibits private alienation while section 40, if given its full scope, gives the transferee a right to enforce the contract. The point arose in a Calcutta case (t) in which it was held that an agreement to sell immoveable property cannot prevail over a subsequent attachment whether before or after judgment and the fair effect of section 64 and O. XXXVIII, r. 10 of the Code of Civil Procedure, 1908, in the events that had happened was that attaching creditors were entitled to have the balance receivable under the agreement by the debtor applied to the payment of their debts. In that case, however, section 55, clause 6, sub-clause (b) of the Transfer of Property Act which entitles a purchaser who has paid a part of the purchase-money to a charge on the property, was not referred to; for as a matter of fact the purchaser in the Calcutta case had paid a sum of Rs. 25,000 odd as purchase-money in advance to the vendor before the attachment was levied. It was, however, observed in that case that it was open to the intended purchaser to compel the transferee at the execution sale to sell the property to him. The same point arose in a Madras case but there the intended purchaser was in advance of the attaching creditor and it was held that the attachment could not prevail against the decree for possession obtained by the purchaser; the distinction between the two cases being, that in the Calcutta case the transfer to the purchaser was by private alienation, while in the Madras case it was a judicial sale. In either case, however, it was observed that it was open to the intended purchaser to enforce his agreement for sale by specific performance. In neither case was it considered that an attachment created a charge on the property (u). In the Madras case property which the first defendant had contracted to sell to the second defendant was attached by the plaintiff in execution of a money decree against the first defendant. After the attachment second defendant sued for specific performance and obtained a decree and possession. He put in a claim to the attached property which was allowed. In a suit brought by the plaintiff to set aside the order, it was held that the proper course was to file a suit under section 53 of the Transfer of Property Act (v).

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that

Transfer by ostensible owner.

(s) *Nur Mahomed v. Dinshaw* (1923) 45 M. L. J. 770.

(t) *Taraknath v. Sanatkumar* (1930) 57 Cal. 274.

(u) *Suraj Bansi Koer v. Sheo Proshad Singh* (1880) 5 Cal. 148, 6 I. A. 88, 109; *Ananta-*

padmanabhaswami v. Official Receiver of Secunderabad (1933) 56 Mad. 405, 60 I. A. 167, 175.

(v) *Sankari v. Mudaragaddi Sanyasi* (1924) 46 M. L. J. 361.

the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. S. 41

The section.—In order to obtain the protection afforded by the section it is necessary for the transferee to prove the existence of the following two conditions (w):

- (1) A person is an ostensible owner of immoveable property
 - (a) with the consent, expressed or implied, of the person interested therein;
 - (b) and transfers the same for consideration.
- (2) The transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Exception.—The section is an exception to the general law that a person cannot convey a better title than he himself has in the property (x).

Scope.—The section is a statutory recognition, followed in India (y), of the principle enumerated by the Judicial Committee in *Ram Coomar v. McQueen* (z). It is a principle of natural equity that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it." It is necessary under the section to prove not merely consideration but also good faith and due inquiry (a). It is of the essence of the section that the conduct of the real owner must induce a belief in the transferee that his transferor had power to make the transfer (b).

Fraudulent intention.—Fraudulent intention is by no means necessary to create estoppel. The determining element is not the motive with which the representation has been made nor a state of knowledge of the party making it but the effect of the representation as having caused another to act on the faith of it. An estoppel does not in itself give a cause of action, but it prevents a person from denying a certain state of facts (c).

Non-representatives in interest.—Estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person primarily estopped (d).

Extent of consent required.—A recent decision of the Allahabad High Court has held that for the purpose of section 41 not only should the transfer by ostensible

(w) *Zarif-un-Nissa v. Shafiq-uz-Zaman Khan* (1928) 55 I. A. 303; *Lakshman v. Vasudev* (1931) 33 Bom. L. R. 356; *Ballu Mal v. Ram Kishan* (1921) 43 All. 263; *Parlab Chand v. Saiyida Bibi* (1901) 23 All. 442; *Macneil v. Saroda Sundari*, A. I. R. (1929) Cal. 83; *Umaram v. Puruk*, A. I. R. (1925) Cal. 993.
 (x) *Umaram v. Puruk*, A. I. R. (1925) Cal. 993; *Kanhu Lal v. Palu Sahu* (1920) 5 Pat. L. J. 521.
 (y) *Sheotahal v. Lal Narain*, A. I. R. (1930) All. 422; *Baidya Nath Dutt v. Alef Jan Bibi*, A. I. R. (1923) Cal. 240; *Baswantapa v. Rance* (1885) 9 Bom. 86; *Mahanta Bhagaban v. Bisweswar*, A. I. R. (1927) Cal. 220; *Gholam Sidhique v. Jogendra Nath*, A. I. R. (1929) Cal. 916; *Mir Mahomed v. Kishori Mohan* (1895) 22 Cal. 909, 22 I. A. 129;

Luchman v. Kalli Churn (1873) 19 W. R. 292; *Mubarakunnissa v. Raza Khan*, A. I. R. (1924) All. 384; *Khwaja Muhammad v. Muhammad Ibrahim* (1904) 26 All. 490.
 (z) 1872, 11 Beng. L. R. 46.
 (a) *Lakshman v. Vasudev* (1931) 33 Bom. L. R. 356; *Ragupathi v. Mishingha*, A. I. R. (1923) Cal. 90; *Vilayat Husain v. Misran* (1923) 45 All. 396.
 (b) *Mohmad Sujat v. Mt. Chandbi*, A. I. R. (1927) Nag. 41.
 (c) *Sarat Chunder Dey v. Gopal Chunder Dey* (1893) 20 Cal. 296, 19, I. A. 203; *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha* (1935) 61 C. L. J. 239 P. C.
 (d) *Umaram v. Puruk*, A. I. R. (1925) Cal. 993; *Lala Prabhu Lal v. Mylen* (1887) 14 Cal. 401.

S. 41 owner of the property be with the consent, express or implied, of the real owner, but he must also transfer the same with such consent, express or implied (e), a construction not easy to follow. Independently of other considerations, regarding the clause "with the consent, express or implied," from a grammatical standpoint I should read it as modifying "is" only and not "transfer" also. The former reading gives to the word "transfer" its ordinary and natural meaning; the latter distorts it.

Nature of consent.—The consent, whereby a person becomes an ostensible owner may be either express or implied of the true owner. It must be intelligent and not induced by misapprehension of legal rights (f). It must be free and not caused by the existence of circumstances enumerated in section 14 of the Indian Contract Act (g). It may be implied by omission causing another's belief and action thereon (h). It must be the true cause of the change of position of the other party. The question whether there has been a representation amounting to acquiescence or not is a question of fact (i). In the undermentioned case (j), one of the Judges of a Division Bench held that acquiescence was a question of fact while the other held it to be one of legal inference from facts found. Mere presence is not necessarily equivalent to consent which implies an intelligent concurrence on due consideration. The consent required is a matter not of form but of substance (k). It has been held that the consent mentioned in the section includes a consent based on a mistake (l) which must be brought within the excepted sections 20, 21 and 22 of the Indian Contract Act.

Implied consent.—Consent which is inferred from conduct or course of dealing is implied as opposed to express. Where a Court sees that the rights of one or two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. The above observations were made where for a long term of years no ostensible act of ownership was exercised by the plaintiff over the house but that on the contrary she allowed her husband's cousin to appear and deal with the house as ostensible owner and in consequence of his conduct the respondents were induced to purchase (m).

Acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or conduct; in other words, acquiescence does not mean simply an active, intelligent consent but may be implied if a person is content not to oppose irregular acts which he knows are being done (n). The principle applies when one stands by and acquiesces in something that is being done by another, and if in consequence of such acquiescence some injury is caused to some third party, it is provided by the section that it is not open to the person so acquiescing to say that what was done by that other person was not authorized by him (o). Though mere acquiescence is not equivalent to consent yet consent need not be by word and may be by act and if consent can be intimated by conduct as well as by act it is clear that acquiescence

(e) *Shafiq-ullah Khan v. Sami-ullah Khan*, (1930) 52 All. 139.
 (f) *Dungariya v. Nand Lal* (1906) 3 A. L. J. 534.
 (g) IX of 1872.
 (h) *Sarat Chunder Dey v. Gopal Chunder Laha* (1893) 20 Cal. 296, 19 I. A. 203.
 (i) *Mahanta Bhagaban v. Bisweswar*, A. I. R. (1927) Cal. 220.
 (j) *Ananda v. Parbati* 1906) 4 C. L. J. 198.

(k) *Bhimappa v. Basawa* (1902) 29 Bom. 400.
 (l) *Ramprasad v. Imratbai* (1922) 18 N. L. R. 27;
Sarat Chunder Dey v. Gopal Chunder Laha (1893) 20 Cal. 296, 19 I. A. 203.
 (m) *Thakuri v. Kundan* (1895) 17 All. 280.
 (n) *Ananda v. Parbati* (1906) 4 C. L. J. 198.
 (o) *Mahanta Bhagaban v. Bisweswar*, A. I. R. (1927) Cal. 220.

may under certain circumstances be taken to be consent (*p*). Silence cannot operate as an estoppel unless it is shown that the transaction took place in consequence of the omission to protest or of the acquiescence of the party keeping silence. The rule . . . that one who knowing his own title stands by and encourages a purchase of property as another's will not be allowed to dispute the validity of the sale . . . implies a wilful misleading of the purchaser by some breach of duty on the owner's part (*q*). Mere silence or omission to act does not create estoppel unless there is a duty to speak (*r*), and although under the said section 14 of the Indian Contract Act it vitiates consent, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that regard being had to them it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech (*s*).

The silence of reversioners when a mortgage is being negotiated cannot operate as an estoppel under section 115 of the Evidence Act, unless it is shown that the taking of the mortgage was in consequence of the omission to protest or of the acquiescence of the reversioners (*t*). Their Lordships of the Judicial Committee think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Sing v. Misri Lall* (*u*), arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence, that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony (*v*). On the death of Z, possession of the estate was taken on behalf of S. by the Court of Wards which a year after released the estate to S. The suit was instituted six years after and some months after S. had completed his spendthrift career by being adjudged insolvent. The claimants were women who had husbands who understood business. They were not ignorant of the state of the family and of the descent of the property and of their share in the succession nor of the way in which S. was encumbering the estate and was thus allowed to be the ostensible owner of the property with the implied consent of the claimants (*w*). Certain properties were given as *mahr* by defendant No. 1 to defendant No. 2 at the time of their marriage in 1908. This was not evidenced by any writing; and the properties continued as before in the name and possession of defendant No. 1. In 1916, when defendant No. 1's son married the plaintiff, defendant No. 1 and his son gave the properties to the plaintiff under a *mahr-nameh*. The plaintiff having sued in 1921 to recover possession of the properties, defendant No. 2 advanced the claim that the properties were hers. Held, negating defendant No. 2's claim, that defendant No. 1 having been in possession as ostensible owner of the properties with the implied consent of defendant No. 2, the transfer of 1916 was valid (*x*).

Attestation as estoppel.—The effect of attestation by a reversioner to a female's alienation was considered by the Madras High Court which held that a presumption was raised when an adult having a tangible interest in the property affected by the

(*p*) *Umaram v. Puruk* A. I. R. (1925) Cal. 993; *Sarat Chunder Dey v. Gopal Chunder Laha* (1893) 20 Cal. 296, 19 I. A. 203. *Bhimappa v. Shivbasappa* (1905) 29 Bom. 400.
(*q*) *Kanchadilal v. Kanhai* (1932) 28 N. L. R. 327; *Joy Chandra v. Sreenath* (1902) 32 Cal. 357 P. C.; *Muhammad Shafi v. Muhammad Said* (1929) 52 All. 248; *Mohmed Sujat v. Mt. Chandbi*, A. I. R. (1927) Nag. 41.
(*r*) *Umaram v. Puruk*, A. I. R. (1925) Cal. 993.

(*s*) Indian Contract Act, sec. 17, expl., *Joy Chandra v. Sreenath* (1905) 32 Cal. 357.
(*t*) *Kanchadilal v. Kanhai* (1932) 28 Nag. L. R. 227.
(*u*) (1895) 18 All. 146, 23 I. A. 1, (4).
(*v*) *Hari Kishen Bhagat v. Kashi Pershad Singh* (1915) 42 Cal. 876.
(*w*) *Zarif-un-Nisa v. Shafiq-uz-Zaman Khan* (1928) 55 I. A. 303.
(*x*) *Makkama Khadirsahab v. Masabi Abasali* (1925) 27 Bom. L. R. 208.

S. 41 deed that his attestation was taken as a proof of his consent to and knowledge of the correctness of the recitals in the deed and it lay upon the person who contended otherwise to prove to the contrary (y).

In *Raj Lukhee Debia v. Gokool Chunder Chowdhry* (z), the Privy Council refused to affirm that mere attestation imported concurrence (a). Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It is, of course, possible, as was pointed out by their Lordships in the case of *Banga Chandra v. Jagat Kishore* (b), that an attestation may take place in circumstances which would show that the witness did in fact know the contents of the document but no such knowledge is to be inferred from the mere fact of attestation (c) unless it can be established by independent evidence that to the signature was attached the express condition that it was intended to convey something more than a mere witnessing of the execution and was meant as involving consent to the transaction. Hence by itself it would neither create an estoppel nor imply consent (d).

Transactions to which the section extends.—The section extends to every “transfer of property” as defined in section 5 of this Act.

Persons interested in immoveable property.—These words mean full owners or the owner (e).

Fiduciary owners.—Persons who by reason of incapacity cannot contract as trustees, guardians and others holding a fiduciary capacity are not within the section.

Minor owners.—The section does not apply where the owners of the property are minors at the date of transfer (f). A minor by reason of inability cannot give consent under the section (g). The guardian is incapable of consenting to apparent ownership of transferor (h). Neither is an infant estopped by the acts and omissions of his mother and natural guardian (i). Nor are the adult members of a Mitakshara joint family, including the father of a minor member, competent to give on behalf of the minor express or implied consent to a transferee of property of the joint family being the ostensible owner of it, so as to enable a purchaser from him to claim the protection of s. 41 of the Transfer of Property Act, 1882 (j). But where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on the contract the infant is not estopped from setting up infancy as a bar to the action (k). The onus to prove minority rests on the party who asserts it. Where a deed is executed by a person who alleged himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority (l).

Ostensible owner.—Ostensible owner is a person who is apparently a full and unqualified owner of the property. A mortgagee is not (m). Nor can an assignee of a mortgagee seek protection of the section as his transfer is not by an ostensible

(y) *Narayana v. Rama* (1915) 38 Mad. 396; *Kandasami v. Rangasami* (1912) 23 M. L. J. 301.
 (z) (1869) 13 M. L. A. 209, 228.
 (a) *Banga Chandra v. Jagat Kishore* (1917) 44 Cal. 186, 43 I. A. 249; *Mollayya v. Krishna-swami*, A. I. R. (1925) Mad. 95.
 (b) (1917) 44 Cal. 186, 43 I. A. 249.
 (c) *Pandurang v. Markandeya* (1922) 49 Cal. 334, 49 I. A. 16.
 (d) *Bang Chandra v. Jagat Kishore* (1917) 44 Cal. 186, 43 I. A. 249.
 (e) *Jogendra v. Salamat*, A. I. R. (1930) Cal. 92.

(f) *Abdullah Khan v. Mt. Bundi* (1912) 34 All. 22; *Dalibai v. Gopibai* (1902) 26 Bom. 433.
 (g) *Shankar v. Daooji*, A. I. R. (1931) P. C. 118.
 (h) *Dambai Singh v. Jawitri* (1907) 29 All. 292.
 (i) *Ram Charan v. Joy Ram* (1912) 17 C. W. N. 10.
 (j) *Shankar v. Daooji*, 58 I. A. 206 (1931) 53 All. 290, 58 I. A. 206.
 (k) *Gadigeppa v. Balangauda* (1931) 55 Bom. 741 F. B.
 (l) *Sadiq Ali Khan v. Jai Kishori* (1928) 30 Bom. L. R. 1346, P. C.
 (m) *Jogendra v. Salamat*, A. I. R. (1930) Cal. 92.

owner but by a mortgagee (*n*). The owner of a property on which charge is created by decree is not an ostensible owner for such a decree reduces his full ownership to a limited ownership (*o*). Similarly, a mortgagor is not an ostensible owner (*p*), nor is the purchaser of the equity of redemption (*q*). Again, permissive possession such as of a licensee or by a person in occupation on condition of doing menial work in the family does not confer any title to convey as ostensible owner (*r*). In the case of *benami* transactions as known in India, the ostensible owner is in possession with the implied consent of the real owner so that a transfer by him cannot be objected to by the latter (*s*). If a property is purchased in the name of *benamidar* and the *indicia* of ownership are in his hands, the real owner can impeach an alienation by him on proof that it was made without his acquiescence and the purchaser was aware that he was a *benamidar* (*t*). The possession of a manager cannot be treated as sufficient evidence of ostensible ownership with consent, express or implied, of the real proprietor within the meaning of the section (*u*). A manager of a joint Hindu family consisting of some minors alienated without necessity the ancestral property. The alienee transferred the property to third persons. In a suit by the minors for setting aside the alienation, it was held that the manager was not an ostensible owner of the property within the meaning of the section (*v*). Neither is a mother an ostensible owner of the property of her minor son, whether Mahomedan (*w*) or Hindu (*x*), nor can apparent ownership of transferor be created by consent of a minor's guardian (*y*). A purchaser, from a member of a joint Hindu family dealing with it as his own property, is not an ostensible owner (*z*).

A Hindu widow enters into possession of the husband's estate by right and not with any express or implied consent of the reversioners. A transferee from her cannot claim protection under the section (*a*). A Hindu widow had mutation effected in favour of her cousin who in his turn transferred the property to one B who purchased it *bona fide*. In a suit by the reversioner it was held that B was not protected by the section as the widow was estopped from questioning the transfer and as the reversioner did not claim under her he could succeed in the suit (*b*). When a husband who puts his wife in the position of true owner and she deals as such he cannot afterwards rely upon the *benami* title (*c*). Where property is owned by male and female members, the latter of whom are *purdanashin*, the former are not ostensible owners (*d*). But a sister's claim was negatived when on the death of her mother, her brother Habib took exclusive possession of some immoveable property belonging to the mother and had his name alone entered in the *khewat*. Some years after in 1896, Habib mortgaged the property, but afterwards redeemed it. In 1908, and again in 1911, Habib mortgaged the property afresh to the son of the former mortgagee but it was not till the mortgagee purchased the property in execution of his decree that Habib's sister, although living in the same place,

(*n*) *Jogendra v. Salamat*, A. I. R. (1930) Cal. 92.
 (*o*) *Kallappa v. Bahwant* (1925) 27 Bom. L. R. 434.
 (*p*) *Amir Jahan v. Khadum Husain*, A. I. R. (1931) Oudh 253.
 (*q*) *Narayan v. Purushottam*, A. I. R. (1931) Nag. 144.
 (*r*) *Chooni Lall v. Nilmadhad*, A. I. R. (1925) Cal. 1024.
 (*s*) *Brojonath v. Koylash* (1868) 9 W. R. 593.
 (*t*) *Bhugwan Doss v. Upooch Singh* (1869) 10 W. R. 185.
 (*u*) *Muhammad Sulaiman v. Sakina Bibi* (1922) 44 All. 674; *Jamna Das v. Uma Shankar* (1914) 36 All. 308.
 (*v*) *Shanker v. Daooji*, A. I. R. (1931) P. C. 118.

(*w*) *Abdullah Khan v. Musammam Bundi* (1912) 34 All. 22.
 (*x*) *Dalibai v. Gopibai* (1902) 26 Bom. 433.
 (*y*) *Dambar Singh v. Jawitri Kunwar* (1907) 29 All. 292.
 (*z*) *Rangaswami v. Sundarapandia*, A. I. R. (1928) Mad. 635.
 (*a*) *Shib Deo v. Ram Prasad* (1924) 46 All. 637.
 Jayagauri v. Purshotamdas (1918) 20 Bom L. R. 177.
 (*b*) *Pancham Singh v. Balak Ram*, A. I. R. (1930) All. 374.
 (*c*) *Nidhee Singh v. Bissonath* (1884) 24 W. R. 79.
 (*d*) *Azima Bibi v. Shamalanand* (1913) 40 Cal. 378 P. C.

S. 41 sued to set aside the mortgage and recover her share by inheritance (e). The position is different in the case of a Hindu family where the manager or the widow has a certain power of alienation. Hence, if a certain property is admittedly joint family property, a purchaser from one of the members of the family dealing with it as his own is not an ostensible owner (f). But where a person has deliberately got the name of another on the record as owner of half of the property, he cannot subsequently plead that he was the real owner of the whole (g). And where a Hindu widow allowed her husband's cousin to appeal and deal with the house as an ostensible owner, in consequence whereof the transferee was induced to purchase, it was held that he was a *bona fide* purchaser (h). So also where certain properties were given as *mahr* by defendant No. 1 to defendant No. 2 at the time of their marriage in 1908 but the transaction was not evidenced by any writing and the properties continued as before in the name and possession of defendant No. 1, the latter was regarded as ostensible owner (i).

Voidable.—The transaction is voidable, not void, at the instance of the real owner. It has been construed as not necessarily voidable in its entirety and that the section is applicable to transactions where a part and not the whole is voidable (j), a construction doubted by the Bombay (k) and Allahabad (l) High Courts.

Real owner's remedy against transferee.—A transfer in the circumstances mentioned in the section is not voidable on the ground that the transferor was not authorized to make it. What the section enacts is that a transfer by an ostensible owner where the transferee does not take reasonable care and act in good faith is voidable at the instance of the real owner. An agreement enforceable by law is a contract (m). An agreement which is enforceable by law at the option of one or more parties thereto but not at the option of the other or others is a voidable contract (n). The remedy of the real owner is to sue for rescission of the contract and the Court may order the transferee to pay to the real owner rents and profits, if any, received by him while in possession (o). On adjudging the rescission of a contract the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require (p). Again, section 86 of the Indian Trust Act (II of 1882) enacts that where property is transferred in pursuance of a contract which is liable to rescission or is induced by fraud or mistake the transferee must on receiving notice to that effect hold the property for the benefit of the transferor subject to repayment by the latter of the consideration actually paid. Section 96 of the same Act saves the rights of transferees in good faith for consideration, while section 95 of the same Act declares that the transferee's duties, liabilities and disabilities are similar to those of a trustee of the property for a person for whose benefit he holds it.

Right of real owner against the ostensible owner.—The section is silent as to the real owner's remedy against the ostensible owner. The former may file a declaratory suit under section 42 of the Specific Relief Act, I of 1877, so long as the ostensible owner has not parted with the possession and has not conveyed the property to a purchaser as contemplated by the section. In such a case the Court would

(e) *Mul Raj v. Fazal Imam* (1923) 45 All. 520.
 (f) *Rangaswami v. Sundarapandia*, A. I. R. (1928) Mad. 635.
 (g) *Mathura Prasad v. Mt. Anandi*, A. I. R. (1924) All. 63.
 (h) *Thakuri v. Kundan* (1895) 17 All. 280.
 (i) *Makhama Khadirsahab v. Masabi Abasali* (1925) 27 Bom. L. R. 208.
 (j) *Sethumadhava v. Bacha Bibi*, A. I. R. (1928)

Mad. 778.
 (k) *Appa Dhond v. Babaji Krishnaji* (1922) 46 Bom. 85.
 (l) *Mt. Sahodra v. Badri Prasad*, A. I. R. (1929) All. 737.
 (m) Sec. 2 h, Indian Contract Act, IX of 1872.
 (n) Sec. 2 i, Indian Contract Act, IX of 1872.
 (o) Sec. 35 of the Specific Relief Act, I of 1877.
 (p) Sec. 38 of the Specific Relief Act, I of 1877.

order its restoration to the real owner. But in case the property has passed from the hands of the ostensible owner to that of a purchaser of the character as mentioned in the proviso to the section, the real owner's remedy against the ostensible owner would lie in damages. Reference may be made to sections 82 and 95 of the Indian Trust Act, II of 1882.

To make it.—This expression refers to the particular transfer which must include the entirety of the interest purported to be transferred by the transaction (q).

Proviso.—The proviso which is the second condition of the section is to the effect that the transferee from an ostensible owner can defeat the real owner only if, after taking reasonable care to ascertain that the transferor had power to make the transfer, he has acted in good faith (r). Reasonable care is such care as a person of ordinary prudence would take in the absence of some specific circumstances which would have been the starting point of an inquiry which might be expected to lead to some result (s). It has been interpreted to mean such care as an ordinary man of business or a person of ordinary prudence would take (t). Each case must depend upon its own particular circumstances (u).

What the section requires is reasonable care not generally with regard to every aspect of the transaction but merely for the purpose of ascertaining that the transferor had power to make the transfer (v). The ordinary standard of diligence is calling for the title-deeds and examining them. If the documents disclosed indicate anything to put the transferee on notice or inquiry leading to the existence of knowledge or any information in the title then the matter might conceivably be otherwise (w). Proof of inquiry by purchaser is an essential condition enjoined before seeking protection under the section (x). When there are certain avenues of inquiry open the transferee who refuses or omits to avail himself of them is not entitled to relief (y). Casual inquiries of irresponsible persons as tenants and neighbours will not protect him (z).

The following remarks of Lindley, L.J., in *Bailey v. Barnes* (a), indicate what is meant by "reasonable care" in the section. "A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way." A person seeking the protection of the section has to satisfy the fulfilment of two conditions, first, that a particular person was

(q) *Sethumadhava v. Bacha Bibi*, A. I. R. (1928) Mad. 778.

(r) *Partap Chand v. Saiyida Bibi* (1901) 23 All. 442; *Azima Bibi v. Shamalanand* (1912) 40 Cal. 378; *Jugmohan Das v. Indar Prasad*, A. I. R. (1929) Oudh 160; *Pateshri Pertab v. Nageshar* (1911) 8 A. L. J. 358; *Kanchadilal v. Kanhai* (1932) 28 N. L. R. 227; *Zangabai v. Bhawani* (1907) 9 Bom. L. R. 388; *Ram Charan v. Joy Ram* (1912) 17 C. W. N. 10; *Sarupa v. Mt. Dhundan*, A. I. R. (1930) Lah. 286.

(s) *Macneil & Co. v. Saroda Sundari Debi*, A. I. R. (1929) Cal. 83.

(t) *Gholam Sidique v. Jogendra Nath*, A. I. R. (1926) Cal. 916; *Kanhailal v. Polu Sahu* (1920) 5 Pat. L. J. 521; *Manji v. Hoorbai* (1910) 12 Bom. L. R. 1044.

(u) *C. Sundarammal v. Arunachala*, A. I. R. (1927) Mad. 1138.

(v) *Sethumadhava v. Bacha Bibi*, A. I. R. (1928)

Mad. 778.

(w) *Sethumadhava v. Bacha Bibi*, A. I. R. (1928) Mad. 778; *Lakshman v. Vasudev* (1931) 33 Bom. L. R. 356; *Rajani Kanta v. Bashiram*, A. I. R. (1929) Cal. 636; *Mt. Kasturi Bibi v. Baliram*, A. I. R. (1923) Nag. 15.

(x) *Sheogobind v. Anwar Ali* (1929) Pat. 305; *Hanuman v. Abbas*, A. I. R. (1929) Oudh 193.

(y) *Sheotahal v. Lal Narain* (1930) A. I. R. 422; *K. V. Galliara v. U. Thet*, A. I. R. (1929) Rang. 117; *Jugmohan Das v. Indar Prasad*, A. I. R. (1929) Oudh 160; *Mt. Rasulan Bibi v. Nand Lal*, A. I. R. (1930) All. 521; *Abdulla Khan v. Musammat Bundi* (1912) 84 All. 22.

(z) *Amrita Lal v. Pratap Chand*, A. I. R. (1931) Cal. 144.

(a) (1894) 1 Ch. D. 25.

S. 41 the ostensible owner of the property with the consent, express or implied, of the person who was the real owner or was interested in the immoveable property, and secondly, to establish the further fact that the transferee had taken care to inquire about the power of the transferor before accepting the transfer (b). A person cannot be said to be an ostensible owner with the consent of the true owner within the meaning of the section on the basis of an entry in his favour in a mutation register when the claim to have his name entered in the register had been disputed by the true owner, and the entry was made because he was in possession at the time, which facts the transferee could have discovered by inquiries made (c). In such cases revenue records are no evidence of title (d). Mere inspection of *khewat* is not sufficient inquiry in the case of an auction purchaser when the judgment debtor is a Mahomedan (e). Nor the paper title disclosed in the sale deed, it being the transferee's duty to make inquiries of the defendant in actual possession as to her title (f). It has been held by the Judicial Committee that mutation of names by itself created no proprietary interest (g). Mere verification in the revenue or municipal records that the property was registered in the name of the ostensible owner may not suffice where suspicious circumstances exist to put the purchaser on further enquiry (h). In most cases coming from Mahomedan families, the names of the sisters and mother, who are also heirs of a deceased Mahomedan, are never entered in the *khewat*. It cannot be held, therefore, that Mahomedan sons, simply because their names alone are down in the *khewat*, are entitled to give a good title to the transferee and the mother and sisters shall be precluded from claiming their shares (i). Entry in a revenue register is not always enough to induce a person to think that the person whose name is entered was the proprietor and had a right to sell the property which was entered in his name (j). Plaintiff, the owner of a house, went on a pilgrimage, leaving the property in charge of an agent, who had his name entered in the municipal register and thereafter sold the property as his own. It was held that the vendor was not an ostensible owner (k). On a suit by collateral heirs for recovery of possession of the house, a defendant mortgagee not having made proper inquiries as to the mortgagor's title, was held not entitled to protection (l). In case of a coparcenary property standing in the name of the eldest member, a lender making no inquiry, and there being nothing to suggest that representation was made that no other member was in existence, the section will not apply so as to deprive a coparcener of his rights to the property (m).

Where a person in possession of the property mortgaged was recorded as owner and held the title-deeds of the property, a mortgagee from him was protected (n) and so also where the person in possession was not only recorded as owner but had mortgaged the property 20 years ago to the father of the subsequent mortgagee

- (b) *Muhammad Shafi v. Muhammad Said* (1930) 52 All. 248.
 (c) *Kanchadilal v. Kanhai* (1932) 28 Nag. L. R. 227; *Sheogobind v. Anwar Ali*, A. I. R. (1929) Pat. 305; *Nageshar Prasad v. Raja Pateshri* (1915) 20 C. W. N. 265 P. C.
 (d) *Sarupa v. Mt. Dhundan*, A. I. R. (1930) Lah. 288.
 (e) *Mt. Rasulan v. Nand Lal*, A. I. R. (1930) All. 521.
 (f) *Vyankapacharya v. Yamanasami* (1911) 35 Bom. 269; *Kondiba v. Nana* (1903) 27 Bom. 408.
 (g) *Chokhey Singh v. Jote Singh* (1909) 31 All. 73, 38 I. A. 38; *Mohamad Sujat v. Mt. Chandbi*, A. I. R. (1927) Nag. 41.
 (h) *C. Sundarammal v. Arunachala*, A. I. R. (1927) Mad. 1138.

- (i) *Mt. Rasulan Bibi v. Nand Lal*, A. I. R. (1930, All. 521; *Mohmad Sujat v. Mt. Chandbi*, A. I. R. (1927) Nag. 41.
 (j) *Merwanji Muncherji Cama v. The Secretary of State for India in Council* (1915) 19 C. W. N., 1056 P. C.; *Partap Chand v. Saiyida Bibi* (1901) 23 All. 442.
 (k) *Muhammad Sulaiman v. Sakina Bibi* (1922) 44 All. 674.
 (l) *Ballu Mal v. Ram Kishan* (1921) 43 All. 263.
 (m) *Kokilambal v. Sundarammal*, A. I. R. (1925) Mad. 902; *Kanku Lal v. Palu Sahu* (1920) 5 Pat. L. J. 521.
 (n) *Gholam Sidhique v. Jogendra Nath*, A. I. R. (1926) Cal. 916; *Baidya Nath v. Alef Jam Bibi*, A. I. R. (1923) Cal. 240; *Khwaja Muhammad v. Muhammad Ibrahim* (1904) 26 All. 491.

who had satisfied himself that his name was still in the *khewat* (o). The finding as to absence of reasonable care and good faith is a finding of fact (p). Raking out the old records of the municipality or of the Police Department cannot be regarded as a discharge of the obligation under the section as to come within "reasonable care" and "good faith" (q).

Good faith of transferee.—Transferee's knowledge of the transferor's want of title vitiates the transfer (r). Where a Court finds that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right (s). Only those persons are entitled to the benefit of the section who have not been able to discover the true owner in spite of inquiries made and who in full belief that the person making the transfer is the real owner take the transfer from him (t). A transfer of immoveable property by an ostensible owner does not pass title to the transferee when he does not make inquiries and is not acting in good faith (u). A party wishing to take advantage of the section must be able to show that he had made an inquiry into the title of the ostensible owner (v). In order to be a *bona fide* transferee it is not necessary for him to go behind the revenue records and make further inquiry unless circumstances create suspicion about the title (w).

Misconception of a right in law does not render a transferee "bona fide."—The degradation of a daughter under the Hindu Law on account of incontinence does not put an end to her right to inherit the *stridhan* property of her mother so that a conveyance by the son of such property confers no title on the purchaser who is under a misconception as to the daughter's right, and is therefore not protected by the section (x). No protection will be afforded to a transferee whose title depended on a deed to which the ostensible owner was a party and which amounted to a fraud on the creditor of the real owner. The transferee, being a relative of the vendors, having lands adjoining the lands in suit, took a sale deed within a week of the death of one of the vendors from the *benamidar*, that is, ostensible owner, he was held not to have proved his own good faith and therefore was disentitled to the protection of the section (y).

Knowledge of family property is a bar to relief.—A creditor who advanced money to the ostensible owner without inquiring into the title was refused protection as it was found that he resided in the same locality as the ostensible owner and had been lending money to the family for a long time and could not therefore claim to be a *bona fide* transferee (z). But a purchaser from a Hindu wife whose husband misrepresented that the property belonged to her is a transferee in good faith (a). So also an effectual concealment of the real owner's identity caused by misrepresentation would protect the transferee (b). Nor can the true owner recover on his secret title after he has stood by and permitted his undivided brother to sue

(o) *Mul Raj v. Fazal Imam* (1923) 45 All. 520.

(p) *Mohmad Sujat v. Mt. Chandbi*, A. I. R. (1927) Nag. 41.

(q) *Kartar Singh v. Mt. Meher Nishan* (1935) 16 Lah. 313; (*Khana paimash* in the Punjab); *Muhammad Sulaiman v. Sakina Bibi* (1922) 44 All. 674; *Merwanji Muncherji Cama v. The Secretary of State for India in Council* (1915) 19 C. W. N. 1056 P. C.

(r) *Mollayya v. Krishnaswami*, A. I. R. (1925) Mad. 95.

(s) *Thakuri v. Kundan* (1895) 17 All. 280.

(t) *Jugmohan v. Indar Prasad*, A. I. R. (1929) Oudh 160.

(u) *Ragho v. Dwarka*, A. I. R. (1924) Lah. 738.

(v) *Hanuman v. Abbas*, A. I. R. (1929) Oudh 193.

(w) *Muhammad-din v. Mt. Sardar Bibi*, A. I. R. (1927) Lah. 666.

(x) *Angammal v. Venkata* (1903) 26 Mad. 509.

(y) *Lakshman v. Vasudev* (1931) 33 Bom. L. R. 356.

(z) *Pateshri v. Nageshar* (1911) 8 A. L. J. 358 on appeal *Nageshar v. Raja Pateshri* (1916) 20 C. W. N. 265 P. C.

(a) *Luchman v. Kalli Churan* (1878) 19 W. R. 292.

(b) *Chunder Coomar v. Hurbuns* (1889) 16 Cal. 137.

S. 41 for possession from the transferee when there was nothing to put the latter on inquiry as to who was the real owner (c), for although a *benamidar* can sue in his own name for the recovery of immoveable property, it must be held that such a suit was with the consent and approval of the true owner against whom any adverse decision on title would operate as *res judicata* (d). When there is no evidence to prove that a mortgagee took the mortgage from the ostensible owner after taking reasonable care to ascertain that the transferor had power to make the transfer and that he acted in good faith, he cannot claim protection (e). But when there was nothing to put the mortgagee on inquiry as to the real title the principle of the section was applied (f). When during the husband's absence on pilgrimage the wife sold a piece of land which had before her husband's departure been mortgaged by her, the purchaser who paid off the mortgage having by proper inquiries satisfied himself that the wife was owner, it was held that the husband could not recover the land nor was he allowed to redeem the mortgage (g). The duty to make inquiry does not bind a purchaser for value to inquire whether the wife of the alienor is *enceinte* (h).

Burden of proof.—It is not enough for the party seeking to invalidate a sale to show that proper inquiry was not made. The onus lies on him to prove that there was something to invoke an inquiry and what that inquiry would have revealed (i). It is when the preliminary burden is discharged by the party attempting to invalidate the sale that proper inquiry was not made that the burden shifts on the transferee of proving that he took reasonable care to inquire into the title (j). Proof that a transferee exercised reasonable care and acted in good faith is not enough if the transferor be not the ostensible owner of the immoveable property with the consent, express or implied, of the person interested (k). It is otherwise when there is nothing in the transaction to require the transferee to make a further inquiry as to the real title to the property beyond what appeared from the entries in the revenue records (l).

Auction sale.—Although the language of section 41, Transfer of Property Act, would indicate that it applies to the case of a private transfer alone, it has been taken without deciding the point, that it may be applied also to the case of an auction purchase (m). The Allahabad High Court has held the contrary. According to the definition of section 5 of the Act, there must be some person to convey. In the case of an auction no person conveys. It is, in fact, a transfer by law. Section 41 relates to transfer by ostensible owner, and therefore the case of auction purchaser cannot come under section 41 (n). The view of the Bombay High Court is to the same effect (o).

(c) *Shangara v. Krishnan* (1892) 15 Mad. 267.
 (d) *Nand Kishore v. Ahmed Ata* (1896) 18 All. 69.
 (e) *Amir Jahan v. Khadim Husain*, A. I. R. (1931) Oudh 253.
 (f) *Khawaja Muhammad v. Muhammad Ibrahim* (1904) 26 All. 490.
 (g) *Niras Purbe v. Most. Tetri* (1915) 20 C. W. N. 103.
 (h) *Venkata v. Gatham* (1914) 27 M. L. J. 580.
 (i) *Rajani Kanta v. Bashiram*, A. I. R. (1929) Cal. 636; *Mohmad Sujat v. Mt. Chandbi*, A. I. R. (1927) Nag. 41.
 (j) *Rajani Kanta v. Bashiram*, A. I. R. (1929) Cal. 636.
 (k) *Shankar v. Daooji*, A. I. R. (1931) P. C. 118.
 (l) *Mathura Prasad v. Anandi Kunwar* (1923) 21 A. L. J. 498; *Mul Raj v. Fazal Imam* (1923) 45 All. 520; *Mathura Prasad v. Mt.*

Anandi, A. I. R. (1924) All. 63; *Mubarak-un-Nissa v. Muhammad Raza Khan* (1924) 46 All. 377; *P.L.T.A.R. Chettyar a firm v. Maung Kyaing*, A. I. R. (1929) Rang. 333; *Mathura Prasad v. Anandi*, A. I. R. (1924) All. 63; *Mul Raj v. Fazal Imam* (1923) 45 All. 520; *Makkama v. Masambi* (1925) 27 Bom. L.R. 208; *Muhammad-din v. Mt. Sardar Bibi*, A. I. R. (1927) Oudh 448; *Khawaja Muhammad v. Muhammad Ibrahim* (1904) 26 All. 491; *Niras Purbe v. Most Tetri* (1915) 20 C. W. N. 103; *Aunada v. Nilphamari* (1921) 26 C. W. N. 436.
 (m) *Mt. Rasulan Bibi v. Nand Lal*, A. I. R. (1930) All. 521.
 (n) *Mangat Lal v. Ghasi Khan*, A. I. R. (1929) All. 800.
 (o) *Vaman v. Tikaram* (1927) 29 Bom. L. R. 471.

Revenue sales.—The section does not apply to revenue sales (p).

S. 41

Civil Procedure Code, section 66, old section 317.—This section lays down the rule that if the property is brought to sale in a Court auction a suit cannot be instituted on the ground that the defendant was only a *benamidar* for the plaintiff (q). This rule extends to the mortgagee of the purchaser (r). The provisions of section 82 of the Trust Act (II of 1882) do not apply to this section.

Conflict between sections 41 and 52.—Sections 41 and 52 are mutually exclusive. The estoppel arising under section 41 cannot be such as to override the imperative provisions of section 52 (s).

Distinction between section 115 of the Evidence Act (I of 1872) and section 41.—An analysis of the two sections would reveal the obvious distinctions between the application of the ordinary principles of estoppel enunciated in section 115 of the Evidence Act which is a rule of proof and the application of the principles to which effect has been given in this section which is a statutory qualification and restriction of the general law of estoppel contained in the Evidence Act.

Section 41 imposes upon the purchaser of immoveable property the duty of exercising reasonable care and diligence. The Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* (t), while dealing with title as between rival purchasers supported by an estoppel affecting the assignee of the person estopped, observed that the law laid down in section 115 does not differ from the English Law on that subject and the general principles stated in *Cairncross v. Lorimer* (u). In that case a widow had held *benami*, from her husband during his life, property as to which he had executed a *hibanama* in her favour. After his death she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the same property comprised in the *hibanama* and in the mortgage, the plaintiff derived his title from the son, having purchased his inherited share of the estate, while the defendants relied on a purchaser at a sale in execution of a decree obtained by the mortgagee. Held, that section 115 of the Evidence Act was applicable. The son had represented that the *hiba* gave a right to his mother to mortgage, and consequently neither he nor his representative in estate could be allowed to deny the truth of this representation, intentionally made on his part, which also had been acted on by the mortgagee; and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of the mortgagee's interest, at a sale regularly carried out, would have acquired a valid title to the property although such purchaser might have been fully aware of all the circumstances (v).

Mesne profits.—In *Angammal v. Venkata* (w), it was held that the purchaser was not entitled to protection under the section, and the plaintiffs were awarded mesne profits at the rate of Rs. 20 per month for three years prior to the plaint and from date of plaint till delivery of possession. Mesne profits can be claimed only against a person who is in actual possession. But a claim for them beyond three years at the date of the suit cannot be sustained as the same would be barred by limitation (x).

(p) Sec. 66, Civil Procedure Code 1908; sec. 182, Bombay Land Revenue Code, Act V of 1879; sec. 36 of Act XI of 1859, Bengal Revenue Sale Law; sec. 38 Madras Revenue Act II of 1864; sec. 173 (2), Bengal Tenancy Act.

(q) *Kandasami v. Nagalinga* (1913) 36 Mad. 564.

(r) *Manji v. Hoorbai* (1910) 12 Bom. L. R. 1044.

(s) *Shafiq-Ullah Khan v. Sami-Ullah Khan*

(1930) 52 All. 139.

(t) (1893) 20 Cal. 296.

(u) (1860) 3 H. L. C. 829.

(v) *Sarat Chunder Dey v. Gopal Chunder Laha Bank Ltd. v. Menkwa Kabushiki Kaisha* (1893) 20 Cal. 296, 19 I. A. 203; (1935) 61 C. L. J. 239 P. C.

(w) (1903) 26 Mad. 509.

(x) *Ragho v. Dwarka*, A. I. R. (1924) Lah. 738

S. 41

Subsequent purchasers.—The section is not limited to purchasers from ostensible owners but includes subsequent purchasers, and it may safely be maintained that even if one of such purchasers had some sort of constructive notice, the defendant who is the last purchaser cannot be dislodged from his position as *bona fide* purchaser for value without notice without proof of circumstances bringing such notice home to him (y).

Voluntary transfers.—Consideration being an essential element of the section transfers which are without consideration are not within the section.

Involuntary transfer.—The section does not apply to a transfer made *in invitum* by an order of the Court under which the judgment debtor himself does not join in the actual transfer. Under the section it is the ostensible owner who is the transferor and not somebody else (z).

Fractional interest.—The power to make the transfer by ostensible owner may be limited to a portion of the property, in which event the principle on which the rule is based would be applicable to such part of the property to which the power of transfer does not relate (a). But this has been doubted by the Allahabad High Court (b). Involving as it does the contention whether a Court could split up the contents of a document relating to a transaction regarding immoveable property in order to hold that one part of it was genuine while the other part was *benami*, Macleod, C.J., while refusing to give effect to such a contention in the circumstances of that case, said, "*Benami* transactions are generally effected to conceal some fraud, or in order to support some object of a discreditable nature. But though the Courts have in the past recognized that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, I would not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion" (c).

Pleadings and issues.—It is not sufficient for a purchaser alleging himself to be a *bona fide* purchaser for value without notice to plead simply that he is a purchaser for value; he must also go on to show that he is a purchaser for value *bona fide* and without notice. It is necessary that he must specifically plead that he is a *bona fide* purchaser for value without notice in his plaint or written statement, as the case may be. If he does not plead all that, he will not be allowed at the hearing to go in evidence on that point (d). In a more recent case, it was held that under the section it was necessary to prove not merely consideration but also good faith and due inquiry. In the absence of such pleadings or issues these questions cannot be raised in second appeal (e).

Second appeal.—The question whether the section can be applied in second appeal on the facts as found by the Courts below as an inference of law has been answered in the affirmative by the Allahabad High Court (f) differing from its

(y) *Gholam Sidhique v. Jogendra Nath*, A. I. R. (1926) Cal. 916; *Baidya Nath v. Alef Jan Bibi*, A. I. R. (1923) Cal. 240.
 (z) *Vaman v. Tikaram* (1927) 29 Bom. L. R. 471.
 (a) *Sethumadhava v. Bacha Bibi*, A. I. R. (1928) Mad. 778.
 (b) *Mt. Sahodra v. Badri Prasad*, A. I. R. (1929) All. 737.
 (c) *Appa Dhond v. Babaji Krishnaji* (1922) 46

Bom. 85.
 (d) *Mulji v. Macleod* (1903) 5 Bom. L. R. 991; *Mt. Sahodra v. Badri Prasad*, A. I. R. (1929) All. 737.
 (e) *Lakshman v. Vasudev* (1931) 33 Bom. L. R. 356; *Mahdeo v. Ganeshram*, A. I. R. (1928) Nag. 308.
 (f) *Mul Raj v. Fazal Imam* (1923) 15 All. 520.

previous decision (g). A Division Bench of the Calcutta High Court (h) has, however, differed in opinion. One Judge (Rampini J.) held that the question of acquiescence or waiver is a question of fact and the finding of the lower Appellate Court on such a question is final and cannot be interfered with in second appeal, while Mookerjee, J., held that acquiescence is not a question of fact but of legal inference from facts found and it is open to the appellant in second appeal to invite the High Court to consider whether the question of acquiescence has been properly decided by the lower Court. As remarked by the Judicial Committee, "questions of law and fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law" (i). As regards construction of a document, the same tribunal has observed that unless there has been a misconstruction of a document which could be treated as contrary to law a mistaken inference from a document is an error not of law but of fact so that the judgment of a lower Appellate Court is not liable to be reversed in second appeal as being contrary to law (j).

Ss. 41-42.]

42. Where a person transfers any immoveable property, reserving power to revoke the transfer and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person
having authority to
revoke former transfer.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyors as to B's use of the house having been detrimental to its value.

Operation of power.—The section deals with implied revocation of a power to revoke expressly reserved to the transferor on a transfer of immoveable property. So that where a man executes a subsequent transfer to another of the same property for consideration such transfer operates as exercise of such power. The section is founded on 27 Eliz., c. 4, sec. 5. There are no Indian decisions on this subject as Hindus are fettered by the system of joint family property and Mahomedans by the rule of *wakf* not favouring revocation.

Power of revocation.—A power of revocation may be conferred in an instrument on the executant either by deed or will. It is with the former class with which the section deals. It may be an absolute or a qualified power capable of being exercised with the consent of a third person. Writing is necessary to create the power. It may be reserved by the deed of transfer or by a document of the same date. It may be interlined. To the transferor an exercise of a power of revocation is regaining a lost dominion. The inclusion of it is to be deprecated where settlements are made for the education or advancement of children. It may extend

(g) *Jamna Das v. Uma Shankar* (1914) 36 All. 308.

(h) *Ananda v. Parbati* (1906) 4 C. L. J. 198; *Beri Ram v. Kundu Lal* (1886) 14 Cal. 189, followed.

(i) *Nafar Chandra v. Shukur Sheikh* (1919) 46

Cal. 189, 45 I. A. 183.

(j) *Saheb Rao v. Jaiwantrao* (1933) 35 Bom. L. R. 816 P. C.; see *Sailendra Nath Das v. Saroj Kumar Das* 1935) 61 C. L. J. 154 P. C.

S. 42 to the whole or a part. The exercise of the power must not be illegal or void or transgress the rule of perpetuity. There are instances in which settlements irrevocable in form have been permitted to be revoked by the Courts on the ground that a power of revocation ought to have been inserted. A settlement made by a father and son contained no power of revocation. Each had a wife and large family and each declared that had he been aware of the effect of the deed he would not have executed it. It was held that under the circumstances the deed must be rectified by adding a power of revocation (*k*).

By a marriage settlement of the wife's property a general power of appointment by will was given to the wife. On her pre-deceasing her husband without issue and in default of appointment, in trust for the next of kin of the wife excluding the husband. But if the wife survived then, in default of children, in trust for the wife absolutely. The wife contracted debts and there was no possibility of issue. Held, upon the application of the wife, with the approbation of the husband, that the next of kin being mere volunteers the corpus might be applied in payment of debts (*l*). In order to support a voluntary settlement it must be shown that unusual provisions are brought to the notice of and understood by the settlor. A power of revocation is not essential to the validity of such a settlement. Whether there should be a power of revocation or not must depend upon circumstances, and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation (*m*). The power must be expressly reserved, otherwise the deed would be treated as irrevocable. Nor is a voluntary deed of settlement voidable by the settlor merely because it does not contain a power of revocation (*n*). But sometimes deeds are found containing a clause of revocation with the consent of a third person. In such a case, creditors cannot assail them.

Leases and mortgages.—As the illustration shows, a power to lease for any number of years would operate as a power of revocation ; so also an unlimited power to mortgage but not a power to charge for a specified amount.

Forcing the revocation.—A creditor may under section 53 of this Act adopt proceedings to set aside a settlement, even though it be expressed as irrevocable, and compel a settlor to revoke the settlement if it be expressed to be revocable. Again, under section 52, clause 2, sub-clause (b) of the Presidency Towns Insolvency Act, the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge, shall comprise the property of the insolvent and would therefore vest in the Official Assignee. Under section 17 of the Presidency Towns Insolvency Act, on the making of an order of adjudication the property of the insolvent, wherever situate, shall vest in the Official Assignee (*o*). The Official Assignee could compel the exercise of a power of revocation possessed by a debtor for the benefit of the general body of creditors. It is now well settled that where a tenancy for life and ultimate reversion are vested in one and the same person there being intervening interests or limitations, and there is a power of appointment given to that person which might defeat his own interest, then if he becomes bankrupt or assigns his property for the benefit of his creditors, that power is not extinguished but he is

(*k*) *Welman v. Welman* (1880) 15 Ch. Div. 570.
 (*l*) *Paul v. Paul* (1880) 15 Ch. D. 580; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Prideaux v. Lonsdale* (1883) 4 Giff. 159, 68 E. R. 661; *Dutton v. Thompson* (1883) 23 Ch. D. 278.
 (*m*) *Phillips v. Mullings* (1871) 7 Ch. App. 244.

(*n*) *Henry v. Armstrong* (1881) 18 Ch. D. 668.
 (*o*) *In re Jewandas Jhawar* (1913) 40 Cal. 78; *Official Assignee, Bombay, v. Registrar, Small Causes Court, Amritsar* (1910) 37 Cal. 418, 37 I. A. 80; *In re Ganeshdas Panalal* (1908) 32 Bom. 198.

not allowed to exercise it so as to defeat the interest of his trustee in bankruptcy or of his assignee. The trustee in bankruptcy could not give his consent without the sanction of the Court of Bankruptcy (*p*). But where a debtor has a general power of appointment, his trustee in liquidation has no power after his death to appoint the property, the subject of the power (*q*).

Ss. 42

Express revocation.—A trust which is made revocable may be extinguished by express revocation under section 77 of the Trusts Act, II of 1882.

43. Where a person *fraudulently* or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Transfer by authorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C not having rescinded the contract of sale, may require A to deliver Z to him.

The section.—There must be an estoppel by

1. Representation.
2. That representation must be fraudulent or erroneous.
3. It must be to the effect that the person making the representation is authorized to transfer certain immoveable property, and
4. Such person must profess to transfer such property for
5. Consideration.

A transfer so made shall, at the option of the transferee in order to feed the estoppel,

- (a) Operate on any interest which the transferor may acquire in such property
- (b) At any time during which the contract of transfer subsists.

Nothing in the section shall impair

The right of transferees

- (i) in good faith
- (ii) for consideration
- (iii) without notice of the existence of the option.

(*p*) *In re Cooper* (1884) 27 Ch. D. 565.

(*q*) *Nichols v. Nixey* (1885) 29 Ch. D. 1005.

S. 43

Alteration in the section.—By section 13 of Act 20 of 1929, after the word “person” the words “fraudulently or” have been inserted. The word “erroneously” was construed to include all representations, whether tainted with fraud or not (*r*). To render the meaning clear the section has been altered as above.

Persons claiming under the person estopped.—The section extends to persons claiming under the transferor, for such a person can never be in a better position than he from whom he takes it (*s*).

Who can set up transferor's fraud.—Not only the transferee but a party claiming through the transferor can contend that the transaction was fraudulent and made with a view to elude a statute (*t*).

Representatives.—Estoppel binds the transferor and his representatives (*u*). It enures for the benefit of the transferee and his representative (*v*) as it works on the interest of the land, and this is supported by the rule of proof enunciated in section 115 of the Indian Evidence Act, I of 1872, which regulates the law on the subject of estoppel in these terms. “When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. The section protects a transferee in good faith for consideration without notice of the option conferred by it on the transferee who has acted on the representation.

Reciprocal nature of estoppel.—To constitute a good estoppel both parties must be bound, mutuality being an essential ingredient of the doctrine (*w*).

Consideration.—This is an essential ingredient for the application of the principle enunciated in the section. The section cannot apply if the deed was without consideration (*x*). Hence gifts are excluded.

Hindu Law.—The principle of English Law which allows a subsequently acquired interest to feed the estoppel has been held by the Privy Council to apply to Hindu conveyances (*y*) though there is a contrary dictum of the same tribunal (*z*).

Personal character of estoppel.—The Common Law doctrine of estoppel is of a very personal nature and only exists between the parties to the transaction. It is part of the law of evidence and is not the same as the equitable doctrine. You cannot found an action on it as you can in equity (*a*).

Estoppel whether implied.—Estoppels are odious and not to be construed or raised by implication (*b*).

- (*r*) *Radhey Lal v. Mahesh Prasad* (1885) 7 All. 864; *Sarat Chunder Dey v. Gopal Chunder Laha* (1893) 20 Cal. 296, 19 I. A. 203.
 (*s*) *Taylor v. Needham* (1810) 2 Taunt 278, 127 E. R. 1084; *Clemow v. Geach* (1870) 6 Ch. App. 147.
 (*t*) *Doe d Williams v. Lloyd* (1839) 5 Bing. N. C. 741, 132 E. R. 1286.
 (*u*) *Webb and Austin* (1844) 7 Man. & G. 701, 135 E. R. 282; *Gresham Life Assurance Society v. Crowther* (1915) 1 Ch. 214; *Chola Bhaira v. Purna Chandra* (1915) 19 C. W. N. 1272; *Hatti Kudur v. Andar Sayad* (1915) 28 M. L. J. 44.
 (*v*) *Hatti Kudur v. Andar Sayad* (1915) 28 M. L. J.

44.
 (*w*) *Gaunt v. Wainman* (1836) 3 Bing. N. C. 69, 132 E. R. 335.
 (*x*) *Jagan Nath v. Dibbo* (1909) 31 All. 53.
 (*y*) *Krishna Chandra v. Rasik Lal* (1916) 21 C. W. N. 218 P. C.
 (*z*) *Dooli Chand v. Birj Bhookun* (1880) 6 C. L. R. 528 P. C.
 (*a*) *Williams v. Pinckney* (1897) 67 L. J. Ch. 34.
 (*b*) *Palmer v. Ekins* (1728) 11 Mod. Rep. 407, 92 E. R. 505; *Bowman v. Taylor* (1834) 2 Ad. & El. 278, 111 E. R. 108; *Right (d). Jefferys v. Bucknell* (1831) 2 B. & Ad 278, 109 E. R. 1146.

Duration of estoppel.—Between mortgagor and mortgagee the reconveyance determines it (c). Between lessor and lessee it exists during the endurance of the lease (d).

Moveable property.—The principle of equity enunciated in this section is applicable to moveables (e), as was observed by the Allahabad Court in (f).

Interest feeding the estoppel.—Founded on representation, the doctrine enunciated in the section rests on two cardinal principles. First, there must be an estoppel growing out of representation made by a person who has not in the property the interest which he professes to transfer and, secondly, the subsequent acquisition by him of that interest to feed the estoppel created by the representation. If there be no estoppel, there can be no feeding. Hence there must be a precise, clear and unambiguous statement to create the estoppel and also there must be that subsequently acquired interest which is capable of being engrafted on that representation, otherwise the estoppel must remain unfed. This doctrine seems to have originally risen in the case of lessor and lessee and subsequently extended to various transfers of property. This doctrine is criticized by Sir George Jessel as no longer necessary in law, no longer useful and in his opinion not to be carried further than a Judge is obliged to carry it, being a doctrine by which falsehood is made to have the effect of truth. He further expressed that it could have no operation except in the case of third parties who were innocent of fraud and had become owners for value, there being no reason for preferring one purchaser for value to another; but that as against the man himself or persons claiming without value the purchaser or the mortgagee could recover without any recourse to estoppel at all (g). It is not every representation that will do for an estoppel and it is not every statement that will do. There is no authority for the proposition that an estoppel can be created by covenant. The covenant is an agreement that if the covenantor has not the power to convey, he will be liable in damages. It is not a mere assertion that he has the legal estate but an agreement really that if he has it not, he will pay for it. Even in the case of a recital there is a modern decision to show that it must be a strict recital that the man has a legal estate; nothing less will do (h). Similarly, where a recital was to the effect that a vendor was seised "or otherwise well and sufficiently entitled to the property in question free from encumbrances" it was held that the recital which was an ordinary one and which in substance amounted to a statement that a vendor had an estate either at law or at equity and the fact that it stated, the estate whatever it was, was free from encumbrances, created no estoppel for the purpose of making the legal estate pass (i). A distinction has, however, been made between general and particular recitals. The former does not operate as an estoppel though recital of a particular fact does (j). Again, the doctrine will not apply if there be an estoppel without a subsequently acquired interest to feed it (k). An apparent defect in title is no bar to the feeding

(c) *Davies v. Bush* (1825) M'cle. & Yo. 58, 148 E.R. 324.

(d) *James v. Landon* (1585) Cro. Eliz. 36, 78 E.R. 302; *Hayne v. Maltby* (1789) 3 Term. Rep. 438, 100 E.R. 665.

(e) *Bansidhar v. Sant Lal* (1888) 10 All. 133.

(f) *Gaya Din v. Kashi Gir* (1907) 29 All. 163.

(g) *The General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society*, (1878) 10 Ch. D. 15.

(h) *The General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building*

Society (1878) 10 Ch. D. 15; *Onward Building Society v. Smithson* (1893) 1 Ch. 1; *Williams v. Pinckney* (1897) 77 L. T. 700.

(i) *Heath v. Crealock* (1874) 10 Ch. App. 22.

(j) *Lawison v. Tremere* 1 A. & E. 792; *Heath v. Crealock* (1874) 10 Ch. App. 22; *Onward Building Society v. Smithson* (1893) 1 Ch. 1.

(k) *Doe d Viscount Downe v. Thompson* (1847) 9 Q. B. D. 1037; *Ramkrishna v. Anusuyabai* (1924) 26 Bom. L. R. 173; *Sukhada Moyi Dasi v. Atul Chandra*, A. I. R. (1923) Cal. 165.

S. 43. provided the other party has believed in the truth of the representation and acted upon it (*l*). Nor where a deed is void or voidable. Hence, where a person of age makes a lease and has nothing in the premises but they after descend to him, the lease shall inure by way of estoppel; but it is otherwise in the case of an infant, whose deed is never good and can therefore raise no estoppel (*m*). So also if a contract purports to transfer property which the law makes inalienable, that contract cannot be given effect to with reference to another property which the transferor may subsequently acquire (*n*).

Where a person has received advantage under a void contract he is bound to make restitution (*o*). The provisions of the section are not applicable in case of transactions which are void or defeat the provisions of the law (*p*). Or where the alienation on grounds of public policy is forbidden by law (*q*). A transfer which is forbidden by law cannot be upheld under the guise of the provisions of section 43. This view of law was pointed out at some length by their Lordships of the Judicial Committee in the case of *Ananda Mohan Roy v. Gour Mohan* (*r*). Again, the doctrine does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person (*s*). This principle of law, which is sometimes referred to as feeding the grant by estoppel, is well established in this country. If a man who has no title whatever to property, grants it by a conveyance, which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first (*t*). By the English Law of estoppel, where a grantor has purported to grant an interest in land which he did not at that time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, "feeds the estoppel." By this doctrine the estoppel is derived from the recitals of title contained in the conveyance, and it is these recitals and these only which the grantor has to make good, so that if he subsequently acquires the ownership of the property by some other title, the subsequently acquired interest does not feed the estoppel so as to make the original conveyance effective as against a third party (*u*). It is material that there must be positive proof of both the grantor's assertion of his interest in land, which he had not at that time possessed, as also that he has subsequently acquired that interest, otherwise there could be no feeding. If there be no such assertion there would be no estoppel to be fed. A by deed purported to grant a freehold estate to B, by way of mortgage, and the deed contained no recitals but there were the usual mortgagor's covenants for title including a covenant that the mortgagor "had power to grant the premises in manner aforesaid." The mortgage was accepted by B on the faith of certain forged title-deeds produced and handed to him by A. At the date of the mortgage A had no legal estate nor any interest whatever in the property. Subsequently, however, A acquired by

(*l*) *Mohan Singh v. Seva Ram*, A. I. R. (1924) Oudh 209.

(*m*) *Smith v. Low* (1739) 1 Atk. 489, 26 E. R. 310.

(*n*) *Mohan Singh v. Seva Ram*, A. I. R. (1924) Oudh 209.

(*o*) *Javerbhai v. Gordhan* (1915) 39 Bom. 358; *Haribhai v. Nathubhai* (1914) 38 Bom. 249; *Jijibhai v. Nagji* (1909) 11 Bom. L. R. 693; *Krishnan v. Sankara Varma* (1886) 9 Mad. 441.

(*p*) *Dwarka Prasad v. Nasir Ahmad*, A. I. R. (1925) Oudh 16; *Sumsuddin v. Abdul Husain* (1907) 31 Bom. 165; *Bindeshwari v. Har Narain*, A. I. R. (1929) Oudh 185.

(*q*) *Narahari v. Siva Korithan Naidu* (1913) 24 M. L. J. 462.

(*r*) (1923) 50 Cal. 929, 50 I. A. 239.

(*s*) *Prasanna Kumar v. Srikantha Rout* (1913) 40 Cal. 173 (186).

(*t*) *Tilakdhari Lal v. Khedan Lal* (1921) 48 Cal. 1 (20); *Doe d. Christmas v. Oliver* (1829) 10 B. & C. 181, 109 E. R. 418; *Webb v. Austin* (1844) 13 L. J. C. P. 203, 135 E. R. 282.

(*u*) *Fernando v. Gunatillaka* (1921) 2 A. C. 357 (366); *Rajapakse v. Fernando* (1920) A. C. 892 (897).

purchase the legal estate and mortgaged it to C. Held that inasmuch as the mortgage to B contained no precise averment that A was seised of the legal estate, no estoppel had been created in favour of B as against C. (v). In English Law two principles are applied, namely, the Common Law principle of feeding the estoppel based on *Doe v. Oliver* (w), and the analogous equitable principle, the first mentioned principle being known as estoppel by deed. By the latter principle effect is given to the original contract. The Common Law principle depends solely upon an estoppel by recitals in the first deed and operates only when the recital contains a precise statement of the vendor's title (x). The equitable principle applies only when the first deed amounts to an unambiguous agreement to convey the precise estate which afterwards accrues to the grantor (y), the cardinal distinction between the two being, that one is based on recitals, the other on the words of the grant. The subject is somewhat complicated owing to the intricate distinctions which exist in English Law and the divergence of views expressed by Common Law Judges. Stripped of technicalities, the English Common Law is found in section 43 while the equitable principle in section 18 (a) of the Specific Relief Act, 1877. The main difference between the two sections is that under section 43, at the option of the transferee the benefit of the subsequent acquisition goes automatically to the earlier grantee, while under section 18 (a) it is left to the purchaser or the lessee, as the case may be, to compel the vendor or lessor to convey the subsequently acquired interest. Again, under section 43 two requisites are necessary before the estoppel can be fed. The feeding is dependent upon the option of the transferee and the subsistence of the contract of transfer while no such requisites are necessary under section 18 (a).

No estoppel, no feeding.—This is illustrated by the rule of Hindu Law, where under the Mitakshara a father or manager of a joint Hindu family has no power to alienate except in order to discharge an antecedent debt binding on the estate or on the ground of legal necessity. Even such an alienation is not binding on the share of the alienor (z) unless such share has been acquired by him on partition (a).

Estoppel unfed.—There must be a subsequently acquired interest by the transferor to feed the estoppel created by the section, for the transfer which comes into existence under the section operates at the option of the transferee on any interest which the transferor may acquire in such property and that acquisition of interest must be during the time the contract of transfer subsists, that is to say, unless there is subsequently acquired interest there is nothing to feed the estoppel with. Where a Mahomedan husband mortgaged his wife's property under a power-of-attorney disputed by her, on her death the share acquired by him by inheritance was held to be within the mortgaged security (b). A payment by a mortgagor to a prior encumbrancer would extinguish that mortgage and the rights of subsequent encumbrancers would be determined as if such prior mortgage never existed (c). And

- (v) *General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (1878) 10 Ch. D. 15.
 (w) (1829) 10 B. & C. 181, 109 F. R. 418.
 (x) *Heath v. Crealock* (1874) 10 Ch. App. 22; *General Finance Mortgage & Discount Co. v. Liberator Permanent Benefit Building Society* (1878) 10 Ch. D. 15; *Poulton v. Moore* (1915) 1 K. B. 400.
 (y) *Smith v. Osborne* (1857) 6 H. L. C. 375; *In re Harper's Settlement* (1919) 1 Ch. 270.
 (z) *Lachman Prasad v. Sarman Singh* (1917) 39 All. 500, 44 I. A. 163; *Sahu Ram v. Bup Singh* (1917) 39 All. 437, 44 I. A. 126; *Ram Sahai v. Parbhu Dayal* (1921) 43 All.

- 655; *Madho Parshad v. Mehrban Singh* (1891) 18 Cal. 157, 17 I. A. 194; *Daya Ram v. Harcharan Das* (1927) 8 Lah. 678; *Jai Narain v. Mahabir Prasad* (1927) 2 Luck. 226; *Anant Ram v. The Collector of Etah* (1918) 40 All. 171 P. C.; *Anar Dayal v. Har Prasad* (1920) 5 P. L. J. 605; *Mathura v. Kajakumar* (1921) 6 P. L. J. 526.
 (a) *Ram Ratan v. Ganga*, A. I. R. (1923) Oudh 265.
 (b) *Aisha Bibi v. Mahfur-un-nissa Bibi* (1924) 46 All. 310; *Manjappa v. Krishnayya* (1906) 29 Mad. 113.
 (c) *Badan v. Murali Lal* (1915) 37 All. 309.

S. 43 where a Hindu wife executed a mortgage of the property of her husband who was presumed to have been dead at the date of the suit brought by the mortgagee, the mortgage was considered to be operative on that date (*d*). The subsequently acquired interest feeds the estoppel even where the defect in title is apparent, provided the other party has believed in the truth of the representation and acted on it (*e*).

Nothing to feed the estoppel.—The rule enunciated in the section does not apply if a transferor, who has transferred the property without a title, has not recovered the property, for till then, it cannot be said that any circumstance came into existence which would enable the transferee to claim option under the section (*f*).

Fraudulently or erroneously.—The representation to operate as an estoppel must be fraudulent or erroneous. It must have been made by the transferor and believed in and acted upon by the transferee. The rule of estoppel is laid down in section 115 of the Evidence Act, 1872, and follows the English Law on the subject of which the general principle is stated in *Cairncross v. Lorimer* (*g*). The main question is whether the representation has caused the person to whom it was made to act on the faith of it. The existence of estoppel does not depend on the motive or on the knowledge of the matter on the part of the person making the representation. It is not essential that an intention of the person whose declaration has induced another to act or to abstain from acting should have been fraudulent, or that he should not have been under a mistake or misapprehension (*h*). Under the section the representation to operate as an estoppel must be fraudulent or erroneous. What the law mainly regards is the position of the person who was induced to act and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another by a representation made or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. There is no ground for the suggestion, that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found in the earlier cases of *Pickard v. Sears* (*i*), *Freeman v. Cooke* (*j*), *Cornish v. Abington* (*k*), and *Carr v. London and North Western Railway Co.* (*l*). A fraudulent intention is by no means necessary to create an estoppel. The determining element is not the motive with which the representation has been made nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. The section does not apply where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. Knowledge of both parties of the truth, negatives the estoppel (*m*). It is settled law that the language of the section clearly implies that the transferee is ignorant of the facts and accepts and acts upon the fraudulent or erroneous representation and the false profession; and no transferee, who has not been so led thereby, can claim relief under the section. This is in

(*d*) *Mahadeo Singh v. Har Buhsh*, A. I. R. (1928) Oudh 13.

(*e*) *Mohan Singh v. Seva Ram* A. I. R. (1924) Oudh 209.

(*f*) *Ramkrishna v. Anusuyabai* (1924) 26 Bom. L. R. 173; *Sakhadamoyi Dasi v. Atul Chandra*, A. I. R. (1923) Cal. 165.

(*g*) (1860) 3 H. L. C. 829.

(*h*) *Sarat Chunder Dev v. Gopal Chunder Laha* 1893) 20 Cal. 296, 19 I. A. 203.

(*i*) (1837) 6 A. & E. 469.

(*j*) (1848) 2 Exch. 654.

(*k*) (1859) 4 H. & N. 549.

(*l*) (1875) 10 C. P. 316.

(*m*) *Mohori Bibee v. Dharmodas Ghosh* (1903) 30 Cal. 539, 30 I. A. 114; *Sitaram v. Harkubai* (1908) 4 N. L. R. 28; *Mt. Salu Bai v. Bajat Khan* (1917) 13 N. L. R. 130; *Dwarka Prasad v. Nasir Ahmad*, A. I. R. (1925) Oudh 16.

accordance with the law of estoppel (n). The mode of its application is by preventing the transferor from proving the fact that he acquired the property subsequent to the transaction. The rule of estoppel gives a fictitious date to the acquisition of title placing it anterior to the transfer. To obtain the benefit of the section it must be shown that there is an erroneous or fraudulent representation. Whether there was such a representation or not is a question of fact and inference of fact which must be accepted in second appeal. J. and B. purported to mortgage a tank to one K. who brought a suit on the mortgage and purchased the property in execution of their decree and thereafter the plaintiff purchased half the tank from K. The tank originally belonged to S. and a half share descended to A. and the other half to J. and B. As there was, however, no representation to the plaintiff by J. and B. the section did not apply (o). Where an erroneous representation was made by the mother who claimed to be the owner and professed to make the transfer when the property belonged to her sons, section 43 did not apply (p). Where there is no representation, there is no estoppel (q). In order to bring section 43 into operation there must be representation by the transferor believed by the transferee who, relying on the truth of that representation, changed his position to his detriment (r).

A Mahomedan husband under a power-of-attorney in his favour from his wife executed a mortgage of her property. The power was disputed but before the question was decided finally, the wife died and the husband became her heir to the extent of one-fourth, against which it was held, the mortgagee was competent to proceed (s).

A member of an undivided Hindu family, consisting of himself, his adopted son and his uncle, sold, without family necessity, certain land belonging to the family, to the plaintiff, who sued for declaration of title and possession of the land. During the pendency of the suit the undivided uncle died, having made a gift of his property to his daughter-in-law. The gift was held to be invalid and the plaintiff was declared entitled to a moiety of the land sold to him (t). Where two of three co-owners leased the property to the exclusion of the third, who died pending the lease, leaving a will whereby he left one-half of his one-third share to each of the remaining co-owners, the section was applied and the lessee's imperfect title was completed by the subsequent acquisition (u). A mortgage under Mitakshara law of joint family property is void unless it be to pay an antecedent debt or for legal necessity. But where the mortgagor's interest has been separated by partition, it may become available as security for the debt (v). A sale by the father of joint family property purporting to act for himself and his two minor sons and alleging that it was self-acquired property, having been found not binding on the minor

(n) *Gopi Nath v. Rup Ram*, A. I. R. (1930) All. 786; *Krishna v. Dharendra* (1929) 56 Cal. 813, 56 I. A. 74; *Sundar Lal v. Ghissa*, A. I. R. (1929) All. 589; *Mulraj v. Indar Singh* (1926) 48 All. 150; *Ladu Narain v. Goberdhan*, A. I. R. (1925) Pat. 470; *Dwarka Prasad v. Nasir Ahmad*, A. I. R. (1925) Oudh 16; *Jabedali v. Prasanna*, A. I. R. (1923) Cal. 423; *Kodi Shankara v. Moidin* (1918) 35 M. L. J. 120; *Salu Bai v. Bajat Khan* (1917) 13 N. L. R. 130 (152); *Hattikudur v. Andar* (1915) 28 M. L. J. 44; *Pandir Bangaram v. Karumoor Subbaraju* (1910) 34 Mad. 159; *Jagan Nath v. Dibbo* (1908) 31 All. 53; *Mokhoda Debi v. Umesh Chandra* (1907)

7 C. L. J. 381.
(o) *Sukhadamoyi Dasi v. Atul Chandra*, A. I. R. (1923) Cal. 165.
(p) *Jabedali v. Prasanna*, A. I. R. (1923) Cal. 423.
(q) *Krishna v. Dharendra* (1929) 56 Cal. 813, 56 I. A. 74.
(r) *Ladu Narain v. Goberdhan*, A. I. R. (1925) Pat. 470.
(s) *Aisha Bibi v. Mahfuz-un-nissa Bibi* (1924) 46 All. 310.
(t) *Virayya v. Hanumanta* (1891) 14 Mad. 459.
(u) *Sulin Mohan v. Raj Krishna* (1921) 33 C. L. J. 193.
(v) *Ram Ratan v. Chaudhri Ganga Baksh*, A. I. R. (1923) Oudh 265.

S. 43 sons, it was held that the alienee was entitled to the possession of one-half and not one-third (*w*). K., a Hindu, had separated from his brother D. He sold to S. the equity of redemption of certain property which was vested in his brother D. under a deed of release and assignment executed by the brothers on partition. D. had disappeared and was not heard of and K. represented by a recital to that effect that he was exclusively entitled to the right of redemption. On the date of sale D. was not known to be dead and it was proved that he died subsequent to the sale by K. and it was held that S. was entitled to the benefit of section 43 (*x*).

The true rule may accordingly be taken that if a transferor without title has once become entitled to a valid estate in the land the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest for value without notice (*y*).

Personal equity.—Closely resembling the rule enacted in this section, though materially differing from it, is the equity affecting the conscience of the transferor. The rule in the section is founded on estoppel arising out of representation but there are cases, in which without representation the conscience of the party transferring the property is charged, where owing to defective or imperfect title the contract remains executory or cannot be carried out to its full extent. The transferor is compelled, out of the subsequently acquired interest, to perfect his title and thus to perform at a subsequent stage what he failed to perform at the time of the contract. This obligation does not arise under this section but flows from the contractual relation between the parties and the case is thus governed by section 18 (a) of the Specific Relief Act.

That a title by estoppel rests upon representation made by the grantor and acted upon by the grantee is well illustrated by the case of a mortgagee of *Deshgat Vatan* who knew that the property mortgaged to him was land appertaining to an hereditary office and inalienable beyond the lifetime of the incumbent. Subsequent to the mortgage, the estate of the mortgagor was enlarged so as to be alienable in the lifetime of the holder. After the enlargement, the mortgagee claimed to hold the property as if it were an estate similar to that of any owner of private property. It was held that the mortgagee could not allege that he had any title by estoppel, under which any enlarged estate coming to the mortgagor subsequent to the mortgage, would inure to his benefit (*z*). The above distinction is illustrated by the following case: The defendant having entered into a contract with the plaintiff to purchase his estate, declined to complete the purchase on the ground of fraudulent misrepresentation of title on the part of the plaintiff. Far from the representation being fraudulent, the defendant himself pointed out, by his earliest requisition, that the vendor should procure the concurrence of the heir-at-law, an objection which excluded altogether the notion of fraudulent misrepresentation. The means of curing the defect in the title of the vendor was pointed out by the purchaser himself. On the requisition not being complied with, the defendant affected to rescind the contract with the plaintiff and bought up the interest of the heir-at-law. The right to rescission was denied by the defendant who sued for

(*w*) *Muthuswami Pillai v. Sandana Velan*, A. I. R. (1927) Mad. 649.

(*x*) *Sundar Lal v. Ghissa*, A. I. R. (1929) All. 589.

(*y*) *Chota Bhaira v. Purna Chandra* (1915) 19 C. W. N. 1272; *Smith v. Osborne* (1857) 6 H. L. C. 375 (390); *Re. Bridgwater's Settlement* (1910) 2 Ch. 342; *Taylor v. Wheeler*

(1706) 2 Vern. 564; *Jennings v. Moore*

(1709) 2 Vern. 609; *Martin v. Seamore*

(1670) 1 Ch. Cas. 170; *Holroyd v. Marshall*

(1862) 10 H. L. C. 191; *Tailby v. Official*

Receiver (1888) 13 A. C. 523.

(*z*) *Gangabai v. Baswant* (1910) 34 Bom. 175.

specific performance which was decreed. It was there observed: " But the Court has even gone so far as to hold that, the conscience of each of the contracting parties being bound by the contract, it will not permit the person who has contracted to sell an estate to which he had no title, and to which, after the contract, by dealing with the actual owner he obtained a good title, to evade his contract. The Court imposes on him the obligation to fulfil the contract, which, at the time he entered into it, he had not the power to fulfil, but which, by his own subsequent acts, he acquires the means of performing. The Court considers that the vendor, having obtained the means of completing the contract, and of conveying to the purchaser what he had contracted to sell, is bound in conscience to fulfil the obligation which he has incurred " (a).

The distinction between section 18 of the Specific Relief Act and the present section is illustrated by the case where a mother who contracted to sell an immoveable property without any legal necessity, not in her personal capacity and not on the representation that the property was her own, but as mother and next friend of her minor son. Both the parties contracted upon the footing that the purchaser would not get a valid title without the sanction of the District Judge. The minor died before the sanction could be obtained, leaving the mother as heir. Holding that the agreement could not be specifically enforced against the mother, it was observed that section 18 of the Specific Relief Act had no application for the mother never contracted to sell any property as if it were her own; she only contracted to sell as guardian of her minor son. No doubt, if she had contracted to sell the property as her own, it not then being hers by inheritance, section 18 of the Specific Relief Act would have assisted the plaintiff; nor could section 43 of the Transfer of Property Act apply, for there was no erroneous representation made by the mother, the true state of affairs having been disclosed to the intending purchaser (b). On the 24th September 1920, S. mortgaged a house to Z & Co. by deposit of title-deeds. Z & Co. similarly mortgaged it to a bank. It was subsequently found that S's title was defective, he having an undivided three-fourth share, the remaining one-fourth having become vested in one J. When S. found that his title was defective he obtained a first charge on the remaining one-fourth by decree which was deposited with Z & Co. Z & Co. by virtue of their mortgage from S. were entitled to the whole interest and the defect in title was made up by S. obtaining a decree and charge as to one-fourth. In this case there was no representation according to the facts of the case. The case was therefore not governed by section 43 but came within the doctrine of personal equity, compelling the transferor to perform what he originally failed to do (c).

The plaintiff in a pre-emption suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain property of which he was the owner and also the property the subject-matter of the suit for pre-emption. The suit for pre-emption was successful. Held that the mortgage took effect as regards the property, the subject-matter of the pre-emption suit, from the time when the plaintiff mortgagor obtained possession by virtue of his decree in the suit (d). And where a Mahomedan executed a *hibanama* of property of which he had a two-third share, the remaining one-third being owned by his sister, which was subsequently acquired by him, it was held that the wife in whose favour the *hibanama* was executed acquired a title to the entire property. There the lower Courts considered

(a) *Murrell v. Goodyear* (1859) 2 Cliff. 51, 66 E. R. 22.

(b) *Rashmoni v. Surja Kanta Roy* (1905) 32 Cal. 832.

(c) *Zoliskofer & Co. v. Official Assignee*, A. I. R. (1927) Rang. 100.

(d) *Gaya Din v. Kashi Gir* (1907) 29 All. 163.

S. 43 the case was within the rule laid down in section 43. But when it was pointed out in second appeal that there was no evidence of erroneous representation, the Court considered such a finding unnecessary and supported the decree on the ground that the conveyance of a non-existent property though inoperative as a conveyance, is operative as an executory agreement, which would attach to the property, the moment it was acquired by the grantor and which in equity would transfer the beneficial interest to the vendee, without any new act being done by the vendor to confirm the conveyance (e). A Mahomedan wife executed, of her husband's property, a mortgage on 22nd September 1924. Her husband had disappeared some years prior to the mortgage and it was presumed, under section 108 of the Evidence Act, I of 1872, that he was dead on the 26th October 1926. Still the mortgage was held to be operative (f). In this case there was no representation of any kind by the wife, nor is it conceivable how the transaction was binding on the minor son of the deceased owner. Yet the rule in section 43 was applied. Besides the two equities above discussed there is a third equity supported by a group of cases which do not belong to either of the heads above mentioned. These are cases of mortgagors acquiring interests in the mortgaged property subsequent to the mortgage and which are governed by section 70 of the Transfer of Property Act, whereby the accession to the mortgaged property subsequent to the mortgage inures for the benefit of the mortgagee for the purpose of his security. A on behalf of himself and his four brothers, acquired the *shikmi* interest in a *chuck* which at the time was subject to a *mokarari* lease. A and two of his brothers mortgaged the *chuck* and subsequently A on behalf of himself and his four brothers acquired the *mokarari* interest in the *chuck*. The purchase of *mokarari* was an accession to the mortgaged property under section 70 of the Transfer of Property Act, and the purchaser of the *chuck* at the sale in execution of the decree on the mortgage was entitled to three-fifths of the *mokarari* interest as well as to three-fifths of the *shikmi* interest (g). Further, in the case of mortgagor and mortgagee three principles have to be borne in mind. One laid down by the present section, the other by section 70 of this Act which deals with accession to the mortgaged properties and the third dealt with in section 18 (a) of the Specific Relief Act, I of 1877. Where a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall operate on the subsequently acquired interest during the subsistence of the contract at the option of the transferee. That is the first principle. A mortgage was executed by a Mahomedan husband of the wife's property under a power-of-attorney from her which she contended was not binding on her. During the pendency of the appeal, the wife died and the husband became her heir of one-fourth. It was further found that he actually received the mortgage-money for his own expenses. It was held that the mortgagee was entitled to proceed against the property to the extent of the share of the wife inherited by the husband (h). Another principle is that every enlargement of the mortgagor's interest in the mortgaged premises prior to redemption usually inures for the benefit of the mortgagee (i). And the

(e) *Rustam Ali v. Abdul Jabbar*, A. I. R. (1923) Cal. 535.

(f) *Mahadeo Singh v. Har Bakhsh*, A. I. R. (1928) Oudh 13.

(g) *Surja Narain v. Nanda Lal* (1906) 33 Cal. 1212.

(h) *Aisha Bibi v. Mahfuz-un-Nissa* (1924) 46 All. 310.

(i) *Behari Lal v. Indra Narayan*, A. I. R. (1927) Cal. 665; *Basar Khan v. Leakat Hossein* (1919) 23 C. W. N. 841 (P. C.); *Sarju*

Prasad v. Bindeshri (1911) 33 All. 382; *Durga Das v. Muhammad Ismail* (1908) A. W. N. 155; *Surja Narain v. Nanda Lal* (1906) 33 Cal. 1212; *Ajudhia Prasad v. Man Singh* (1902) 25 All. 46; *Ajijuddin v. Sheik Budan* (1895) 18 Mad. 492; *Shyama v. Ananda* (1880) 3 C. W. N. 323; *Deolie Chand v. Nirban Singh* (1879) 5 Cal. 253.

same principle would apply where the mortgagor acquiring the mortgaged property attempts to use the mortgage rights as a shield against subsequent mortgages executed by himself. The effect of payment or purchase in such cases is to extinguish the mortgage and the rights of subsequent encumbrancers are determined as if such prior mortgage never existed (j).

The third principle underlies section 18 (a) of the Specific Relief Act, I of 1877, whereby a person, having only an imperfect or defective title contracts to sell or let is required to make good the contract out of the subsequently acquired interest and thus to perfect his title. The same principle would apply to mortgages. The Privy Council has held that the principles of English Law applicable to mortgages in this connection may be applied to Indian mortgages (k). A mortgage by a *Ghatwal* of certain property which was subject to certain restrictions on his right of alienation at the time of execution, but which were removed afterwards and before the institution of the suit, operated as a conveyance which attached to the property, the moment the restrictions were removed and in equity transferred the beneficial interest to the mortgagee without any act being done by the mortgagor to confirm the mortgage (l). Section 18 (a) of the Specific Relief Act has to be read in connection with section 27, according to which specific performance of a contract may be enforced against (a) either party thereto, (b) any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract. It has been held by the Privy Council that the section lays down a general rule that the original contract may be specifically enforced against a subsequent transferee but allows an exception to that general rule, not to the transferor, but to the transferee, and it is for the latter to establish the circumstances which will allow him to retain the benefit of a transfer which *prima facie* he had no right to get. Hence an innocent purchase must be not merely asserted but proved (m).

Transfers which defeat the legislature or are opposed to public policy.—An estoppel cannot validate a void transfer. The provisions of this section have no application to transactions forbidden by law or are of such a nature that if permitted would defeat the provisions of any law (n) or which the Court regards as opposed to public policy or as would defeat the plain provisions of the Legislature. There is an essential difference between restrictions on transfers imposed by the Legislature and those imposed by a grant or by a Court or decree. The general policy of law is to promote free alienation but there are cases in which, for the protection of particular interests, it is expedient to fetter the privilege of free alienation. In such cases the prohibition against transfer being founded upon consideration of public interest, must be treated as absolute (o). An alienation prohibited and illegal at the date it was made, cannot be rendered valid by subsequent removal of the prohibition. No equities arise out of a transaction which is prohibited on grounds of public policy. The section cannot be applied to make a transfer valid which on the

(j) *Manjappa v. Krishnayya* (1906) 29 Mad. 113.

(k) *Raja Kishendatt v. Raja Mumtaz Ali* (1879) 5 Cal. 198, 6 I. A. 145.

(l) *Surendra Nath Roy v. Rajendra Chandra Chandra* (1918) 27 C. L. J. 289; *Khobhari Singh v. Ram Prosad Roy* (1907) 7 C. L. J. 387; *Barnsidhar v. Sant Lal* (1887) 10 All. 133; *Buldeo Sahu v. N. B. Miller* (1904) 31 Cal. 667; *Gaya Din v. Kashi Gir* (1906) 29 All. 163.

(m) *Bhup Narain v. Gocul Chand* (1934) 38 C. W. N. 303; *Varden v. Luckpathy* (1862)

9 M. I. A. 303 followed; *Himatlal v. Vasudev* (1912) 36 Bom. 446; *Baburam Bag v. Madhab Chandra* (1913) 40 Cal. 565; *Tiruvankatachariar v. Venkatachariar* (1913) 26 M. L. J. 218; *Naubat Rai v. Dhaunkal Singh* (1916) 38 All. 184; *Muhammad Sadik v. Masihan Bibi* (1930) 9 Pat. 417; *Peerkha Lalkha v. Bapu Kashiba* (1923) 25 Bom. L. R. 375, disapproved.

(n) *Radha Bai v. Kamod Singh* (1908) 30 All. 38.

(o) *Balbhaddar Singh v. Kusehar Das*, A. I. R. 1928) Oudh 344.

S. 43

date on which it was made was prohibited by statute. The alienation of a service *inam* is void and though it is subsequently enfranchised, the alienee cannot invoke the aid of section 43 of the Transfer of Property Act (p). It has been observed that a contract which is void *ab initio* cannot be validated by the provisions of this section (q). The transfers of expectancies are void in India as forbidden by section 6 (a) of the present Act and section 23 of the Contract Act. Therefore a contract by a Hindu to sell immovable property to which he is the then nearest reversionary heir expectant upon the death of a widow in possession and to transfer it upon possession accruing to him, is void. To such class of cases as are opposed to statute law, the section is inapplicable (r). But in the case of reversioners, a distinction is made between the transfer of a reversionary and a transfer by the reversioner as if it were an absolute interest. Transfers of the former class would obviously fall within the purview of section 6 (a) and would be void *ab initio*, while those of the latter class would be regulated by section 43 of the Act. In the illustration to the section, A clearly has at the date of the transfer no more than a reversionary right of succession in the property he professed to transfer, on the erroneous representation that he was authorized to transfer it. Notwithstanding this initial difficulty in the title, when the succession opens and A becomes the owner of the property, C, the transferee, obtains under the section an indefeasible right to it in fulfilment of the original contract of transfer. Hence where a person purports to transfer property *in præsenti* but in which he has only a reversionary interest at the date of the transfer, the transaction is valid. Where a Mahomedan borrowed on a property which belonged exclusively to his mother in which he had only a *spes successionis*, on the false representation that the property belonged to him, it was held that on the death of the mother prior to the institution of the suit, when the defendant succeeded to the property, the present section applied (s). The same view was taken by the Madras High Court where a Mahomedan who had only a *spes successionis* in his father's property mortgaged it upon an express declaration that he had a title *in præsenti* in it. During the progress of the suit to enforce the mortgage, the mortgagor's father died and he became the owner by succession. His defence under section 6 (a) failed and it was held that section 43 applied (t). A purchaser of property from the holder of a service *inam* who is prohibited by law from alienating the property cannot claim a valid title thereto on the ground that the *inam* has since been enfranchised and a *patta* has been issued to the alienor. The section can have no operation when the alienation is forbidden by law on grounds of public policy (u). A mortgage, executed by a mortgagor, who was at the time a person disqualified under section 8 of the Jhansi Encumbered Estates Act of 1882, is a contract for an unlawful consideration within section 23 of the Indian Contract Act, so that the present section 43 could not be brought to aid such a transaction (v). Possession obtained through a transaction which the law prohibits and declares

(p) *Sannamma v. Radhabhaya* (1918) 41 Mad. 418; *Narahari Sahu v. Korithan Naidu* (1913) 24 M. L. J. 462; *Sri Kakarlapudi v. Sri Raja Kandukuri* (1915) 28 M. L. J. 650 followed; *Angannayya v. Narasayya* (1908) 18 M. L. J. 241 overruled; *Ramayya v. Jagannadhan* (1916) 39 Mad. 930.
 (q) *Mohan Singh v. Seva Ram*, A. I. R. (1924) Oudh 209 (216).
 (r) *Annada Mohan v. Gour Mohan* (1923) 50 Cal. 929, 50 I. A. 239; *Bindeshwari v. Har Narain*, A. I. R. (1929) Oudh 185; *Sri Jagannada v. Sri Rajah Prasada* (1916) 39 Mad. 554; *Samsuddin v. Abdul Husein* (1907) 31 Bom. 165; *Dwarka Prasad v.*

Nasir Ahmad, A. I. R. (1925) Oudh 16.
 (s) *Syed Bismilla v. Manulal Chabildas*, A. I. R. (1931) Nag. 51; *D. Sinclair v. Sitabkan* (1890) 3 C. P. L. R. 72.
 (t) *Alamanayakunigari v. Murukuti* (1915) 29 M. L. J. 733; *Mahadeo Singh v. Har Baksh*, A. I. R. (1928) Oudh 13; *Sarju Prasad v. Bindeshwar* (1911) 33 All. 382.
 (u) *Narahari Sahu v. Sira Korithan Naidu* (1913) 24 M. L. J. 462; *Batchu Ramayya v. Dhara Satchi* (1913) 25 M. L. J. 635; *Ramaswami Naick v. Ramaswami Chetty* (1906) 30 Mad. 255.
 (v) *Radha Bai v. Kamod Singh* (1908) 30 All. 38.

to be void is adverse. It is just such possession originating without colour of title which is contemplated by the law of limitation (*w*).

S. 43

Operation of the transfer.—In order that a subsequently acquired interest may attach itself to the transfer made by the transferor under a fraudulent or erroneous representation, three requisites are necessary. It can only be (1) at the option of the transferee, and (2) during the time the contract of transfer subsists, and (3) a transferee in good faith for consideration without notice of the option not intervening. A contract can no longer be deemed to subsist when a transferee has obtained a decree for specific performance or damages following on a rescission of the contract. Even a mere rescission of the contract by the transferee would determine the contract. The words of the section are wide enough to include the case of a contract merged in a decree. A Mahomedan woman with her eldest son executed a mortgage of an estate in which her younger children were entitled to shares. The mortgagee obtained a decree against the co-mortgagors and the suit was otherwise dismissed. Subsequently, the shares of the co-mortgagors were increased by inheritance from one of the other defendants who died before the decree was executed. In rendering the increased shares of the mortgagors liable to be sold in execution of the decree, it was said that the words of section 43, "at any time during which the contract of transfer subsists" were wide enough to cover the present case, for although the contract had merged in the decree, it must be held to subsist till the mortgage was satisfied and the mere fact of the share in question having devolved on respondent subsequent to the decree appeared to be no reason for holding section 43 inapplicable (*x*). And so where a portion of the property comprised in a mortgage was acquired by the mortgagor subsequent to the mortgagee's decree, the latter was held entitled to execute the decree against the mortgagor's interest acquired on partition (*y*).

Option of the transferee.—The subsequently acquired interest referred to in the section does not automatically attach to the previous interest but the transferee can obtain it, if he chooses to do so. It rests upon his option and it is for him to exercise that option. Such option, however, can only be exercised during the time the contract of transfer subsists.

Estoppel fed automatically.—That at the option of the transferee the transfer operates on the subsequently acquired interest automatically without a deed, is indicated by the illustration to the section where the word "deliver" is used. Under section 54, the mode of transfer by delivery is restricted to tangible immoveable property of a value less than Rs. 100, and in the case of property of the value of Rs. 100 and upwards, it is necessary for the parties to resort to a registered instrument. This distinction is not made by the present section.

Contract of transfer.—Under the section the transferor by false or erroneous representation professes to transfer certain immoveable property to the transferee which is not the whole of his stipulated interest. Consequently the contract of sale cannot be considered to have been fully executed, and hence the phrase "contract of transfer" is used in the section in spite of the transfer having been made and before the acquisition of the subsequently acquired interest, for the transfer has not taken place according to the settled terms between the parties. According to section 54

(*w*) *Gopala Dasu v. Rami* (1921) 44 Mad. 946; *Adam v. Bapu* (1909) 33 Bom. 116; *President and Governors of Magdalen Hospital v. Knolls* (1879) 4 A. C. 324; *Budesab v. Hanmanta* (1897) 21 Bom. 509.

(*x*) *Ajijuddin Sahib v. Sheik Budan Sahib* (1895) 18 Mad. 492.

(*y*) *Durga Das v. Muhammad Ismail* (1908) A. W. N. 155.

S. 43 of the Act, "a contract for sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties." This leads to the distinction made in English Law of discharge of a contract executory and executed. It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction to discharge the obligation of that contract. But an executed contract cannot be discharged except by a release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment (z).

Proviso.—The option reserved to the transferee under the section is liable to be defeated by a subsequent transferee in good faith for consideration without notice of the existence of the option, but the absence of any of the three necessary requisites here enumerated would defeat the rights of the subsequent transferee (a).

A mortgage was executed on behalf of A. by her husband N. in favour of B in 1877. On A.'s death the property passed to N. and other heirs. In 1886 N. executed a mortgage of his share inherited from A. to C. C. purchased in execution of his mortgage decree the property mortgaged to him and obtained possession in 1892. C. was found not to be a *bona fide* purchaser for value without notice of the share purchased by him. In 1891 B. brought a suit on his mortgage against the mortgagor's heirs and against C. as puisne mortgagee. It was held that before a subsequent purchaser could be bound by the principle of equity which underlies that section, it is necessary to find whether the purchaser was a *bona fide* purchaser for value without notice. Issue was sent down as no finding of the lower Court was recorded on this point (b).

If a transferor without title has once become entitled to a valid estate in the land, the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice—the heir inclusive (c). The subsequent transferee's knowledge of the original transfer is immaterial. What is material is that he should have notice of the existence of the original transferee's option to proceed against the transferor (d).

Pleas of "non est factum."—It has been doubted whether the old authorities on the plea of *non est factum* extend beyond cases where the party is blind or illiterate. These were the observations in a case where it was held that misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the plea failed (e). In a more recent case the defence of *non est factum* was, however, allowed to prevail where the defendant's signature was obtained by fraud, he being ignorant of the contents of a document which was represented to him as an insurance paper when in fact it was a guarantee (f).

Lessor and lessee.—As between these, when once the relation is established, if any estate or interest passes from a lessor or his real title is shown upon the face of the lease, there can be no estoppel. If a lessor has no title and the lessee be evicted by title paramount, he may plead that as a defence to an action by the lessor. But so long as a lessee continues in possession under the lease he cannot set up any defence founded upon the fact that the lessor, *nil habuit in tenementis* and upon the execution of the lease there is, in contemplation of the law, created in the lessor a

(z) *Foster v. Dawber* (1851) 6 Ex. 839 (851), 155 E. R. 785.

(a) *Durga Das v. Muhammad Ismail* (1908) A. W. N. 155.

(b) *Hanuman v. Gursahay* (1913) 18 C. L. J. 181.

(c) *Chela Bhaira v. Purnaj Chandra* (1915) 19 C. W. N. 1272.

(d) *Mohan Singh v. Seva Ram*, A. I. R. (1924) Oudh 209.

(e) *Howatson v. Webb* (1908) 1 Ch. 1; *King v. Smith* (1900) 2 Ch. 425.

(f) *Carlisle and Cumberland Banking Co. v. Bragg* (1911) 1 K. B. 489.

reversion in fee simple by estoppel which passes by descent to his heir and by purchase to his assignee, who may sue on the covenants in the lease. This was the decision in *Cuthbertson v. Irving (g)*, where Martin B., employing the metaphor feeding the estoppel, observed, "There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises, to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words, a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease. Secondly, where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel; and an action will lie by the assignee of the reversion against the tenants on the covenants in the lease, *Webb v. Austin (h)*, and by the tenant against the assignee of the reversion, *Sturgeon v. Wingfield (i)*." It has been held that when a lessor is by his recital shewn to have a specific estate and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them in respect of any after-acquired interest of the grantor, the newly acquired title being said to feed the estoppel. The principle is not inapplicable to a case where there was originally no title at all and is not confined in its application to cases where there is an enlargement of an existing interest (*j*).

Mortgagor and mortgagee.—The principle of the section also applies as between mortgagor and mortgagee. T. and D. sued DD. for recovery of certain property. The suit was decreed and the defendant appealed. The plaintiff mortgaged 8 *biswa* share in village U. which was part of the property in dispute to W. By compromise each of the parties got half of the property mortgaged and it was further provided that DD. should pay the debt due to W. W., having sold his rights as mortgagee, the purchaser sued on the mortgage. The Court held that the mortgage was enforceable only against 4 *biswa* share of the village which was still held by T. and D. No party who has made a transfer to another is entitled to say that the transferee has no right to the property. This principle has been stretched so far as to enact a rule of law in the present section, where, a person without owning a property purports to transfer it, he would be bound to make good the transfer, if later he acquires the property (*k*).

No title.—Both section 43 of the Transfer of Property Act and section 18 (a) of the Specific Relief Act, I of 1877, apply to cases where there is no title at all and are not confined in their application to cases where there is an enlargement of an existing interest. A conveyance of a non-existent property though inoperative, as a conveyance, is operative as an executory agreement, which would attach to the property the moment it is acquired by the grantor and which in equity would transfer the beneficial interest to the purchaser without any new act being done by the vendor to confirm the conveyance (*l*). The equitable principle is expressed in

(g) 4 H. & N. 742, 157 E. R. 1034.

(h) (1844) 7 Man. & G. 701, 135 E. R. 282.

(i) (1846) 15 M. & W. 224, 153 E. R. 831.

(j) *Krishna Chandra v. Rasik Lal* (1916) 21 C. W. N. 218 P. C.; *Protab Chandra v. Judisthir Das* (1914) 19 C. L. J. 408; *Aditya Prasad v. Parmananda Patel* (1919) 4 P. L. J. 505.

(k) *Shiam Lal v. Sohan Lal* (1928) 50 All. 290; *Eshaq Lal v. Dulla*, A. I. R. (1930) All. 115.

(l) *Rustam Ali v. Abdul Jaffer*, A. I. R. (1923) Cal. 535; *Surendra Nath v. Rajendra*

Chandra (1918) 27 C. L. J. 289; *Kobhari Singh v. Ram Prosad* (1904) 7 C. L. J. 387; *Holroyd v. Marshall* (1862) 10 H. L. C. 191; *Colleyer v. Isaacs* (1811) 19 Ch. D. 342; *Tailby v. Official Receiver* (1888) 13 A. C. 523; *Baldeo Sahu v. N. B. Miller* (1904) 31 Cal. 667; *Bansidhar v. Sant Lal* (1887) 10 All. 133; *Gaya Din v. Kashi Gir* (1906) 29 All. 163; *Mohan Singh v. Pandit Seeba Ram*, A. I. R. (1924) Oudh 209.

Ss. 43-44

the dictum of Lord Westbury in *Holroyd v. Marshall* (m), that if a vendor or mortgagor agrees to sell or mortgage property of which he is not possessed at the time and he receives consideration for the contract and afterwards becomes possessed of the property, answering the description in the contract, a Court of Equity would compel him to perform the contract and the Court would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

Court sales.—The case of an execution sale, however, stands on an obviously different footing. The decree-holder does not guarantee the title of the judgment-debtor; the intending purchaser knows that under the law he can acquire nothing beyond the right title and interest of the judgment-debtor (n).

Third Schedule, paragraph 11 of the Civil Procedure Code of 1908.—A transfer made in contravention of the provisions of this paragraph is void and of no legal effect whatever. Section 43 does not apply to such a transfer (o).

Inquiry and reasonable care.—These elements, necessary under section 41, are not essential under the present section (p).

Exchange.—The section applies to an exchange of immoveable property which stands on the same footing as a sale. A exchanged his property with B's. At the time of the exchange B had only a half share in the property but subsequently acquired the other half by purchase. It was held that as soon as B's title was perfected, the benefit accrued to A (q). For right of party deprived of the thing received in exchange, see section 119 of the Act.

Official Receiver.—A purchaser from the Official Receiver, when the property of the insolvent did not vest in him, can claim the benefit of the section when the property vests in him. The subsequent vesting order makes the sale valid. It is not sale in execution of a decree or by order of the Court so as to attract the advantages and the infirmities attending Court sales (r).

Insolvency.—Property, which had devolved upon the insolvent after adjudication and before discharge but not claimed by the receiver, was held to attract the application of the section so as to entitle the mortgagee to enforce his mortgage executed between the dates of adjudication and discharge (s).

44. Where one of two or more co-owners of immoveable property legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment

(m) (1862) 10 H. L. C. 191.

(n) *Prasanna Kumar v. Srikantha Rout* (1913) 40 Cal. 173.

(o) *Gaurishankar v. Chinnumiya* (1919) 46 Cal. 183; *Mt. Salu Bai v. Bajal Khan* (1917) 13 N. L. R. 130; *Murray v. Murat Singh* (1907) 3 N. L. R. 171; *Magniram v. Bakubai* (1912) 36 Bom. 510 dissented from.

(p) *Gopi Nath v. Rup Ram*, A. I. R. (1930) All. 788; *Maung Ba Tin v. Maung Po Kin* 14 Bur. L. R. 329.

(q) *Bhairab Chandra v. Jiban Krishna* (1921)

33 C. L. J. 184.

(r) *Basava Sankaran v. Anjaneyulu* (1927) 50 Mad. 135; *Muthiah Chettiar v. Doraiswami Pillai*, A. I. R. (1927) Mad. 1091; *Sankaram v. Narasimhulu*, A. I. R. (1927) Mad. 1; *Nagasami Aiyar v. Ramasami Aiyar* (1924) 47 M. L. J. 755; *Narasimudu v. Basava Sankaram* (1924) 47 M. L. J. 49.

(s) *Diwan Chand v. Manak Chand* (1935) 16 Lab. 392; *Narain Singh v. Har Gopal Tewari* (1933) 55 All. 503.

of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Transferee's rights and obligations.—Under the section, on a transfer by a co-owner of a share in immoveable property or of any interest therein, the transferee's rights are :—

(1) To joint possession or other common or part enjoyment of the property with the other co-owner or co-owners.

(2) To enforce a partition of the same.

His obligations are that he is subject

(1) To conditions and

(2) Liabilities affecting the share or interest at the date of the transfer.

Transferee.—Includes a mortgagee (*t*) as well as a lessee (*u*), but clause 2 excludes a person who is not a member of the family, so that a stranger cannot take the benefit of clause 1 where the share transferred is that of a dwelling-house (*v*).

The only remedy of such a transferee is to seek a partition and not to force his way into the family dwelling-house. It is therefore necessary for a Court when a suit is instituted by a stranger to an undivided family for a partition of a dwelling-house to find first whether the house in question was a dwelling-house and belongs to an undivided family (*w*). It is only to the dwelling-house belonging to the undivided family and not to every house that the restriction in clause 2 applies.

Transferee's right under clause 1.—The purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain allotment to himself by metes and bounds of his vendor's share in that portion of the property; for a suit for partial partition of an undivided family property will not lie. The transferee of a coparcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular item of the family property but a joint right with the other coparceners to the ownership and enjoyment of each individual item with an incidental right to obtain a partition of the whole family property and have his share made over to him after due provision for family debts and liabilities (*x*). The rights of such purchaser are not extended by section 44 of the Transfer of Property Act which only gives him "the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same."

(*t*) See sec. 58 of the Transfer of Property Act, IV of 1882.

(*u*) *Durga Charan v. Khundkar* (1918) 27 C. L. J. 441; *Ramasami v. Alagirisami* (1904) 27 Mad. 361; *Muhammad Jafar v. Mashar-ul-Hasan* (1906) 3 A. L. J. 474; see sec. 105 of the Transfer of Property Act, IV of 1882.

(*v*) *Sivaramayya v. Kapa Venkata* (1930) 53

Mad. 417; *Nilkamal v. Kamakshya*, A. I. R. (1928) Cal. 539.

(*w*) *Brijmohan v. Mt. Mahbhuban*, A. I. R. (1930) All. 509.

(*x*) *Venkatarama v. Meera Labai* (1890) 13 Mad. 275; *Pandurang v. Bhaskar* (1875) 11 Bom. H. C. R. 72.

S. 44

Liabilities affecting the transferee.—The purchaser of an undivided share of a Hindu coparcener gets only an equity to enforce partition and takes the share when partitioned subject to all liabilities on it in the hands of his vendor (*y*).

At the date of the transfer.—The transferee of a co-sharer cannot be liable for the negligence or misdeeds of his transferor or legal representative subsequent to alienation nor can he be liable for acts of waste done by the legal representative of the transferor or his omission to do necessary repairs after the date of the institution of the suit for partition (*z*).

Share of a dwelling-house.—Both under this Act as well as the Partition Act (*a*), the share of the dwelling-house in question must belong to an undivided family. On a partition "dwelling-house" would generally mean not only the house itself but also the land and appurtenances which were ordinarily and reasonably required for its enjoyment (*b*). Section 4 of the Partition Act has been held to apply to the rest of a house, portion of which was separated owing to one member selling his interest in it (*c*).

Mode of division.—Where the mode of division is found inexpedient, section 2 of the Partition Act gives the Court power to order sale (*d*).

Undivided family.—This phrase applies to a family divided in status and is not restricted to what is ordinarily known as a joint Hindu family. It is an expression of general application, and means a family, whether Hindu, Mahomedan, Christian, etc., possessed of a dwelling-house which has not been divided or partitioned among members of the family (*e*). The words "undivided family" must be taken to mean undivided *qua* the dwelling-house in question and to be a family which owns the house but has not divided it. There is nothing in the Act to support the suggestion that the words were intended to be used in the narrow and restricted sense as comprising a body of persons who can trace their descent from a common stock. It is the ownership and not its actual occupation which brings the operation of the section into play (*f*). The requirements of the section are satisfied if it be shewn that the house is an undivided one and the members of the family occasionally reside therein. It is unnecessary to prove that the members of the family constantly resided nor is it necessary that they should be joint in food (*g*).

Court sale.—Section 44 does not apply to a sale by the Court.

Hindu Law.—The rule enunciated in section 44 does not override the Hindu Law (*h*).

Transferee from a Hindu coparcener in the Bombay Presidency.—It cannot be said that any coparcener has a particular share in any item of the family property. He has only an undivided share in the whole of it. In Bombay it is settled law that a coparcener can sell his own interest in joint family property provided there is

(*y*) *Venkureddi v. Venku Reddi* (1927) 50 Mad. 535; *Narayan v. Nathaji* (1904) 28 Bom. 201; *Udaram v. Ramu* (1875) 11 Bom. H. C. 76.
 (*z*) *Chandra v. Abidalli*, A. I. R. (1925) Nag. 68.
 (*a*) IV of 1893, secs. 2 and 4.
 (*b*) *Pran Krishna v. Surath Chandra* (1918) 45 Cal. 873; *Nilkamal v. Kamakshya*, A. I. R. (1928) Cal. 539.
 (*c*) *Masitullah v. Umrao*, A. I. R. (1929) All. 414.
 (*d*) *Bai Hirakore v. Trikamdas* (1908) 32 Bom. 103.
 (*e*) *Sivaramayya v. Kapa Venkata* (1930) 53 Mad. 417; *Khirode Chunder v. Saroda*

Prasad (1910) 12 C. L. J. 525; *Sultan Begam v. Debi Prasad* (1908) 30 All. 324; *Masitullah v. Umrao*, A. I. R. (1929) All. 414.
 (*f*) *Nilkamal v. Kamakshya*, A. I. R. (1928) Cal. 539; *Sultan Begam v. Debi Prasad* (1908) 30 All. 324; *Vaman v. Vasudev* (1899) 23 Bom. 73; *Khirode Chandra v. Saroda Prasad*, 12 C. L. J. 525.
 (*g*) *Pakija Bibi v. Adhar Chandra*, A. I. R. (1929) Cal. 231; *Vaman v. Vasudev* (1899) 23 Bom. 73.
 (*h*) *Kota Balabadra v. Khetra Doss* (1916) M. L. J. 275.

valuable consideration for it (i). Under the Mitakshara as interpreted in the Bombay Presidency a purchaser cannot get joint possession of the share but is only entitled to a declaration of his rights that he has acquired the interest of the vendor and a declaration that he be left to recover that interest by separate suit for partition in which all necessary parties and properties should be joined (j). The relief can only be given by way of a suit for a general partition (k). Joint possession cannot be given to the vendee (l). The sale is valid even though the deed takes the form not of the sale of his interest but of a sale of the whole (m). And where a stranger purchases a particular portion of the joint family property from one of the coparceners in a joint family he is entitled to file a suit against the other members of the family for partition and on partition, if possible, the property which he has purchased as belonging to a certain coparcener should be given to him as his share (n). The Madras High Court has also held that a purchaser of the interest of a coparcener must sue for general partition (o). A contrary view has been taken by the Allahabad High Court (p).

The following propositions were laid down so far as the Presidency of Bombay is concerned with regard to the rights and remedies in the case of a purchase by a stranger of an undivided share in a joint Hindu family in *Bhau v. Budha* (q).

(1) A stranger-purchaser of the undivided share of a coparcener in a joint Hindu family, if out of possession should not be given joint possession with the other coparceners, but should be left to his remedy of a suit for partition (r).

(2) On the other hand, a coparcener, who has been excluded, may obtain joint possession with such a purchaser who has obtained possession of the joint-family property (s).

(3) The purchaser in possession need not be ejected in a suit for recovery of possession brought by an excluded coparcener but can be declared to be entitled to hold (pending a partition) as a tenant in common with the other coparceners (t).

Allenee of share in a Hindu coparcenary in the Madras Presidency.—The following rules are deducible from the authorities as to the position of such an alienee according to Mitakshara in the Presidency of Madras.

(1) When a coparcener alienates his share in certain specific family property the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for general partition of the entire family property. The transferor remains a member of the coparcenary until partition is effected (u).

(i) *Pandu Vittoji v. Goma Ramji* (1919) 43 Bom. 472; *Ishrapa v. Krishna* (1922) 46 Bom. 925; *Suraj Bunsí Koer v. Shco Pershad Singh* (1879) 5 Cal. 6 I. A. 88. *Balgobind Das v. Narain* (1893) 15 All. 339, 20 I. A. 116. (148)

(j) *Pandu Vittoji v. Goma Ramji* (1919) 43 Bom. 472.

(k) *Ishrapa v. Krishna* (1922) 46 Bom. 925; *Balaji v. Ganesh* (1881) 5 Bom. 499; *Krishnaji v. Sitaram* (1881) 5 Bom. 496; *Pandurang v. Bhaskar* (1874) 11 Bom. H. C. 72.

(l) *Deendayal v. Jugdeep Narain* 4 I. A. 247 (1877) 3 Cal. 198; *Hardi Narain v. Ruder Perakash*, 11 I. A. 26 (1883) 10 Cal. 626.

(m) *Pandu Vittoji v. Goma Ramji* (1919) 43 Bom. 472; *Vadivelam v. Natesam* (1912) 37 Mad. 435; *Marappa Gaundan v. Ranga sami Gaundan* (1899) 23 Mad. 89.

(n) *Dhulabhai v. Lala Dhula* (1922) 46 Bom. 28; *Pandurang v. Bhaskar* (1874) 11 Bom.

H. C. 72; *Udaram v. Ranu* (1875) 11 Bom. H. C. 76; *Kandasamy v. Velayutha* (1927) 50 Mad. 320.

(o) *Manjaya Mudali v. Shanmuga Mudali* (1915) 38 Mad. 684; *Iburamsa v. Theruvenkatasami* (1911) 34 Mad. 269.

(p) *Ram Mohan v. Mul Chand* (1906) 28 All. 39. (1926) 50 Bom. 204.

(r) *Balaji Anant v. Ganesh Janardan* (1881) 5 Bom. 499; *Pandu v. Goma* (1918) 43 Bom. 472; *Ishrapa v. Krishna* (1922) 46 Bom. 925.

(s) *Bhiku v. Puttu* (1905) 8 Bom. L. R. 99.

(t) *Babaji v. Vasudev* (1876) 1 Bom. 95; *Kallapa v. Venkatesh* (1878) 2 Bom. 676; *Dugappa v. Venkatramnaya* (1880) 5 Bom. 493; *Balaji v. Ganesh* (1881) 5 Bom. 499.

(u) *Manjaya Mudali v. Shanmuga Mudali* (1915) 38 Mad. 684; *Subba Row v. Ananthanarayana Aiyar* (1912) 23 M. L. J. 64; *Iburamsa Rowthan v. Theruvenkatasami* (1911) 34 Mad. 269 dissented from.

S. 44

(2) The alienee cannot sue for partition and allotment to him of his share of the property alienated (v).

(3) Such an alienee has no right to possession and no status as a tenant in common although he might have obtained possession of the property in execution of the decree against one of the coparceners (w).

(4) When a coparcener became an outcaste and was driven out of the family, and did not enjoy family property for over twelve years, it amounted to exclusion and the right to recover his share is barred (x).

(5) When such purchaser fails to apply for amendment of his plaint after an issue is raised questioning the frame of the suit, his suit is liable to be dismissed (y).

(6) The alienee need not be directed to institute a separate suit to work out his rights by a partition, but was entitled in the coparcener's suit as a defendant to get a decree for partition and claim to be allotted the item purchased by him in respect of his vendor's share, if that was inconsistent with the rights of other coparceners (z).

(7) The alienee is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition (a).

(8) A purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant in common with other members (b).

As regards the other provinces of India, most of the cases relate to Court sales of a coparcener's share where according to Mitakshara Law the right of a coparcener to alienate the undivided share is different from Bombay and Madras. In those provinces one coparcener has no authority without the consent of his co-sharers to mortgage or sell his undivided share in a portion of the joint family estate in order to raise money on his own account and not for the benefit of the family (c).

Persons entitled to claim partition.—As a general rule, every joint owner is entitled to partition, viz., to be placed in a position to enjoy his own rights separately or without any interruption or interference by his co-sharer. The general rule must, however, be taken subject to exceptions and qualifications dependent upon the nature of the thing owned jointly, the nature of the interest of the party claiming partition, the nature of the terms and conditions on which the different joint owners held their respective interests.

It has been held that "partition" is applicable only to those suits in which the plaintiff seeks to convert his joint ownership and joint possession of the whole property into separate ownership and separate possession of a portion of the property. Therefore, a partition suit lies only when the plaintiff and the defendants have unity of interest or title in the property sought to be partitioned and unity

(v) *Manjaya Mudali v. Shanmuga Mudali* (1915) 38 Mad. 684; *Venkatarama v. Meera Labai* (1890) 13 Mad. 275; *Palani Konan v. Masakonon* (1897) 20 Mad. 243; *Ramkishore Kedarnath v. Jainarayan Ramarackhpal* (1913) 14 M. L. T. 163.

(w) *Manjaya Mudali v. Shanmuga Mudali* (1915) 38 Mad. 684; *Deendayal Lal v. Jugdeep Narain Singh* (1878) 3 Cal. 198, 4 I. A. 247; *Suraj Bunsu Koer v. Sheo Persad Singh* (1880) 5 Cal. 148 6 I. A. 88; *Hardi Narain Sahu v. Ruder Perakash Misser* (1884) 10 Cal. 626, 11 I. A. 26.

(x) *Manjaya Mudali v. Shanmuga Mudali* (1915) 38 Mad. 684.

(y) *Manjaya Mudali v. Shanmuga Mudali* (1915) 38 Mad. 684; *Subba Row v. Ananthanarayana Aiyar* (1912) 28 M. L. J. 64.

(z) *Ramasami Aiyar v. Venkatarama Ayyar* (1923) 46 Mad. 815; *Ramkishore v. Jainarayan* (1913) 40 Cal. 966 (P. C.).

(a) *Maharaja of Bobbili v. Venkataramanjulu Naidu* (1916) 39 Mad. 265.

(b) *Maharaja of Bobbili v. Venkataramanjulu Naidu* (1916) 39 Mad. 265.

(c) *Deendayal Lal v. Jugdeep Narain Singh* (1877) 3 Cal. 198, 4 I. A. 247; *Hardi Narain Sahu v. Ruder Perakash Misser* (1883) 10 Cal. 626, 11 I. A. 26; *Suraj Bunsu Koer v. Sheo Persad Singh* (1879) 5 Cal. 148, 6 I. A. 88; *Madho Parshad v. Mehrban Singh* (1891) 18 Cal. 157, 17 I. A. 194; *Amar Dayal v. Har Parshad* (1920) 5 P. L. J. 605; *Jai Narain v. Mahabir Prasad* (1927) 2 Luck. 226.

of possession (*d*). Equally partition can be had between parties one of whom owns an interest subordinate to the other (*e*). The Privy Council has held that the right of partition exists when two parties are in joint possession of land under permanent titles although their titles may not be identical (*f*). In a suit for partition the plaintiff should establish that he and the defendant are not only joint owners but also entitled to joint possession as the object of the suit is to transfer the joint possession into possession in severalty (*g*). The Court must in each case determine whether the balance of convenience is in favour of allowing partition (*h*).

A lessee for a term of years is entitled to partition though that partition can only last for the period of his lease (*i*). And a lessee of shares of some lessors in an entire village and of shares of other lessors in a portion is entitled to maintain a suit for partition as to portion jointly held by him and some lessors (*j*). So also a suit for partition by a lessee against co-sharers of lessor is maintainable (*k*). But a purchaser of an undivided two-thirds share in huts used as residence by a joint Hindu family could not be given a decree for joint possession. The proper course to follow is either to direct delivery of possession by partition, in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition (*l*). And an alienee from a member of a joint Hindu family is not entitled to possession of the alienor's share as a tenant in common. His only right is to obtain by a suit for partition the share to which his alienor is entitled (*m*). There is no fixed rule of law that a property held in temporary right cannot be partitioned, the only rule being the rule of convenience. Tenants would be entitled to partition under the section unless it could be proved there was some disability against partition (*n*). In the absence of proof of inconvenience to other co-sharers a patnidar whose right extends over only a fractional share of one of many *mouzahs* in the zemindari is entitled to maintain a suit for partition (*o*).

The estate of a deceased Burman Buddhist vests in his heirs on his death, but there is no analogy between their position and that of the coparceners of a joint Hindu family under the Hindu Law. In the former case the estate does not vest collectively or jointly but each heir gets a definite fraction in every portion of the estate of the deceased which vests in him separately and individually which he is entitled to claim. He cannot be decreed to be with the co-heir a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them. A Burman Buddhist heir is not entitled to maintain a partition suit in the strict sense of the word and his suit for division of the inheritance must be an administration suit (*p*).

Partial partition.—A suit for partition of a portion of the joint estate is maintainable when it is the only property held jointly by the plaintiff and the defendant (*q*).

Tenant in common.—The result of the authorities is that according to the *Mitakshara* a purchaser of a share in a Hindu coparcenery is a tenant in common with the coparceners other than his alienor in Bombay, but not according to the

(*d*) *Maung Ba Tu v. Ma Thei Su*, A. I. R. (1928) Rang. 73.

(*e*) *Hemadri v. Ramani* (1897) 24 Cal. 575.

(*f*) *Bhagwat v. Bipin Behari* (1910) 37 Cal. 918 P. C.

(*g*) *Durga Charan v. Khundkar* (1918) 27 C. L. J. 441.

(*h*) *Hemadri v. Ramani* (1897) 24 Cal. 575.

(*i*) *Ramasami v. Alagirisami* (1904) 27 Mad. 361.

(*j*) *Ramasami v. Alagirisami* (1904) 27 Mad. 361.

(*k*) *Sri Chandra v. Mahima Chandra* (1916) 23 C. L. J. 231.

(*l*) *Girija Kanta v. Mohin Chandra* (1915) 20 C. W. N. 675.

(*m*) *Kota Balabadra v. Khetra Doss* (1916) 31 M. L. J. 275.

(*n*) *Rajanimohan v. Sambhunath* (1930) [57] Cal. 715.

(*o*) *Uma Sundari v. Benod Lal* (1907) 34 Cal. 1026.

(*p*) *Maung Ba Tu v. Ma Thei Su* (1927) 5 [Rang. 785.

(*q*) *Radha Kanta v. Ripro Das* (1905) 1 C. L. J. 40.

Ss. 44-45. recent rulings of the Madras High Court. In the other Provinces the question does not arise as alienation is prohibited except with the consent of the other coparceners.

Official Receiver.—Although an Official Receiver, on the insolvency of a Hindu father, can sell the family property including the son's share therein, still the purchaser from the Official Receiver is not entitled to apply, under section 4 of the Provincial Insolvency Act, 1920, for delivery of possession of the property in so far as the son's share is concerned; his remedy would be by instituting a regular suit for possession in the ordinary Civil Courts; but the Official Receiver or the purchaser is entitled, in so far as the insolvent's share is concerned, to be given joint possession of the property, on an application filed under section 4 of the Act (r).

Official Assignee.—Where the managing member of a joint Hindu family, consisting of himself and his sons, is adjudicated an insolvent the interest of the sons does not vest in the Official Assignee by reason of the adjudication although it would be competent to the latter to deal with their shares, if the debts of the insolvent were of such a nature as to be binding on their interest.

The Official Assignee as representing the managing member, is entitled to joint possession with the sons of the family property.

There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals; but the latter is entitled to all other rights of the insolvent including the right to possession (s).

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Generally.—Sections 45, 46 and 47 relate to transfer to and by two or more persons. The words "respectively" and "proportion" are words of severance and their employment in section 45 makes it clear that tenants in common and

(r) *Venkatram v. Chokkier* (1928) 51 Mad. 567.
(s) *The Official Assignee of Madras v. Rama-*

chandra (1923) 46 Mad. 54.

not joint tenants are referred to (t). In case of a joint tenancy there must be unity of possession, unity of interest, unity of title and unity of time. It has been held by the Allahabad High Court that conveyance of land to two or more persons without words indicating the intention that they are to take as tenants in common, constitutes a joint tenancy (u). The same principle would apply to a transfer of property to husband and wife to whom the English Law applies. This section is supplementary to section 44.

Three tests.—The section deals with three classes of funds on a transfer of immoveable property to two or more transferees and indicates the measure of interest taken by each. They are :—

- (1) Common fund.
- (2) Separate fund.
- (3) Presumptive joint fund.

The respective interests the transferees take in the property in case (1) are identical with their respective interest in the fund ; in case (2) in proportion to the shares respectively advanced ; in case (3), where there is no evidence of their interest in the fund, equally.

Modification.—Of the above three rules, the first two are subject to modification by contract to the contrary between the transferees entitled to the funds, while the third is subject to evidence adduced.

Common fund.—Property purchased out of common fund is held in shares in proportion to the interests of the transferees in the common fund (v).

Separate funds.—When mortgagees advance moneys according to the shares specified in the mortgage deed their rights in the mortgaged property will be proportionate to their interests (w).

Volunteers.—The section deals with transfers for consideration. Its principle has no application to gifts (x).

Revenue sale.—Where the owners, having committed default in paying revenue, their property was sold and purchased by them at the sale by the Collector, who issued a certificate to them jointly, it was held that they had equal shares notwithstanding their original shares being unequal (y).

Presumption.—Where there is no specification of the shares of the purchasers the rule of presumption laid down in the section applies and they are deemed to be entitled to the property in equal shares (z). The rule of presumption laid down in paragraph 2 applies when no evidence is available and not where evidence is available but not adduced (a).

Various incidents of joint tenancy and tenancy in common in English Law.—The essential difference between the two is that tenants in common hold their lands

(t) *Torret v. Frampton* (1654) Style 434, 58 E. R. 840 ; *Le Gros v. Cockerell* (1832) 5 Sim. 384, 58 E. R. 380.
 (u) *Mankamna Kunwar v. Balkishan Das* (1906) 28 All. 38.
 (v) *Parsotam v. Janki Bai* (1907) 29 All. 354 (384).
 (w) *Parlab v. Nehal Singh*, A. I. R. (1926) All.

676.
 (x) *Arakal Joseph Gabriel v. Domingo Inas* (1911) 34 Mad. 80.
 (y) *Debi Pershad v. Mt. Aklio* (1899) [4 C.] W. N. 465.
 (z) *Abdullah v. Ahmad*, A. I. R. (1929) All. 817.
 (a) *Ram Pher v. Ajudhia Singh*, A. I. R. (1925) Oudh 369.

- S. 45 either by several titles or by several rights but joint tenants hold by one title and by one right, but there is no difference between them as to possession and manner of taking the profits (b). Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint unless there are words of severance or an inference arises from the nature of the transaction (c). There is a difference between words which create a tenancy in common in a will and in a conveyance: for the words equally to be divided, in a will, create a tenancy in common not by force of the words themselves but by the intent of the testator, that there should be no survivorship.

There were two ways of creating a tenancy in common by conveyance, viz., either by limiting it to them expressly as tenants in common, or else by limiting a moiety, or a third, or other undivided part, to one; and the other moiety, or third, to another, etc., for, if otherwise, though the words "equally divided" be used, yet they shall signify only an equal division and proportion of the profits (d). Where persons contributed rateably to the purchase-money they were held to be tenants in common (e). In case of a joint tenancy a receiver could be appointed (f). A joint tenancy may be severed. There is nothing hard, severe or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants. If any of them had a bad opinion of their own lives they may sever (g). A marriage of a woman who is a joint tenant in freeholds or leaseholds does not operate as a severance of her joint tenancy (h). It may also be severed by conduct (i), or by alienation of the interest of one joint tenant (j). But an actual alienation, not a mere declaration of one of the parties, is necessary (k). Nor will a deed of gift by one joint tenant of his moiety to his wife effect a severance (l), being voluntary and without consideration. A demise by one of two joint tenants of his part to the other severs the joint tenancy (m). As between tenants in common, possession by one is possession of the other (n). There is no fiduciary relation between them (o). Where one tenant in common receives all the profits his liability is to account to the other only for what he receives more than what comes to his just share (p). But for ordinary repairs a tenant in common has no right of action against his co-tenant for contribution (q). A tenant in common in occupation is not liable to the other for waste (r). But after a decree in a partition suit he may be restrained by injunction from destroying or wasting the property (s). Tenants in common cannot make a joint lease for their estates are several and distinct and there is no privity between them (t). And when two tenants in common join in a lease it operates as a several lease of each and the confirmation of the other. It cannot be pleaded as a joint demise (u).

(b) *Pullen v. Palmer* (1696) 3 Salk. 207, 91 E. R. 780.
 (c) *Morley v. Bird* (1798) 3 Ves. Jun. 628, 30 E. R. 1192.
 (d) *Stringer v. Phillips* (1730) as reported in 1 Eq. Cas. Abr. 291, n. 21 E. R. 1053.
 (e) *Lake v. Craddock* (1733) 3 P. Wms. 158, 24 E. R. 1011.
 (f) *Hills v. Webber* (1901) 17 T. L. R. 513.
 (g) *Staples v. Maurice* (1774) 4 Bro. Parl. Cas. 580, 2 E. R. 395.
 (h) *Palmer v. Rich* (1897) 1 Ch. 134.
 (i) *Williams v. Hensman* (1861) 30 L. J. Ch. 878, 70 E. R. 862; *Leak v. Macdowall* (1862) 32 Beav. 28, 55 E. R. 11.
 (j) *Sym's case* (1584) Cro. Eliz. 33, 78 E. R. 299.
 (k) *Partridge v. Powlet* (1740) 2 Atk. 54, 26 E. R.

430.
 (l) *Moyse v. Gyles* (1700) Prec. & Ch. 124, 24 E. R. 60.
 (m) *Cowper v. Fletcher* (1865) 34 L. J. Q. B. 187, 122 E. R. 1267.
 (n) *Sterling v. Penlington* (1739) 2 Eq. Cas. Abr. 730, 22 E. R. 616.
 (o) *Kennedy v. De Trafford* (1897) A. C. 180.
 (p) *Henderson v. Eason* (1851) 17 Q. B. 701.
 (q) *Leigh v. Dickeson* (1884) 15 Q. B. D. 60.
 (r) *Griffies v. Griffies* (1863) 8 L. T. 758.
 (s) *Bailey v. Hobson* (1869) 39 L. J. Ch. 270.
 (t) *Heatherley v. Weston* (1764) 2 Wils. 232, 95 E. R. 783.
 (u) *Gyles v. Kempe* 1677) Freem. K. B. 235, 89 E. R. 168.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations.

(a) A, owning a moiety, and B and C each a quarter share, of *mauza* Sultanpur, exchange an eighth share of that *mauza* for a quarter share of *mauza* Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that *mauza*.

(b) A, being entitled to a life-interest in *mauza* Atrali and B and C to the reversion, sell the *mauza* for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

Section 46 contrasted with section 45.—As section 45 deals with the respective interests taken by two or more transferees in the property transferred as dependent upon their interests in the consideration, section 46 deals with interest of two or more transferors in the consideration as dependent upon their respective interests in the property transferred. The former section relates to transferees, the latter to transferors. Both deal with tenants in common. Section 46 speaks of distinct interests which cannot exist in a joint tenancy. Section 46 is the converse of section 45.

Two tests.—The section deals with two classes of transferors, viz., those having interest in the property of

- (i) equal value
- (ii) unequal value.

In case (i) they share in the consideration equally, in case (ii) proportionately to the value of their respective interests.

Modification.—The rule in the section may be modified by the transferors by contract to the contrary.

Volunteers.—As consideration is an essential ingredient in the section its principles do not apply to gifts.

Persons having distinct interest.—It is not necessary that the transferors should belong to the same class such as vendors, lessors or mortgagors; they may belong to different classes such as mortgagor and mortgagee, lessor and lessee, tenant for life and reversioner, tenant for life and remainderman.

Consideration.—This may consist of money or lands taken in exchange as in illustration (a) to the section.

Co-widows.—Under the Mitakshara, the estate which two Hindu widows take by inheritance is not several but a joint estate for life (v).

(v) *Ram Piyari v. Mulchand* (1885) 7 All. 114;
Gajapathi Nilmani v. Gajapathi Radhamani, (1876) 1 Mad. 290, 4 I. A. 212.

Bhugwandeem v. Myna Bate (1867) 11 M. I. A. 487.

Ss. 47-48

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners
of share in common
property.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in *mauza* Sultanpur, transfer a two-anna share in the *mauza* to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-anna share from each of the shares of B and C.

Share or shares of the transferors.—When several co-owners of immoveable property transfer a share or shares therein such transfer takes effect on shares :—

- (1) Equally when their shares are equal.
- (2) In proportion to the extent of their shares when such shares are unequal.

The section is complimentary to section 46 which deals with how consideration is to be shared in similar circumstances. Section 47 deals with transfer of a fraction while section 48 deals with transfer of the whole.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights
created by transfer.

Maxim.—This section is based on the English maxim, "*qui prior est tempore, potior est jure*" subject to certain exceptions to be noted hereafter and subject to special contract or reservation binding the earlier transferees.

Essence of the rule of priority.—The principle of priority expressed in this section is that when a person by two or more instruments creates rights over the same immoveable property and the essential incidents of the prior instrument conflict with the essential incidents of a subsequent instrument, the rights created by the subsequent instrument shall be subject to the rights created by the prior instrument unless such is excluded by a reservation in the prior instrument as a result of a special contract (w).

A familiar example is in the case of a lease where the lessee usually stipulates that on a sale of the property the lease shall determine notwithstanding the residue of the period stipulated. Cases under the section can only arise when the owner

(w) *Motichand v. Sagun* (1905) 29 Bom. 46;
Narayan v. Laxuman (1905) 29 Bom. 42;
Karamat Khan v. Sami-ud-din (1886)

8 All. 409 (418); *Sirbadh v. Ragunath* (1885)
7 All. 568 (572).

of the immoveable property has not parted by the prior transfer with his full proprietary interest.

S. 48

Requisites of the section.—The rights must be created :

- (1) at different times ;
- (2) in favour of different transferees ;
- (3) over the same immoveable property ;
- (4) they must be such as cannot all exist together ;
- (5) they must be such as cannot be exercised to their full extent together ;
- (6) by the same or different transferors.

Transfer.—Includes a mortgage by deposit of title-deeds (x). And that this is so is supported by reference to section 58 (f) of the Transfer of Property Act and the proviso to section 48 of the Registration Act. In India there is no distinction between a legal and equitable mortgage (y).

Rights need not be created by the same person.—The antagonistic deeds need not be executed by the same person under the section. The first deed may be executed by the transferor, the second by his assignor or his heir. So far as the two documents create, at different times, rights in or over the same immoveable property which cannot co-exist or cannot be exercised to their full extent together, the section comes into operation. In this the section bears a similarity to section 50 of the Registration Act which deals with rival documents which need not be executed by the same person (z).

Cannot all exist or be exercised to their full extent together.—The principle is applicable when the instruments in question are conflicting (a) and not where legal effect can be given to one without infringement of the other (b).

Possession.—The date of transfer and not possession is the determining factor (c).

Date of execution, not registration, the decisive factor.—The principle of the section is independent of any consideration of registration. It is applicable only when the subsequent instrument operates in defeasance of an essential incident of the prior instrument. According to section 47 of the Indian Registration Act, XVI of 1908, a registered document operates from the time from which it would have commenced to operate as if no registration thereof had been required or made, and not from the time of registration (d).

Abrogation of priority.—There is a notable exception to the general rule, "*qui prior est tempore, potior est jure*" to be found in advances made to save the encumbered property from loss or destruction. So that a mortgage executed by a receiver for the purpose of preserving the property takes precedence of all other loans, even of any loan raised at an early date for the preservation of the property (e). Again, priority is lost by a prior mortgagee by the existence of circumstances mentioned in sections 78 and 79 of the Transfer of Property Act (f).

- (x) *Ralli Bros. v. Punjab National Bank, Ltd.* (1930) 11 Lah. 564 ; *Gokul Dass v. Eastern Mortgage and Agency Co.* (1906) 33 Cal. 410 ; *Coggan v. Pogose* (1885) 11 Cal. 158
 (y) *Imperial Bank of India v. U. Rai* (1924) 51 Cal. 86, 50 I. A. 283.
 (z) *Chunilal v. Ramchandra* (1898) 22 Bom. 213 ; *Kondiba v. Nana* (1903) 27 Bom. 408.
 (a) *Sirbadh Rai v. Raghunath* (1885) 7 All. 568 (572) ; *Karamat Khan v. Sami-ud din* (1886) 8 All. 409 (418).
 (b) *Ramachandra v. Krishna* (1886) 9 Mad. 495 ; *Ramaraja v. Arunachala* (1884) 7 Mad.

- 248 ; *Sobhagchand v. Bhaichand* (1882) 6 Bom. 193.
 (c) *Narayan v. Laxuman* (1905) 29 Bom. 42 ; *Khondiba v. Nana* (1903) 27 Bom. 408.
 (d) *Gopal Ram v. Lachmi Misir*, A. I. R. (1926) All. 549 ; *Bindeshri v. Somnath* (1916) 14 A. L. J. 382 ; *Motichand v. Sagun* (1905) 29 Bom. 46 ; *Narayan v. Laxuman* (1905) 29 Bom. 42 ; *Santaya v. Narayan* (1884) 8 Bom. 182.
 (e) *Giridhari v. Dhirendra* (1907) 34 Cal. 427.
 (f) See sec. 50, Indian Registration Act.

Ss. 48-49

Auction-purchasers.—As between competing auction-purchasers, the principles which govern preference are the same as those which regulate the claims of priority among mortgagees (g).

Priority of operation of deeds executed on the same day.—When two deeds are executed on the same day, the Court must inquire which was in fact executed first (h), but if there is anything in the deeds themselves to shew an intention, either that they shall take effect *pari passu* or even that the later deed shall take effect in priority to the earlier, in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties (i). In case of mortgagees, where by evidence it cannot be ascertained which takes priority, they take as joint tenants or tenants in common (j).

Concurrent leases.—A familiar illustration of the section is to be found in concurrent leases dealt with in the chapter on Leases.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Transferee's right under policy.

The section.—The section does not come into operation until the transfer is executed as the words "transferred" and "at the date of transfer" indicate. The marginal note is not correct. The transferee has no right under the policy. His rights under the section are against the transferor (1) on the moneys actually received by the transferor, and (2) to be applied in reinstating the property.

The Law of Property Act, 1925.—Section 47 (1) of this Act enacts as follows:— "Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor."

By sub-section (3) the above rule is made applicable to a sale or exchange by an order of the Court.

The above section differs from the present one inasmuch as the destruction referred to is caused before the transfer. Moreover, under English Law the purchaser under a contract of sale is the equitable owner thereof.

Reinstatement.—The transferee has no right to be reimbursed for his loss. His only right is to reinstatement. He cannot claim the insurance moneys when he is a mortgagee in discharge or reduction of the amount due to him.

(g) *Baijanath v. Bhimappa* (1901) 3 Bom. L. R. 92.

(h) *Garlside v. Silkstone & Dodworth Coal & Iron Co.* (1882) 21 Ch. D. 762; *Ramratan v. Bishun Chand* (1906) 11 C. W. N. 732.

(i) *Garlside v. Silkstone & Dodworth Coal & Iron Co.* (1882) 21 Ch. D. 762.

(j) *Ramratan v. Bishun Chand* (1906) 11 C. W. N. 732.

Policy of Insurance.—A fire insurance is a contract of indemnity and where there is a contract of indemnity no more can be recovered by the insured than the amount of his loss. Only those can recover who have an insurable interest and they can recover only to the extent to which that insurable interest is damaged by the loss. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. Upon payment of the amount of loss the insurer is entitled to be put into the place of the insured; and if at a subsequent time the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him (k).

Vendor and purchaser.—Under English Law, a contract of sale makes the purchaser an equitable owner, whilst under Indian Law it creates no interest for the purchaser. A policy of fire insurance is a contract of indemnity, the insurance company being liable to make good the actual loss sustained by the assured. Prior to the Law of Property Act, 1925, it was settled law that "on the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly" (l).

In England between vendor and purchaser a case arose (m) where a fire occurred after the contract but before completion. It was held by Brett and Cotton, L.J.J., affirming the decision of Jessel, M.R., that the purchaser who had completed his contract, was not entitled as against the vendor to the benefit of the insurance. They, however, doubted whether as between the vendor and the insurance company the former could retain the moneys. This expression of doubt gave rise to the case of *Castellain v. Preston* (n). As the vendor in *Rayner v. Preston* (o) had received not only the insurance moneys from the company but the sale was afterwards completed and the purchase-money agreed upon was also received by him without any abatement on account of the damage by fire, it was held that the company was entitled to recover a sum equal to the insurance money from the vendor for their own benefit. In a Rangoon case (p) it was held that a purchaser under a contract of sale had an insurable interest under the following circumstances. The property was insured on the 16th October 1928 and was conveyed on the 16th August 1929. On the same day subsequent to the conveyance the original vendor entered into an agreement with the purchaser for a repurchase of the property by 31st December 1929. On the 12th October 1929 the policy was renewed for a further period of one year to 12th October 1930. Before the conveyance was executed by the purchaser to the original vendor as stipulated the property was destroyed by fire on the 19th April 1930.

Mortgagor and mortgagee.—As between these it is usually provided in the mortgage itself that on occurrence of a fire the mortgagor shall receive the mortgage-money and employ it either in reinstating the property or in repayment to the mortgagee according to the latter's option. Such a case would fall, in the absence of a contract to the contrary, within the provisions of this section. There are further

(k) *Darrell v. Tibbitts* (1880) 5 Q. B. D. 560;
North British Mercantile Insurance Co. v.
London Liverpool & Globe Insurance Co.
 (1876) 5 Ch. D. 569.

(l) *North of England Pure Oil-cake Co. v. Archangel*
Maritime Insurance Co., L. R. 10 Q. B. 249.

(m) *Ravner v. Preston* (1881) 18 Ch. D. 1.

(n) (1883) 11 Q. B. D. 380.

(o) (1881) 18 Ch. D. 1.

(p) *Ganan Sundaram v. Vulcan Insurance Co.,*
Ltd., A. I. R. (1931) Rang. 210.

Ss. 49-50

provisions with regard to mortgages enacted in sections 72 and 76 of the Act. A mortgagee, however, cannot claim against the insurance company under a policy of insurance effected by the mortgagor unless there is a covenant to insure for the benefit of the mortgagee or to apply the policy moneys in reinstatement or otherwise for the benefit of the mortgagee (q). Where the defendants assigned certain machinery by bill of sale to secure a sum of money advanced by the plaintiff and the deed contained a covenant to insure but no provision for the application of policy moneys in case of fire in liquidation of the mortgage, it was held, on the machinery being burnt down, that the plaintiff had no claim to the benefit of the policy as against the defendants, for to hold otherwise would be to make a new contract between the parties (r). A question of somewhat the same kind was decided in favour of the mortgagee in *Garden v. Ingram* (s), but that case differed materially in principle. In that case a lease contained a covenant that the premises should be insured in the names of the lessor and lessee, and that the moneys secured by the policy should be applied in restoring the premises. The lessee mortgaged his lease but the mortgage contained no mention of the insurance, though the lease was referred to in the recitals. The premises having been destroyed by fire, the mortgagee restored them without waiting to get the money due on the policy; and on a claim filed by the mortgagee, the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt to the insurance office, to enable the mortgagee to receive the money payable under the policy.

Lessor and lessee.—According to section 108 (e) of the Transfer of Property Act, a lease of immoveable property is void at the option of the lessee if a material part of the property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let. As to the right to moneys received under the policy of fire insurance in the case of a lease, reference may be made to notes under section 108 (e).

Priority of mortgagee overrides a garnishee.—The mortgagee as transferee having a right conferred by statute to the insurance moneys, his right cannot be displaced by a garnishee order even when made absolute, if before actual payment his claim has crystallized (t).

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid, or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent bona fide paid to holder under defective title.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Payment of rent before due date.—Rent is defined in section 105 of this Act as "money share of crops, service or any other thing of value to be rendered periodically

(q) *P. V. Chetty Firm v. Motor Union Insurance Co., A. I. R.* (1923) Rang. 6.
(r) *Lees v. Whiteley* (1866) 2 Eq. Cas. 143.
(s) (1852) 23 L. J. Ch. 478.

(t) *Sinnott v. Bowden* (1912) 2 Ch. 414; *Evans v. Rival Granite Quarries, Ltd.* (1910) 2 K. B. 979; *Cairney v. Bach* (1906) 2 K. B. 746; *Norton v. Yates* (1906) 1 K. B. 112.

or on specified occasion to the transferor by the transferee." Hence payment before due date cannot be regarded as fulfilment of the obligation imposed by the covenant to pay rent. It is in fact a loan by the tenant to the landlord under an implied condition that the landlord should continue entitled to the rent at the time it became due, and able, therefore, then to give the tenant a valid discharge (u). The rent must be paid as rent (v). B, having leased his land to the plaintiff at a rent payable quarterly, subsequently mortgaged the land to the defendants who allowed B to remain in receipt of the rent. Subsequently to the mortgage, B applied to the plaintiff, who was not aware of the mortgage, to pay him a year's rent in advance, and the plaintiff did so. After the payment, and before the rent had become due, the defendants gave notice to the plaintiff to pay the rent to them, and the plaintiff refusing to pay it, the defendants distrained for it. Held that the payment was not good as against the mortgagees, and that the plaintiff was still liable to pay them the rent (w). In the absence of any express agreement the mortgagor has no power to grant a lease of the mortgaged property so as to bind the mortgagee. The lessee has a precarious title as the paramount title of the mortgagee may be asserted against both the lessee and the mortgagor (x). Any lease granted by the mortgagor after the mortgage is void as against the mortgagee (y). A tenant under such a lease has no right as against the mortgagee to rent paid in advance to the mortgagor (z). But a mortgagee who does not take care to inquire of the lessee in possession cannot recover rents paid by the lessee to the lessor in advance before execution of the mortgage. Similarly, payments made by tenants to a mortgagor after a mortgage but before notice of it must in order to be valid against the mortgagee have been made in respect of rent which was due at the time of payment or become due before notice of the mortgage (a). Nor is the tenant making such a payment relieved from his obligations to a transferee who purchases the property from the transferor (b), or at an auction (c). It cannot, however, be said that a lessee from the mortgagor acquires no interest whatever in the property demised to him. The true status of the lessee was indicated in the observation in *Pope v. Biggs* (d), that the mortgagor may be considered as acting in the nature of a bailiff or agent for the mortgagee. Consequently, if the mortgagor after he has granted the mortgage deals with the property in the usual course of management, the interest created by him may be rightly deemed operative against the mortgagee. An illustration of this view will be found in the case of *Moreland v. Richardson* (e). The same principle was recognized in *Banee Pershad v. Reet Bhunjan* (f), report of which is supplemented in the undermentioned case (g).

Compensation or damages.—Against a person in wrongful possession the owner's claim is not for rent but for compensation or damages for wrongful possession or occupation. To such cases the section has no application (h).

- (u) *De Nicholls v. Saunders* (1870) 5 C. P. 589.
 (v) *Tiloke Chand v. Beattie & Co.*, A. I. R. (1926) Cal. 204.
 (w) *De Nicholls v. Saunders* (1870) 5 C. P. 589.
 (x) *Macleod v. Kissan* (1908) 30 Bom. 250; *Rustomji v. Keshavji* (1926) 28 Bom. L. R. 1162; *Tiloke Chand v. Beattie*, A. I. R. (1926) Cal. 204; *Girdhar Lal v. Liladhar* (1931) 29 Bom. L. R. 1123.
 (y) *Pope v. Biggs* (1829) 9 B. & C. 245, 109 E. R. 91.
 (z) *Rustomji v. Keshavji* (1926) 28 Bom. L. R. 1162; *Tiloke Chand v. Beattie & Co.*, A. I. R. (1926) Cal. 204.
 (a) *Kiran Chandra v. Dutt & Co.*, A. I. R. (1925)

- Cal. 251; *Cook v. Guena* (1872) 77 C. P. 132.
 (b) *P. Z. R. Co-operative Society v. Maung Thu.* A. I. R. (1931) Rang. 292; *Ramlal v. Marwari*, A. I. R. (1922) Pat. 339.
 (c) *Official Assignee v. Abdul Hussain*, A. I. R. (1928) Sind 95.
 (d) (1829) 9 B. & C. 245 (248), 109 E. R. 91.
 (e) (1857) 24 Beav. 33, 53 E. R. 269.
 (f) (1868) 10 W. R. 325.
 (g) *Madan Mohan Singh v. Raj Kishori* (1913) 17 C. L. J. 384.
 (h) *Girdharlal v. Liladhar* (1931) 33 Bom. L. R. 1123.

S. 50

Form of suit : against landlord and tenant.—Under Order 1, rule 3 of the Code of Civil Procedure, 1908, a suit for rent paid in advance may be framed against the tenant and the landlord to whom the rent was paid in advance with an alternative prayer against the landlord if it should turn out that the tenant had paid the rent in good faith to him (i).

Assignment by lessor.—In order to invoke the aid of the section it is not necessary that there should be a transfer or an assignment by the lessor during the tenancy. The section is not in terms limited to such cases and its language is general. These were the observations made in a case (j) where L. mortgaged with possession certain property to S. who on the same day let out the property to L. for 12 years. S. died and his interest as mortgagee survived to his undivided brother R. who died in 1901. Thereafter possession and management of the property was with S.'s widow G. K., the sister and heir of S. and R., brought a suit against the tenant for the recovery of the rent for the years 1902 and 1903 received by G. It was held that the tenant was not liable for the rent sued as he acted in good faith and had no notice of the plaintiff's interest in the property.

Double good faith.—To enable the tenant to claim protection under the section, he must (1) in good faith have paid or delivered the rent to any person, (2) of whom he in good faith held such property (k). So that when a tenant knew that there were disputes between two rival claimants to the title of landlord, chose one of them and paid rent to him, he was held not protected under the section (l).

Reason to believe.—Section 109 of the Transfer of Property Act, 1882, whilst dealing with the rights of lessors' transferee, provides that if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

Notice.—Notice of assignment is fatal to the tenant. It is immaterial whether he receives it from the transferor or the transferee (m).

Rent paid under compulsion of law.—In such a case the tenant is protected. A mortgagor subsequent to his mortgage let the mortgaged premises. Whilst the next quarter was running the mortgagees gave notice requiring the tenant to pay the rent then and thereafter to accrue due to themselves. After this notice a receivership order was made and served on the tenant at the instance of a creditor who had recovered judgment, "without prejudice to the rights of prior encumbrancers." The tenant having failed to make the payment the mortgagees threatened him with legal proceedings and he paid. The receiver claimed payment of the rent over again. It was held that the tenant having paid under compulsion of law and in consequence of his lessor's default, could set up such payment in answer to the claim for the rent by the receiver who claimed through his lessor (n).

Joint discharge.—A payment to one of three persons jointly entitled to receive the money is not good as against the other two (o).

(i) *Madan Mohun v. Holloway* (1886) 12 Cal. 555.
 (j) *Kaveriamma v. Lingappa* (1909) 33 Bom. 96.
 (k) *Kaveriamma v. Lingappa* (1909) 83 Bom. 96;
Peary Lal v. Madhoji (1913) 17 C. L. J. 372.
 (l) *Gambhirya v. Sakharan*, A. I. R. (1927) Nag. 287.
 (m) *Nobin Chandra v. Surendra Nath* (1902) 7 C. W. N. 454; *Peary Lal v. Madhoji*

(1913) 17 C. L. J. 372.
 (n) *Underhay v. Read* (1888) 20 Q. B. D. 209;
Johnson v. Jones (1839) 9 A. & E. 809,
 112 E. R. 1421.
 (o) *Peary Lal v. Madhoji* (1913) 17 C. L. J. 372;
Harihar v. Bholi (1907) 6 C. L. J. 383;
Husainara v. Rahaman Nassa (1910) 13 C. L. J. 3.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

The section.—A transferee of immoveable property with a defective title who is evicted by a person having a better title :—

- (1) Subsequently to his making improvements.
- (2) Believing in good faith that he is absolutely entitled to the property.

Has a right to require the person causing the eviction :

- (i) either to have the value of the improvements estimated and paid at the time of eviction,
- (ii) or to have the value of the improvements estimated and secured at the time of eviction,
- (iii) or to sell his interest in the property to the transferee at the market value at the time of eviction irrespective of the improvements.

When crops planted or sown under the above circumstances are growing at the time of the eviction such transferee is entitled to such crops and to free ingress and egress to gather and carry them.

Generally.—This section deals with the rights and obligations as to improvements between a holder under a defective title and one having a better title. It provides for compensation by the latter to the former provided that the holder under a defective title has made the improvements on the property in the honest belief that he is absolutely entitled thereto. In such circumstances the holder under a defective title has alternative rights against the person having a better title and demanding his eviction, to elect to do one of three things :—

- (a) Either to pay him the estimated value of the improvement at the time of eviction. or

S. 51

(b) To secure to him the estimated value of the improvement at the time of eviction, or

(c) To sell his (holder of the better title) interest to the holder of the defective title at the then market value thereof exclusive of the improvements.

Not opposed to Mahomedan Law.—The rule of equity embodied in this section is not opposed to any principle of Mahomedan Law and section 2 of the Transfer of Property Act, IV of 1882, does not preclude its application in cases decided under the Mahomedan Law (*p*).

Compensation for improvements in cases to which the Act does not apply.—The rule in the section was extended by the Privy Council to the Punjab where the Act is not in force. The respondent on the death of a Hindu widow brought a suit as next heir of the husband to set aside the alienation made by the widow in favour of the appellant, who resisted the respondent's claim, and in the alternative claiming the value of the improvements made by him to the property while in possession which included a temple (Rs. 2,700), a well (Rs. 300), an upper storey to the house (Rs. 2,500), and repairs to the house (Rs. 1,500). In setting aside the alienation, one of the questions which arose for determination in the appeal was the amount of allowances to be made as a condition of the respondent taking possession of the house and the compound, and on the issue to what extent had enhancement of the subject been produced, their Lordships agreed with the Chief Court in thinking that it had been produced to the extent of Rs. 1,400. No compensation was allowed for erection of the temple as it was doubtful whether the property as a marketable subject was enhanced in value thereby (*q*). The same principle applied even before the passing of the Transfer of Property Act (*r*). The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the Legislature. A *bona fide* purchaser of a house for value without notice of an existing simple mortgage and honestly believing in good faith that she was absolutely entitled to the house improved and re-built it at a considerable cost. On a suit by the mortgagee for sale of the house, held, that although section 51 did not in terms apply, yet the rule of equity upon which that section was based might very well be extended to the case and upon that basis the Court was justified in ordering the plaintiff to pay the costs of the improvement as a condition precedent to bring the mortgaged property to sale (*s*). In this case section 51 in terms did not apply, because the transferee was not a person evicted and the plaintiff as prior simple mortgagee was not a person having a better title.

The Mesne Profits and Improvements Act, XI of 1885.—This Act has been enacted to secure to *bona fide* holders under defective titles the value of improvements made by them in cases to which the English Law is applicable. Except for this difference, section 2 of this Act is similar to section 51 of the Transfer of Property Act. It is applicable to holders under defective title having a *bona fide* belief that they have an estate in fee simple or other absolute estate. These words do not occur in section 51 of the Transfer of Property Act, which, however, must be construed in the same way. Another difference between the two sections is that the right in section 2 is given to the person having a defective title "his heirs or assigns" which words do not occur in section 51.

(*p*) *Durgoji Row v. Fakeer Sahib* (1907) 30 Mad. 197.

(*q*) *Kidar Nath v. Mathumal* (1913) 40 Cal. 555 P. C.

(*r*) *In re Thakoor Chunder Pormansuk v. Ramdhome*, (1866) 6 W. R. 228.

(*s*) *Kalyan Das v. Jan Bibi* (1929) 51 All. 454.

Absolutely entitled.—The transferee who makes improvements must believe in good faith that he is the absolute owner of the property. Hence the section is inapplicable to those cases where the ownership falls short of being absolute and a limited owner cannot claim compensation for improvements made by him under this section. It has been observed that section 51 is based upon the principle "He who seeks equity must do equity" (t).

A lessee is not an absolute owner because a tenant could not possibly believe in good faith that he was absolutely entitled to the land (u). Therefore, for improvements made a lessee cannot claim compensation from the true owner on eviction (v). The main principle of the section is that a person must shew that he believed that he was entitled to the land in such a way that he is not to be disturbed, whether it is a sale or perpetual lease he claims under (w). The section is not restricted in its application to transferee for value and volunteers are included.

Limitation of interest.—This section does not protect transferees with limited interest, for example, as between landlord and tenant, mortgagor and mortgagee, transferee from a Hindu widow or other limited owner.

Alienee from a Hindu widow.—An alienee from a Hindu widow cannot be said to be a person believing in good faith that he is absolutely entitled to the property so as to bring himself within section 51. The Privy Council affirmed the decision of the Chief Court of the Punjab which allowed compensation to an alienee from a Hindu widow to the extent of Rs. 1,400 which represented half the expenditure made by the appellant on a well and upper storey of the house which had enhanced the market value of the property. The Transfer of Property Act is not applicable to the Punjab but the general principles were applied (x). This decision was referred to by the Bombay High Court in allowing costs of improvements to an alienee from a Hindu widow who remained in undisturbed possession for 16 years and the evidence shewed that the property was in a tumble-down and uninhabitable condition (y). In a redemption suit a mortgagee was allowed against his mortgagor reasonable and proper costs incurred in making lasting improvements (z). The decisions of both the Madras and Allahabad High Courts have been that alienees were disentitled to compensation because they had not made proper inquiries as to the power of the widow herself to alienate and consequently it was there held that they were not acting in good faith (a).

A Hindu died leaving two widows who divided the property of their husband between themselves for the sake of convenience. One of the widows sold the house which had fallen to her share. She then died and her co-widow sued to recover possession of the house. Held that the purchaser was not entitled to refund of money spent on improvements (b), nor was a transferee from a Hindu widow in a suit by the reversioner to set aside the transfer so entitled (c). The onus is on the alienee to prove the existence of circumstances justifying sale by a limited owner (d). But a gift by a Hindu widow is good against all the world until the reversion

(t) *Kalyan Das v. Jan Bibi* (1929) 51 All. 454.
 (u) *Narasayya v. Raja of Venkatagiri* (1914) 37 Mad. 1, *Ismail Khan v. Jaigun Bibi* (1900) 27 Cal. 570.
 (v) *Nundo Kumar v. Banomali* (1902) 29 Cal. 871.
 (w) *Subba Rao v. Veeranjanyaswami*, A. I. R. (1930) Mad. 298.
 (x) *Kidar Nath v. Mathumal* (1913) 40 Cal. 555. (P. C.).
 (y) *Gangadhar v. Rachappa* (1929) 31 Bom. L. R.

(z) *Nijalingappa v. Chanbasawa* (1919) 43 Bom. 69.
 (a) *Nanjappa Gounden v. Peruma Gounden* (1909) 32 Mad. 530; *Hans Raj v. Musammal Somni* (1922) 44 All. 665; *Rajrup Kunwar v. Gopi* (1925) 47 All. 430.
 (b) *Hans Raj v. Musammal Somni* (1922) 44 All. 665; *Nandi v. Sarup Lal* (1917) 39 All. 463.
 (c) *Jogeshwar v. Janki*, A. I. R. (1926) Nag. 384.
 (d) *Suleman v. P. Venkatraju*, A. I. R. (1925) Mad. 670.

S. 51 falls in, and even then it is liable to be questioned by the actual reversioners. Only when so questioned, if the attack is successful the interest terminates (e). The Privy Council affirmed the above decree of the High Court giving the transferee who had effected improvements, believing in good faith that he was owner, the alternative rights mentioned in the section and in respect of improvements effected at a later date at which he had not proved that he so believed, liberty to remove the materials subject to conditions (f).

Lessees.—A lessee cannot pretend that he believed in good faith that he had a permanent right to the property, and if he erects on the land let to him a building, he cannot claim compensation for it on eviction by the landlord. Such a claim to compensation is impliedly negatived by his right to remove such buildings—a right not only established by judicial decisions but also enacted by the Legislature in clauses (h) and (p) of section 108 of the Transfer of Property Act, IV of 1882 (g), nor is the rule different merely because he acted under a mistaken belief shared by his landlord that he had a larger interest (a lease of 999 years) than he really had (one from year to year) (h). But permanent leases have received a more liberal judicial interpretation. In such cases there would be a tendency to lead to a breach of contract and would be little short of direct fraud on the part of the landlord if he were allowed to evict the tenant without compensation (i). In case of debutter lands trustees are not competent to grant permanent leases and a transferee from a tenant who *bona fide* believed himself to be entitled to occupancy rights is not entitled to compensation for improvements on ejection by the landlord (j), but a tenant will be entitled to compensation for buildings on eviction if he proves that the landlord encouraged him to erect permanent buildings (k), for under section 108 (p) of this Act he is restricted from erecting permanent structures on the property leased and if he does so his remedy is under section 108 (h) of the Act.

Mortgagee.—A mortgage confers no authority on a mortgagee to rebuild the property so as to bind the mortgagor against his will. A Hindu widow inherited a shop from her son and mortgaged it without any legal necessity. The property was then destroyed by floods and the mortgagees rebuilt it with their own money. In a suit by the reversioner for possession of the property free from all encumbrances, it was held that no equity arose in their favour as against the reversioner who was entitled to recover it in a condition in which it was when the widow died (l). A mortgagee cannot be said to be a person believing in good faith that he is absolutely entitled to the property within the meaning of the section. But the decisions on this subject are conflicting. The rights of a mortgagee in possession making improvements to the mortgaged property are now governed by section 63A of the Transfer of Property Act, IV of 1882. A mortgagee in possession can claim for

(e) *Rama Aiyar v. Narayansami Aiyar*, A. I. R. (1926) Mad. 609.

(f) *Narayanawami Ayyar v. Rama Ayyar* (1930) 53 Mad. 692. 57 I. A. 305.

(g) *Ismat Kani v. Nazarali* (1904) 27 Mad 212; (lease for 20 years); *Shaik Husain v. Govardhandas* (1896) 20 Bom. 1 (yearly tenancy); *Venkatavaragappa v. Thirumalai* (1887) 10 Mad. 112 (lease from year to year); *Narayan v. Daji* (1899) 1 Bom. L. R. 191; *Nundo Kumar v. Banomali* (1902) 29 Cal. 871 (permanent lease granted under a prior subsisting lease of the same nature); *Ismail Khan v. Jaigun Bibi* (1900) 27 Cal. 570, (lease by *mutwali* in excess of his powers); *Narasayya v.*

Rajah of Venkatagiri (1914) 37 Mad. 1; *Naunihal v. Rameshar* (1894) 16 All. 328.

(h) *Jugmohan v. Pallonjee* (1898) 22 Bom. 1, (lease from year to year).

(i) *Yeshwadabai v. Ramchandra* (1894) 18 Bom. 66, (Jazandari tenure); *Subba Rao v. Vceranjaneyaswami*, A. I. R. (1930) Mad. 298; *Har Narain v. Sidh Nath*, A. I. R. (1937) Oudh 75; *Pandit Har Narain v. Pandit Sidh Nath* (1937) 12 Luck. 133.

(j) *Naina Pillai v. Ramanathan* (1917) 33 M. L. J. 84.

(k) *Thavasi Ammal v. Salai Ammal* (1918) 35 M. L. J. 281.

(l) *Vrijbhukandas v. Dayaram* (1908) 32 Bom. 32.

items which would fall within section 72 of that Act but not items which would amount to an addition or improvement to the mortgaged property (*m*).

S. 51

A certificated guardian of a minor executed, without permission of the Judge, a usufructuary mortgage of the minor's property. New constructions were made at a cost several times the value of the original property. The minor on attaining majority, had the mortgage declared void, and sought to recover possession. It was held that the principle underlying section 51 could not be extended to the case of a mortgagee (*n*). In a redemption suit the claim of a purchaser from the assignees of the original mortgagee for improvements was disallowed on the ground that from the terms of his conveyance he could not have believed that he was absolutely entitled to the property and that he had a perfect title (*o*). But a mortgagee in possession who has brought the land to sale in execution of his decree cannot recover from the execution purchaser the value of the standing crops. There the right to standing crops was not expressly reserved at the sale or by the sale notice and the ordinary rule that the right to growing crops will pass by sale of land without express mention, applied (*p*).

As regards a mortgagee by conditional sale he cannot acquire a title to the property without going through certain formalities. If, therefore, he assumes, on the expiry of the term of the mortgage, that he has become the absolute owner of the property, it cannot be said that he believed in good faith that he was absolutely entitled to the property within section 51 (*q*). In a combination of simple and usufructuary mortgage a condition converting the mortgage into a sale in the event of the loan not being repaid by a fixed date is a clog on the equity of redemption and improvements effected by a mortgagee honestly believing that he was entitled to the property should be compensated on eviction (*r*).

Reliance was placed on the section on behalf of a mortgagee where the right of a mortgagor of a certain immoveable property was vested in three brothers, members of a joint Hindu family, of whom two passed an agreement to sell the entire property to the mortgagee who was in possession as mortgagee. The third brother who was not a party to the agreement sued to redeem the entire mortgage. It was held that the mortgagee's claim for improvements failed for he had notice of the existence of the third co-sharer so that it could not be said that he believed in good faith to be entitled to the whole (*s*). But when a mortgagee was misled by an order of the Court into believing that he was absolute owner, relief was granted (*t*). A mortgagor in possession was held to have no attachable interest in the crops cut and stored by his tenants upon a sale by the mortgagee through the Court after efflux of time allowed to redeem, on the ground that his position was that of a person acquainted with the imperfection of his title. This was before the Transfer of Property Act was passed (*u*). The option rests with the mortgagor as to whether he will pay the value of the improvements or sell his interest to the transferee (*v*). This view was the one adopted by the majority of the Full Bench in *Ramanathan v. Ranganathan* (*w*).

- (*m*) *Rupan Singh v. Champa Lal* (1915) 37 All. 81.
 (*n*) *Bechu v. Bhabhuti Prasad* (1930) 52 All. 831.
 (*o*) *Parashar v. Ganu* (1903) 5 Bom. L. R. 643.
 (*p*) *Ramalinga v. Samiappa* (1890) 13 Mad. 15.
 (*q*) *Gopi Lal v. Abdul Hamid*, A. I. R. (1928) All. 381.
 (*r*) *Pandiyan Pillai v. Vellayappa* (1917) 33 M. L. J. 316.
 (*s*) *Ramappa v. Yellappa* (1928) 52 Bom. 307;
Dnyanu v. Fakira (1921) 45 Bom. 1304;

- Nijalingappa v. Chanbasawa* (1918) 43 Bom. 69.
 (*t*) *Narayan v. Ganesh* (1926) 28 Bom. L. R. 993.
 (*u*) *Land Mortgage Bank of India, Ltd. v. Vishnu* (1878) 2 Bom. 670.
 (*v*) *Narayan v. Ganesh* (1926) 28 Bom. L. R. 993.
 (*w*) (1917) 40 Mad. 1134; overruled on another point by *Vizagapatam Sugar Development Co. v. Mathuramarreddi* 1924) 46 Mad. 919.

S. 51

Belief in validity of title.—In order to claim compensation for improvements made on the property of a holder under a defective title it is necessary for him to prove that he believed in good faith that he was absolutely entitled thereto. The expression “in good faith” is not defined in the Act, but it appears to be used merely as an equivalent for “honesty.” The definition of the term in the General Clauses Act, 1897, is no innovation, but merely follows the wording in the Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61, s.90), and the Sale of Goods Act, 1893 (56 and 57 Vict., c. 71, s.62). Under the General Clauses Act, section 3, clause 20, “a thing shall be deemed to be done in ‘good faith’ where it is in fact done honestly, whether it is done negligently or not.” According to the said section, however, this definition applies only to Acts made after the commencement of the General Clauses Act, X of 1897. The Transfer of Property Act being an Act of prior date, this definition would not strictly apply, but its principles are nevertheless applicable. This question of good faith is a somewhat difficult question, and what constitutes good faith is a question of fact and must depend upon circumstances of each case. A person may act in good faith though he acts under a mistake of law (x). It is not incompatible with ignorance of law (y), nor is it incompatible with a certain degree of negligence which is a matter to be determined according to the circumstance of each case (z). A belief generally implies good faith. Acting honourably and fairly is not enough. There must be due inquiry, and so where a man consciously avoids inquiry he may still have a belief but it would not be in good faith (a). The words “believing in good faith that he is absolutely entitled thereto” mean a justified belief of having the full proprietary right. Cases of frequent occurrence are those of transfers from Hindu widows. A person who takes what purports to be a permanent lease from a Hindu widow and makes improvements on the property, is not entitled to compensation for those improvements, when on the death of the widow he is evicted by the reversioner. The transfer having been made by a Hindu widow, the section has no application. A person dealing with her would ordinarily know that she has only a life-interest and he can reasonably be expected to make inquiries as to the legal necessity for the widow to make a transfer (b). Good faith within the meaning of the section is not necessarily precluded by facts showing negligence in investigating the title. In fact, to hold that every default in investigating the title *ipso facto* makes section 51 inapplicable would be to exclude a very large class of cases from a rule which is based on obvious considerations of justice; but where a purchaser knows or must be presumed to know, which is the same thing, that under Hindu Law, the vendor could sell only under certain circumstances and he either knows that such circumstances do not exist or wilfully abstains from making any inquiries on the subject, the mere fact that he purchased for consideration will not suffice to shew good faith and he will not be entitled to claim compensation for improvements effected by him (c) even though the reversioner consented (d). Nor can a trespasser (e) nor an assignee from him (f) be said to have an

(x) *Durgoji Row v. Fakcer Sahib* (1907) 30 Mad. 197.

(y) *Rama Aiyar v. Narayanasami*, A. I. R. (1926) Mad. 609; *Harilal v. Gordhan* (1927) 51 Bom. 1040.

(z) *Rama Aiyar v. Narayanasami*, A. I. R. (1926) Mad. 609; *Nanjappa v. Perumal Goundan* (1909) 32 Mad. 530; *Collier v. Baron* (1906) 2 Nag. 34.

(a) *Abhoy Churn v. Attarmoni Dassee* (1909) 13 C. W. N. 931.

(b) *Rajrup Kunwar v. Gopi* (1925) 47 All. 430; *Hans Raj v. Musammal Somni* (1922) 44 All. 665.

(c) *Nanjappa v. Perumal Goundan* (1909) 32 Mad. 530.

(d) *Suleman v. P. Venkatraju*, A. I. R. (1925) Mad. 670.

(e) *Secretary of State v. Dugappa*, A. I. R. (1926) Mad. 921.

(f) *Thomas Souza v. Gulam Moidin* (1903) 13 M. L. J. 214.

honest belief in his title as absolute owner. But a purchaser either from a Mahomedan mother acting as *de facto* guardian for her minor son (*g*) or from a separated uncle acting on behalf of a minor nephew (*h*) is a transferee who believes in good faith that he is absolutely entitled to the property. So where a grantee of land under the order of the tahsildar (the original grant and registry by whom is only conditional) (*i*) paid the assessment and effected improvements in ignorance of an adverse order in appeal, was considered to be a *bona fide* holder within the meaning of the section (*j*). As also an alienee whose alienation had not been questioned for 30 years (*k*). But a person in wrongful possession cannot claim benefit of the section (*l*). In 1906 a Hindu widow sold property belonging to her husband; and in 1910 adopted a son who was a major. The property having been in a tumble-down and uninhabitable condition, the purchasers spent, in 1918, a sum of Rs. 4,000 in rebuilding the main doors and walls, and building two new rooms and a portion of the kitchen. The adopted son having sued in 1922 to avoid the sale, the purchasers claimed Rs. 4,000 for improvements. Held, that the purchasers having in 1918 believed in good faith that they were absolutely entitled to the property, had satisfied and brought themselves within section 51 of the Transfer of Property Act, 1882, and were entitled to claim Rs. 4,000 for improvements (*m*). A right to claim compensation under such circumstances was recognized in this country prior to the passing of the Transfer of Property Act (*n*).

And a purchaser, believing that he had obtained a good title, rebuilt the house which was in a state of ruin and subsequently it was found that he could make out a title only to a share as the house was joint family property, was awarded compensation for improvements made subject to a set-off for his use and occupation of the shares of the other co-tenants (*o*). Plaintiff and defendant by an unregistered deed exchanged lands and the latter erected buildings; the plaintiff lay by and acquiesced. Defendant was given compensation consequent on a decree for possession against him (*p*).

Who is not a transferee within the section.—The following are not entitled to the benefit of this section:—

(1) A son governed by the Dayabhaga Law who has made improvements and substantial additions to ancestral buildings standing on ancestral lands belonging to his father, the plaintiff (*q*).

(2) Transferee with limited interest as a lessee or mortgagee.

(3) A person having notice that the property on which he had made improvements was alleged to be *wakf* (*r*), or was subject to a puisne mortgage, he being purchaser at a sale in execution of a decree on a prior hypothecation bond (*s*).

(g) *Durgosi Row v. Fakeer Sahib* (1907) 30 Mad. 197.

(h) *Harilal v. Gordhan* (1927) 51 Bom. 1040.

(i) *Muthuveera v. The Secretary of State for India* (1907) 30 Mad. 270.

(j) *Chennapragada v. Secretary of State*, A. I. R. (1925) Mad. 963.

(k) *Rama Aiyar v. Narayanasami*, A. I. R. (1926) Mad. 609, on appeal to the Privy Council 53 Mad. 692, 57 I. A. 305.

(l) *Murlidhar v. Parmanand* (1932) 34 Bom. L. R. 164.

(m) *Gangadhar v. Rachappa* (1929) 31 Bom. 453.

(n) *In re Thakoor Chunder Pormanick v. Ramdhone*, 6 W. R. 228.

(o) *Shiam Lal v. Radha Ballabh*, A. I. R. (1925) All. 770.

(p) *Kamathathan v. Ramaswami* (1916) 30 M. L. J. 1.

(q) *Dharma Das v. Amulyadhan* (1906) 33 Cal. 1119.

(r) *Manohari v. Muhammad Ismail* (1911) 33 All. 752.

(s) *Rangayya v. Parthasarathi* (1897) 20 Mad. 120.

S. 51

(4) A purchaser from a Hindu widow when there was no legal necessity for the sale (*t*). A mortgagee from a Hindu widow is not a transferee in good faith (*u*).

(5) A trespasser or an assignee from him cannot be said to have an honest belief that he was absolute owner so as to entitle him to claim improvements made (*v*). Compensation in such a case is to allow a trespasser to purchase another man's property against his will. Injunction, not damages, is the owner's proper remedy (*w*). A trespasser is not entitled to retain possession or to compel the owner to receive compensation for the land (*x*).

(6) A stranger who builds on another's land, believing it to be his own, is in the absence of estoppel or acquiescence on the part of the true owner bound to remove his building (*y*).

(7) A subsequent purchaser with notice of a prior contract is not entitled to compensation for improvements made, for the position of such a purchaser is not better than of the vendor himself, for it is clear that if he the latter make permanent improvements the purchaser is entitled to the benefit thereof without further payment (*z*).

(8) A transferee after commencement of litigation in which the title is agitated (*a*).

(9) A donee from a Hindu widow with limited interest (*b*).

(10) A transferee from a tenant who *bona fide* believed himself to be entitled to occupancy rights therein is not entitled to compensation for improvement on ejectment by the landlord (*c*).

(11) An auction purchaser at a sale held under the first mortgagee's decree to which the subsequent mortgagee was not a party (*d*).

Transferor as evictor.—The section is not restricted in its application to cases where the transferor is not the evictor. Hence a transferee from a separated uncle of a Hindu minor who has never intermeddled or acted as guardian and who has made improvements on the property, believing in good faith that he is absolutely entitled thereto, is entitled to the benefit of the section (*e*). So also a purchaser from a Mahomedan mother purporting to act as a *de facto* guardian of her minor son (*f*).

Option.—Under the section the right to make election is with the person having the better title (*g*). But where a Hindu father both on his account and as guardian of his son executed a sale of the joint family property and the transferee

- (*t*) *Nandi v. Sarup Lal* (1917) 39 All. 463
Suleman v. Perichevla, A. I. R. (1925)
 Mad. 670; *Nanjappa v. Peruma* (1909)
 32 Mad. 530; *Jogeshwar v. Janki Bai*,
 A. I. R. (1926) Nag. 384; *Raj Kishore v.*
Jaint Singh (1914) 36 All. 387; *Hans*
Raj v. Musammat Somni (1922) 44 All
 665; *Kanderpa v. Jogendra Nath* (1910)
 12 C. L. J. 391.
 (*u*) *Hans Raj v. Musammat Somni* (1922) 44
 All. 665.
 (*v*) *Secretary of State v. Dugappa*, A. I. R. (1926)
 Mad. 921; *Munna v. Suklal*, A. I. R.
 (1924) Nag. 142; *Creet v. Gangaraj*
Gulraj (1937) 1 Cal. 203; *Khillu Ram v.*
Mst. Dhani Bai (1937) Lah. 350.
 (*w*) *Jethalal v. Lalbhai* (1904) 28 Bom. 298.
 (*x*) *Ganga Din v. Jagat Tewari* (1914) 12 A. L. J.
 1026.
 (*y*) *Govind Venkaji v. Sadashiv Bharna* (1892)
 17 Bom 771; *Premji v. Haji Cassum* (1895)

- 20 Bom. 298.
 (*z*) *Haradhan v. Bhagabati* (1914) 41 Cal. 852.
 (*a*) *Narayanasicami v. Rama Aiyar* (1930) 53
 Mad. 692, 57 I. A. 305.
 (*b*) *Jogeshwar v. Janki Bai*, A. I. R. (1926) Nag.
 384.
 (*c*) *Naiua Pillai v. Ramanathan* (1917) 33 M. L. J.
 84.
 (*d*) *Nannu Mal v. Ram Chander*, A. I. R. (1931)
 All. 772.
 (*e*) *Harilal v. Gordhan* (1927) 51 Bom. 1040.
 (*f*) *Durgazi Row v. Fakeer Sahib* (1907) 30 Mad.
 197.
 (*g*) *Ramanathan v. Ranganathan* (1917) 40 Mad.
 1134 overruled by *Vizagapatam Sugar*
Development Co. v. Mathuramarreddi (1924)
 46 Mad. 919 on another point; *Narayan v.*
Ganesh (1926) 28 Bom. L. R. 993; *Rama*
Aiyar v. Narayanasami, A. I. R. (1926.),
 Mad. 609; confirmed in (1930) 53 Mad.
 692, 57 I. A. 305.

spent a considerable amount for the improvement and the plaintiff's circumstances were too poor to permit of any purchase by him of the improved property, the Court without giving an option to the plaintiff to recover the property by payment of compensation, required the plaintiff to sell his interest in the property to the transferee (h). This does not seem to be a correct view of the section.

Then.—This word occurring in para 1 of the section means at the time of eviction.

Lien.—The section confers no lien in favour of the transferee for value of improvements made on immoveable property. There can be no lien which is peculiar to moveables (i).

Amount how and when fixed.—The amount to be paid for compensation for improvement is to be fixed at the time of eviction. In the event of the person having a better title desiring to retain the property for himself, he must pay to or secure the person having a defective title the estimated value of the improvements, while if he desires to sell his interest to the transferee the latter must pay the then market value thereof irrespective of the value of such improvement.

Court sale.—Section 51 is inapplicable to a purchaser at a Court sale. There is no covenant for title implied in a Court sale and the purchaser takes only the right title and interest of the judgment-debtor. But a purchaser in a Court auction who is not party to the decree is entitled to the value of the improvements *bona fide* effected by him on being evicted from the property owing to some defect or irregularity in the proceedings leading up to the sale. The time of his making improvements is immaterial, provided he had then an honest belief in the validity of his title. *Bona fide* in this connection means only honest belief in the validity of his title and does not extend to the necessity of making proper inquiries as to the title and regularity of the prior proceedings (j).

Defective title.—This phrase, used in the marginal note, is misleading. A title is usually said to be defective when it is not marketable. It is not used here in the sense of not marketable. An absolute owner may possess a defective title in the sense that it is not marketable. What the phrase here means is that the person who holds the property is not the absolute owner.

Defective title would include absolute want of title.—Defendant purchased at an auction a plot of land and obtained possession of two acres and odd more than what he had purchased. Without being conscious of the mistake and after he made improvements on the whole land, the plaintiff, finding that the defendant had in his possession more lands than were actually sold to him, sought to eject him from the excess land. It was held that section 51 applied because the defendant was a transferee of the property as a whole and believed in good faith that he was absolutely entitled to the whole property and had made improvements *bona fide* on the property (k).

Invalid transfer.—A majority of the Full Bench of the Madras High Court on Letters Patent appeal held that the word "transferee" in section 51 of the Transfer of Property Act includes a transferee under an invalid transfer and the words "the person causing the eviction" include a transferor under an invalid transfer (l).

(h) *Lachmi Prasad v. Lachmi Narain*, A. I. R. (1928) All. 41.

(i) *Dharma Das v. Amulyadhan* (1906) 33 Cal. 1119, 1130.

(j) *Moitheensa v. Apsa Bivi* (1913) 36 Mad. 194.

(k) *Natesa Thevan v. District Board Tanjore*, A. I. R. (1926) Mad. 314.

(l) *Ramanathan v. Ranganathan* (1917) 40 Mad. 1135, overruled by a later Full Bench (1924) 46 Mad. 919 on another point.

S. 51

A Hindu testator gave certain properties to his mother for maintenance with power of alienation. The property was subject to a mortgage created by the testator. The mother gifted the property to the nephew who sold the property to discharge the decree of the mortgagee obtained against the mother, widow and nephew. Held, neither the mother nor nephew had a right to convey and the sale was set aside at the instance of the widow, the purchaser being allowed compensation for improvements made by him, he being an alienee in good faith (m).

Defeasible title.—A defeasible title is not the same thing as a defective title and section 51 applies only to defective and not to defeasible transfers. If the vendor's estate is defeasible the transferee's title is bad. Following are some instances:—

- (a) A power of entry exercisable by a stranger in the event of a breach of covenant, unless void for remoteness. (*Dunn v. Flood* (1884) 25 Ch. D. 629.)
- (b) A transfer of property subject to a right of pre-emption vested in a stranger or co-owner.
- (c) When the transferee held under a settlement void against creditors.
- (d) When the transfer was made with intent to defeat or delay creditors.
- (e) Unless void for remoteness, a power of appointment vested in a stranger.
- (f) A transfer of immoveable property to a third person for the benefit of creditors generally.
- (g) A voluntary transfer followed by the settlor's bankruptcy within two years except as to any interest obtained by a purchaser for value without notice.
- (h) A transfer of property in favour of a creditor with a view to giving that creditor preference over other creditors followed by the transferee's insolvency within three months after the date thereof except as to person making title in good faith and for valuable consideration through or under a creditor of the insolvent.
- (i) An option to purchase renders the title defeasible unless void for remoteness.
- (j) A sale or mortgage on behalf of a minor by a *de facto* guardian and without an order of the Court.
- (k) A certificated guardian of a minor executed, without permission of the Judge, a usufructuary mortgage.

It was held that section 51 could not be invoked by the mortgagee who could not have believed in good faith that he was "absolutely entitled" thereto (n).

Holder under defective title how long entitled to remain in possession.—He is bound to deliver possession on his title being found to be defective by a decree of the Court. Even if the improvements were effected under circumstances which entitle him to their value and to a lien upon the land, it does not follow that he is entitled to remain in possession until he has been reimbursed (o).

Equitable estoppel.—Closely resembling yet materially differing from the principle enunciated in the section is the subject of equitable estoppel or estoppel by acquiescence barring the assertion of a legal right against the owner on eviction

(m) *Nanjamma v. Nacharammal* (1907) 17 M. L. J. 622.

(n) *Bechu v. Bhabhuti Prasad* (1930) 52 All. 831.

(o) *Dharma Das v. Amulyadhan* (1906) 33 Cal. 1119.

of the holder of the defective title without compensation. Where both the parties are equally conversant with the true state of facts this doctrine is inapplicable (p). On this doctrine the Privy Council observed in a Canadian case (q). "Whether there can be any estoppel which is equitable as distinct from legal and whether 'equitable estoppel' is an accurate phrase, their Lordships do not pause to inquire. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying." While awaiting judicial interpretation, it may be permitted to point out that that phrase has been used in numerous authorities, both English and Indian, as synonymous with "acquiescence" or "equitable acquiescence" and as comprised in the subject treated in English Law as *estoppel in pais*. It has been observed in this country that "it must distinctly be kept in view that cases founded upon the equitable rule of estoppel are beyond the purview of section 51 of the Transfer of Property Act" (r).

In a case decided by the House of Lords in 1866, *Ramsden v. Dyson* (s), the Lord Chancellor (Lord Cranworth) stated what the principles of equity on the subject were. He said (page 140): "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by mistake which I might have prevented." Lord Kingsdown said (p. 170): "If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, take possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord or without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (t) and as I conceive, is open to no doubt." Then, after stating that there has been a difference of opinion among great Judges as to the nature of the relief to be granted, he says: "But I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant."

In that case the doctrine of equitable acquiescence was considered and it was held not to apply to the case of a tenant who, with a knowledge of the extent of his own rights, did an act which was at variance with and in excess of those rights. The principle upon which the doctrine of acquiescence is based is that a man who acts in such a way as would make it fraudulent for him to set up his legal rights will be deprived of those rights. But where his acquiescence or other conduct does not amount to a fraud, actual or constructive, he cannot be deprived of his legal rights.

(p) *Ranchodlal v. The Secretary of State for India* (1911) 35 Bom. 182.

(q) *Canadian Pacific Railway v. The King* A. I. R. (1932) P. C. 108.

(r) *Kalyan Das v. Jan Bibi* (1929) 51 All. 454.

(s) (1866) L. R., 1 H. L. 129.

(t) (1811) 18 Ves. 328, 34 E. R. 341.

S. 51 The elements or requisites necessary to constitute fraud of that description were laid down by Fry, J., in *Willmott v. Barber* (u) in the following terms:—

- (1) The plaintiff must have made a mistake as to his legal rights.
- (2) The plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief.
- (3) The defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff.
- (4) The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights.
- (5) The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal rights.

“Where all these elements exist there is a fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment nothing short of this will do.” He adhered to this view in a later case (v). Upon the authority of that case it must be held that mere silence or even acquiescence on the part of a person possessing a legal right will not deprive him of that right unless all the above elements of fraud exist. This appears no doubt to be the law in England. But it will be observed that to raise such an equity, two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. The law as laid down in section 51 of the Transfer of Property Act does not in all respects follow the law of England.

In India the leading case on the subject is *Beni Ram v. Kundan Lal* (w). There was a lease given in 1858 of six bighas of land for a term of years (ending with the then current revenue settlement of the *mouzah* in which the land leased was situate) for the construction thereon of a saltpetre factory. During the term of the lease, the tenant, after the completion of the factory, and, in fact, after it had ceased to exist, erected houses on the land, at a considerable cost, with the knowledge of and without any interference or objection on the part of the landlord. A suit in ejectment brought after the termination of the lease, was dismissed by the Indian Courts (including the High Court on second appeal) on the ground that the landlord stood by and acquiesced in the erection of the permanent structures. On appeal (by special leave) their Lordships of the Privy Council, in reversing the decree of the Courts below and passing a decree in ejectment, with liberty to the tenant to remove the houses built on the land, observed that “in order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.”

(u) (1880) 15 Ch. D. 96.
(v) *Russell v. Watts* (1884) 25 Ch. D. 559, 585.

(w) (1899) 21 All. 496, 26 I. A. 58.

They further drew attention to the fact that the maxim of the English Law "*quicquid inædificatur solo solo cedit*" has no application in India and that the established rule is that the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth, provided he leaves the property in the state in which he received it; implying thereby that there is thus in India even less reason than in England, for raising a plea of equitable estoppel against the landlord in the case of a lease for a term of years. This subject is outside the operation of the section but further reference may be made to the undermentioned cases (x).

What are improvements.—The improvement must be one which would raise the value of the property permanently (y). Ordinary repairs such as putting up a staircase (z) is not an improvement within the meaning of the section. But where an uninhabitable house was very largely rebuilt, costs claimed by the purchasers as improvements in rebuilding the main doors and walls and building two new rooms and a portion of the kitchen were allowed (a). The amount of expenditure made had occasionally very little to do with the real issue,—to what extent has enhancement of the subject been produced (b). The amount payable is not what was actually spent at the time of effecting improvements but the increased value of the property at the time the estimate is made (c). The rule in para 2 of the section is that the amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. While in the event of the transferee purchasing the interest of the evictor he must pay the then market value of that interest irrespective of the value of such improvement. So that sale is to be at market value, payment or security at estimated value. In either case, the valuation to be made at the time of eviction.

Severance of improvements effected in good faith from those not proved to be so effected.—Such a question arose before the Madras High Court where the alienation was not questioned for 30 years and the transferee in an honest belief in his title effected improvements but when at the end of 30 years the title was questioned by suit, he still made some improvements. On the question of compensation it was decided that a certain sum be paid to him for improvements prior to a date named which were effected in good faith that he was the owner, but that as regards improvements effected at a later date, at which he had not proved that he so believed, liberty was given to remove the materials subject to conditions, namely, that if the portion so built could be definitely ascertained the transferee be allowed to remove the materials therefrom in the presence of an officer of the Court and of the plaintiff or his son so as not to cause any diminution in the value of the remainder of the building, the removal to be carried out within one month of

(x) *Krishna v. Mir Mahomed Ali* (1897) 3 C. W. N. 255; *Ahmad Yar Khan v. The Secretary of State for India in Council* (1901) 28 Cal. 693, 28 I. A. 211; *Nundo Kumar v. Banomali* (1902) 29 Cal. 871; *Ali Kazemini v. Manik Chandra* (1923) 27 C. W. N. 969, *Dattatraya v. Shridhar* (1893) 17 Bom. 736; *Yeshwada Bibi v. Ramchandra* (1894) 18 Bom. 166; *The Municipal Corporation of the City of Bombay v. The Secretary of State for India in Council* (1905) 29 Bom. 580; *Ramchandra v. Vishnu* (1920) 22 Bom. L. R. 948; *Kun Muhammad v. Narayanan* (1889) 12 Mad. 320; *Narasayya v. Raja of Venkatagiri* (1914) 37 Mad. 1; *Angammal v. Aslami Sahib* (1915) 38 Mad. 710; *Natesa v. Dis-*

trict Board of Tanjore, A. I. R. (1926) Mad. 314; *Durgar Sing v. Naurang* (1895) 17 All. 282; *Muhammed v. Maru* (1908) 6 A. L. J. 57.

(y) *Sidramappa v. Shidappa* (1929) 31 Bom. L. R. 461.

(z) *Sidramappa v. Shidappa* (1929) 31 Bom. L. R. 461.

(a) *Gangadhar v. Rachappa* (1929) 31 Bom. L. R. 453.

(b) *Kidar Nath v. Mathu Mal* (1913) 40 Cal. 555 (a case from the Punjab where the Act does not apply).

(c) *Kama Aiyar v. Narayansami*, A. I. R. (1926) Mad. 609, confirmed in (1930) 53 Mad. 692, 57 I. A. 305.

S. 51 ascertainment by the Court whether this part of the building could be satisfactorily identified (*d*).

Improvements disregarded.—When the owner of the better title sells his interest in the property to the transferee improvements made by the person with a defective title are not to be taken into consideration.

Improvement secured.—In the event of the person with a better title requiring the eviction of the holder of the defective title he has to secure the improvements made by the latter but the section is silent as to the form the security should take and for how long the amount secured is to remain unpaid, nor is it stated what interest the person with the better title is liable to pay on the amount secured.

Revaluation in execution proceedings.—Where a sum was fixed as value of improvements made by the mortgagee which between the passing and the execution of the decree had increased in value, the Court held that under the altered circumstances the mortgagee was entitled to a revaluation in execution proceedings (*e*). The same principle was applied in favour of the mortgagor when the improvements diminished in value within the period fixed for redemption (*f*).

Injunction.—Where improvements are effected by a person under circumstances which entitle him to their value it does not follow that he is entitled to remain in possession until he has been reimbursed (*g*).

Removal of materials.—The section is silent as to whether the holder of the defective title who is not entitled to any relief under the section can remove the materials utilized by him in effecting improvements. The principle enunciated in the section is an exception to the maxim, "*quicquid plantator solo solo cedit*," and unless the equitable grounds mentioned in the section are made out the moment the improvements are made they belong to the owner of the land by operation of law (*h*). In Rangoon the right of removal has been denied on the ground that it would render the provisions of section 51 nugatory (*i*). In Allahabad, however, the Court granted a mortgagee from a Hindu widow three months' time for removing the materials of the house constructed by him (*j*). A similar view was adopted by the Madras High Court in a case which went up to the Privy Council. There liberty was given to remove the materials subject to certain conditions (*k*). Notwithstanding section 51 a lessee has a right to remove materials in certain circumstances under section 108, clause (*h*) of the Transfer of Property Act, IV of 1882, which debars him from erecting permanent structures on the land leased under section 108 (*p*).

"Lis pendens."—Improvements effected by a transferee pending a suit wherein the property is in question cannot be said to have been made by him in the *bona fide* belief that he is absolutely entitled to the property (*l*). Nor is a party who is put into possession under a decree of the Court which is subsequently reversed entitled to costs of improvements effected while in possession (*m*). The rule laid

(*d*) *Rama Aiyar v. Narayanasami*, A. I. R. (1926) Mad. 609, which was confirmed in (1930) 53 Mad. 692, 57 I. A. 305.
 (*e*) *Ramunni v. Shanker* (1887) 10 Mad. 367.
 (*f*) *Krishna v. Srinivasa* (1897) 20 Mad. 124.
 (*g*) *Dharma Das v. Amulyadhan* (1906) 33 Cal. 1119, 1130; *Jethalal v. Lalbhai* (1904) 28 Bom. 298.
 (*h*) *Maung Aung Ba v. Ma Nyun*, A. I. R. (1928) Rang. 141; *Dharma Das v. Amulyadhan* (1906) 33 Cal. 1119.

(*i*) *Maung Aung Ba v. Ma Nyun*, A. I. R. (1928) Rang. 141.
 (*j*) *Bechu v. Bhabhuti Prasad* (1930) 52 All. 831; *Hans Raj v. Musammal Somni* (1922) 44 All. 665.
 (*k*) *Narayanswami Aiyar v. Rama Aiyar* (1930) 53 Mad. 692, 57 I. A. 305.
 (*l*) *Narayanaramy Ayyar v. Rama Ayyar* (1930) 53 Mad. 692, 57 I. A. 305.
 (*m*) *Velusami v. Bommachi Naicker* (1913) 25 M. L. J. 324.

down in *Mathumsa Rowthan v. Apsa Bin* (n) as to an auction purchaser who is not a party to the suit being entitled to compensation for improvements when he is subsequently ousted from possession on account of the sale being set aside is not applicable to a party to a litigation making improvements during the progress of the contest.

Vendor purchaser.—If there be a treaty for the purchase of land and there be disagreement as to terms and the intended purchaser nevertheless expends money upon it, the vendor is not estopped by acquiescence (o). Where a purchaser *bona fide* takes possession of more land than that purchased and makes improvements on the excess land he is entitled to compensation on eviction (p).

Costs.—The section does not state—

(i) who is to pay the costs of estimating the value of the improvements and what is to happen in case a difference arises between the valuers employed by the rival parties,

(ii) who is to pay the costs of preparation, stamp and registration of the mortgage or other security to be executed by the holder of the better title,

(iii) who is to pay the costs of the preparation, stamp and registration of the conveyance on a sale of the interest of the holder of the better title to the transferee.

As to (i), it seems that the costs should be shared by both the parties if a common valuer be employed or that each party should bear his own costs where separate valuers are engaged. In case of difference the parties must stipulate for a reference to an umpire.

As to (ii), both on principle and in practice the person giving the security must pay all costs. Stamp duty is payable by him under section 29 (a) of the Stamp Act, II of 1899.

As to (iii), costs of preparation of a conveyance is usually borne by the purchaser, including registration and stamp duty which latter is payable by him under section 29 (a) of the Indian Stamp Act, II of 1899.

Crops planted or sown on the property.—As to crops, the section declares that he is entitled to gather and carry them and for that purpose to free egress and ingress. He cannot defer delivery on this ground. The section deals with crops which are growing and not with crops which have grown and are ready for being cut. It therefore becomes necessary to consider such a transferee's rights to adopt measures to protect the crops before they are grown and ready to be cut. The section is silent on the subject. Presumably he is entitled to take steps to protect the crops before they are ready to be cut. But he is not entitled to resist possession until the crops he has sown are cut. The rule in para 3 creates no bar to eviction in such a case but only lays down that the transferee is entitled to the crops sown by him and to free ingress and egress to gather and carry them (q). The section deals with immoveable property which according to section 3 of this Act does not include growing crops. Although under this section a lessee as being a person not believing in good faith that he is absolutely entitled to the property, cannot take advantage of the rule in para 3, nevertheless such a right is recognized when a lease of uncertain duration determines by any means except the fault of the lessee under section 108 (i) of the Transfer of Property Act. But a mortgagee

(n) (1911) 21 M. L. J. 969
(o) *Meynell v. Surtees* (1855) 25 L. J. Ch. 257,
65 E. R. 581.

(p) *Natesa Thevan v. District Board of Tanjore*,
A. I. R. (1926) Mad. 313
(q) *Deo Dal v. Ram Autar* (1886) 8 All. 502.

Ss. 51-52

in possession who has brought the land to sale in execution of his decree cannot recover from the execution purchaser the value of standing crops (*r*). Nor has a mortgagor an attachable interest in the crops cut and stored by his tenants upon a sale by the mortgagee through the Court after expiration of the time allowed to him to redeem, for he is in no better position than a person acquainted with the imperfection of his title (*s*).

Similarly, a purchaser of the crops from a trespasser is not entitled in law or in equity to an order deferring the handing over of the land to the decree-holder until the growing crops have been gathered (*t*).

52. During the *pendency* in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council of *any* suit or proceeding *which is not collusive and* in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property
pending suit relating
thereto.

EXPLANATION.—*For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become obtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.*

Immoveable property cannot be transferred or otherwise dealt with :

- (i) during the pendency in any Court in British India or established beyond the limits of British India by the Governor General in Council
 - (a) of any suit or proceeding which is not collusive and
 - (b) in which any right to immoveable property is directly and specifically in question.
- (ii) by any party to the suit or proceeding
- (iii) so as to affect the rights of any other party thereto under any decree or order which may be made therein.

Exception.—Under an authority of the Court and upon the terms it may impose, such transfer or dealing may take place.

r) *Ramalinga v. Samiappa* (1890) 13 Mad. 15.
s) *Land Mortgage Bank of India, Ltd. v. Vishnu*
 (1878) 2 Bom. 670; (case before the Trans-

fer of Property Act was passed).
t) *Thomas Souza v. Gulam Moidin* (1903) 13
 M. L. J. 214.

Explanation.—Pendency of a suit or proceeding shall be from date of presentation of plaint or institution of the proceeding in a Court of competent jurisdiction till disposed of by a final decree or order and complete satisfaction or discharge thereof obtained or has become barred by limitation.

Changes in the section.—By the Amending Act the following changes have been made :

(a) the word “ pendency ” has been substituted for the original words “ active prosecution ” owing to conflict of judicial opinion as to the meaning of the words “ active prosecution.” The view of the Calcutta High Court was that there can hardly be active prosecution if the plaintiff took no steps to effect service of the summons or if after the decree dismissing the suit no steps were taken to file an appeal (u). The High Court of Bombay held that *lis pendens* ended with the decree (v) except as regards administration suits and suits for account. To render the meaning of the word pendency more lucid, to the section has been added an explanation to make it clear when the pendency of the suit or proceeding shall be deemed to commence and when to end.

(b) For the words “ a contentious ” the word “ any ” has been substituted. This change was made in view of the decision of the Calcutta and Allahabad High Courts that a suit becomes contentious only from the date on which summons was served or the defence was put in (w). But these decisions are not good law since the ruling of the Judicial Committee (x) where it was held there was no warrant for the view that a suit contentious in its original nature was not so within the meaning of the section until summons was served on the opposite party.

(c) After the words “ suit or proceeding ” where they occur for the first time the words “ which is not collusive ” have been inserted. The word collusive has been added because a collusive suit is not a real suit but merely a pretence (y).

The amendments are not retrospective.—It has been held that the amended section has no retrospective effect (z). *Bellamy v. Sabine* (a): This is the leading case on the subject of *lis pendens*. There the question was as to priority of two encumbrancers. The plaintiff John Bellamy was tenant for life of two estates, the C. estate and the S. P. estate. The latter was sub-divided into two estates, the Manor Farm and Villibers. He was also seised in fee of the estate of Cheddington which was mortgaged to the full and therefore substantially of no value. On the 8th of June 1827 the plaintiff sold the whole of his estate to his elder son, Edward Bellamy, who agreed to pay a large number of debts due from the father and also covenanted to pay certain annuities. On the 21st of June 1827 the son Edward entered into an agreement with Thomas Sabine, the family solicitor, whereby in consideration of a sum of money paid to him by Sabine and the latter undertaking to discharge all encumbrances and debts which Edward had agreed to discharge and to pay the annuities, Edward, the son, agreed to transfer the contract of his

(u) *Kishory Mohun v. Mahomed* (1891) 18 Cal. 188; *Dinonath v. Shama Bibi* (1901) 28 Cal. 23.

(v) *Venkatesh v. Maruti* (1888) 12 Bom. 217; *Shivji Ram v. Waman* (1898) 22 Bom. 939; *Bhoje Mahdev v. Gangabai* (1913) 37 Bom. 621.

(w) *Radhasyam v. Sibul Panda* (1888) 15 Cal. 647; *Togendra v. Fulkumari* (1900) 27 Cal. 77; *Parsolam v. Sauchi Lal* (1899) 21 Al. 408;

Krishna v. Dino Mony (1904) 31 Cal. 658.

(y) *Faiyaz Husain Khan v. Prag Narain* (1907) 29 All. 339, 34 I. A. 102.

(y) *Ahmedbhoy v. Vallibhoy* (1882) 6 Bom. 703; *Chenvirappa v. Puttappa* (1887) 11 Bom. 708.

(z) *Harlal v. Lala Prasad*, A. I. R. (1931) Nag. 138.

(a) (1847) 26 L. J. Ch. 797, 41 E. R. 1007.

S. 52

father, to Sabine so as to make Sabine the owner of the property. On the 4th of August 1828 Edward Bellamy died intestate and unmarried, leaving Francis his brother his heir-at-law. On the 23rd February 1829 Sabine mortgaged the C. estate to a gentleman of the name of Davis to secure £3,000 and in July 1830 he mortgaged that part of the S. P. estate known as Manor Farm to Thomas Brickenden to secure £3,000 to him. In 1833 Sabine mortgaged to Good and Brickenden the other part of the S. P. estate known as Villibers; and subject to the existing mortgage to Brickenden he also mortgaged a part of that Manor Farm, that is, a second mortgage to Good and Brickenden. In July 1830 Francis Bellamy filed a suit against Thomas Sabine and John Bellamy and others to set aside the agreements of the 8th of June and the 21st of June 1827 for fraud. On 8th May 1835 a decree was made dismissing the bill as to agreement of 8th June but setting aside the agreement of the 21st June for fraud.

In 1839 the plaintiff Bellamy, the original owner of the property, filed a bill against Thomas Sabine and Francis Bellamy praying for specific performance of the agreement of 8th June 1827 for the sale of the estate to Edward so far as it remained unperformed. A decree was passed accordingly on the 8th of November 1847 and it was declared that the plaintiff was an encumbrancer in respect of whatever remained of the unpaid purchase-money. In July 1856 upon the Chief Clerk's certificate it was declared that John Bellamy's encumbrance was prior to that of Good and Brickenden, it being considered by one of the Vice-Chancellors that the pendency of the suit of Francis Bellamy at the time the mortgage of November 1833 was effected, gave to Good and Brickenden notice of the equitable claim of John Bellamy upon the estate of Thomas Sabine but upon appeal it was held that the encumbrance of Good and Brickenden was prior to the claim of John Bellamy. The same principle was enunciated in *Culpepper v. Aston* (b) where land had been devised to a trustee to sell for payment of debts. The heir filed his bill against the trustee alleging that the real estate was not wanted for the debts and therefore praying a conveyance. It was held that a sale by the trustee *pendente lite* did not bind the heir. So in *Sorrell v. Carpenter* (c) the plaintiff instituted a suit against one Ligo upon a claim which by the decree he established to certain leasehold estates. Pending the suit Ligo sold to the defendant. It was held that pending the suit the defendant could not sustain his purchase. In both these cases the doctrine really was that pending a litigation a defendant cannot by alienation affect the right of the plaintiff to the property in dispute; and the same principle is applicable against the plaintiff so as to prevent him from alienating to the prejudice of the defendant. It is, however, not an accurate mode of stating the doctrine that *lis pendens* is implied notice to all the world. In *Bellamy v. Sabine* (d) it was held that the doctrine of *lis pendens* affecting a purchaser is not founded upon any doctrine of actual or constructive notice but upon the fact that the law does not give to litigant parties pending the litigation, rights to properties in dispute so as to prejudice the opposite party. Hence the rule is independent of notice (e). It is also an exception to the rule that a decree or order in a suit binds parties thereto.

Non-applicability of doctrine.—The doctrine of *lis pendens* does not apply in the following instances:—

- (a) A private sale by a mortgagee in exercise of power conferred by mortgage deed is not affected by the doctrine of *lis pendens* embodied in the section

(b) 2 Ch. Cas. 115.

(c) 2 P. Wms. 482.

(d) (1847) 26 L. J. Ch. 797.

(e) *Girdharlal v. Liladhar* (1931) 33 Bom. L. R.

1123; *Krishnabai v. Sawlaram* (1927) 51 Bom. 37; *Basappa v. Bhimangonda* (1928) 52 Bom. 208.

and the sale is valid, though made during the pendency of a redemption suit filed by the mortgagor (*f*).

- (b) To cases of review.
- (c) When the transferor alone is affected (*g*).
- (d) To an order passed against an intervenor in execution proceedings as the proper remedy in such cases is a suit under O. 21, r. 63 of the Code of Civil Procedure, 1908.
- (e) To a friendly suit (*h*).
- (f) To yearly leases and such other acts as are either the necessary or the ordinary reasonable incidents of an interim beneficial enjoyment (*i*).
- (g) To a transfer pending suit by a person who is not a party to such suit (*j*).
- (h) To personal property other than the chattel interests in land (*k*).
- (i) To the interval that lapses between dismissal of a suit and a fresh suit on the same cause of action.
- (j) Where the parties to the transfer are ranged on the same side (*l*).
- (k) To transfer effected by order of the Court in which the suit or proceeding is pending (*m*).
- (l) Where there is a misdescription of the property in the plaint (*n*).
- X (m) Where alienations are not inconsistent with the rights which may be estab- X
lished by the decree in the suit (*o*).
- (n) The doctrine of *lis pendens* does not apply to the case of a person who, during the pendency of a mortgage suit obtains a mortgage of the property, in consideration for money paid by him and used by the mortgagor to pay off the suit mortgage (*p*).
- (o) To a suit on a pledge of ornaments (*q*).
- (p) To a sale pursuant to a decree on mortgage created before institution of the suit (*r*).
- (q) To election of one of two remedies which are not co-existent but alternative as where a decree-holder by accepting payment of decretal amount is barred from pressing his appeal against an order which had set aside the sale (*s*).

- (f) *Ramakrishna v. Official Assignee of Madras* (1922) 45 Mad. 774.
- (g) *Shib Chandra v. Lachmi Narain* (1929) 33 C. W. N. 1091 P.C.
- (h) *Kathir v. Mremadiss* (1915) 38 Mad. 450.
- (i) *Subbaraju v. Seetharamaraju* (1916) 39 Mad. 283; *Radhika v. Radhamani* (1884) 7 Mad. 96; *Karu v. Pandia*, A. I. R. (1924) Nag. 226.
- (j) *Pethu Ayyar v. Sankaranarayana* (1917) 40 Mad. 955; *Bala v. Daulu* (1925) 27 Bom. L. R. 38; *Ammayya v. Narayana*, A. I. R. (1925) Mad. 487.
- (k) *Wigram v. Buckley* (1894) 3 Ch. 483.
- (l) *Krishnaya v. Mallya* (1918) 41 Mad. 458.
- (l) *Krishraji v. Motilal* (1929) 31 Bom. L. R. 476.
- (m) Sec. 52 of the Transfer of Property Act,

- IV of 1882.
- (n) *Loke Nath v. Achutananda* (1912) 15 C. L. J. 391; *Periamurugappa v. Manicka Chetty* A. I. R. (1926) Mad. 50.
- (o) *Kondi Munisami v. Dakshanamurthi* (1882) 5 Mad. 371.
- (p) *Narayan v. Syed Hafiz*, A. I. R. (1925) Nag. 21.
- (q) *Govind Baba v. Jijibai Saheb* (1912) 36 Bom. 189.
- (r) *Chinnaswami v. Darmalinga*, A. I. R. (1932) Mad. 566; *Har Pershad Lal v. Dalnardhan Singh* (1905) 32 Cal. 891; *Chinnaswami v. Darmalinga* (1932) 56 Mad. 115; *Nagendra Chettiar v. Lakshmi Ammal* (1933) 56 Mad. 846; *Ganpatrao v. Vithabai* (1934) 30 Nag. 284.
- (s) *Mangat Rai v. Dali Chand* (1933) 55 All. 735.

S. 52

- (r) A purchaser subject to a mortgage is not bound by proceedings in a subsequent suit between the mortgagor and the prior mortgagee to which he was not a party (t).

Registration.—In this country there is no registration of *lis pendens* as in England except when execution proceedings are adopted. Such proceedings are registered in what is known as the negative list.

Onus.—A party who relies on section 52 of the Transfer of Property Act must shew that his suit was pending at the time when the deed of transfer sought to be impeached was executed (u).

Proper forum.—The rule applies to suits or proceedings pending in a Court having authority in British India or established beyond the limits of British India by the Governor General in Council (v). The Court must be a Court of competent jurisdiction (w), and may be either of first instance or the Court of Appeal.

British India.—Reference may be made to the Act below (x).

Transfer pending suit or other proceeding.—The bar of transfer created by the section is a qualified one and restricted against affecting the rights of a party to the suit or proceeding under any decree or order which may be made therein. The transfer must be made after the institution of the suit. A transfer made before the suit would not be affected.

Suit.—This includes a decree *ex parte* (y).

Compromise decree.—A consent decree falls within the scope of the rule of *lis pendens* (z). It has been observed that the fact that the final decree was founded upon a compromise does not interfere with the application of the doctrine (a).

Not collusive.—To attract the application of the section the suit or proceeding relied upon must not be collusive. The fight between the parties must not be sham (b). A friendly suit in which there is no contest and the decree declares rights on which the parties are in agreement is collusive (c). A suit may be collusive either in its inception or in an honest suit there may be a collusive decree (d).

Immoveable property.—The doctrine of *lis pendens* applies to immoveable property only.

Moveable property.—The doctrine of *lis pendens* does not apply to moveable property (e).

Immoveable property must be directly and specifically in question.—To attract the doctrine of *lis pendens* it is one of the essential ingredients that the property must be one in respect of which relief is sought so as to come within the meaning of the

t) *Jagatchandra De v. Abdul Rashid* (1935) 62 Cal. 75.
 (u) *Rafiuddin v. Brijmohan* (1913) 9 Nag. 155.
 (v) *Palani Chetti v. Subramanyan* (1896), 19 Mad. 257.
 (w) *Ali Shah v. Husain Baksh* (1879) 1 All. 588.
 (x) The General Clauses Act, X of 1897, sec. 3 (7).
 (y) *Ram Bharose v. Rampal Singh* (1920) 42 All. 319; *Krishnappa v. Shivappa* (1907) 31 Bom. 393; *Brojo Kishore v. Meajan Biswas* (1909) 13 C. W. N. 1138.
 (z) *Bhagirathi v. Rajkishore*, A. I. R. (1930) All. 354; *Tinoodan v. Trailokya* (1912) 17 C. W. N. 413; *Bharat Ramanuj v. Srinath Chandra* (1922) 49 Cal. 220; *Periamurugappa v. Manicka Chetty*, A. I. R. (1926) Mad. 50; *Parvati Ammal v. Govindaraja*, A. I. R. (1924) Mad. 359; *Annamalai*

Chettiar v. Malayandi Appaya (1906) 29 Mad. 426; *Sat Narain Singh v. Badri-Prasad*, A. I. R. (1928) O. 146; *Mt. Ramadulari v. Upendranath* (1925) 4 Pat. 619.
 (a) *Shiam Lal v. Sohan Lal* (1928) 50 All. 290.
 (b) *Chenvirappa v. Pullappa* (1887) 11 Bom. 711; *Ahmedbhoy v. Vallibhoy* (1882) 6 Bom. 703; *Bharat Ramanuj v. Srinath Chandra* (1922) 49 Cal. 220.
 (c) *Jogendra v. Fulkumari* (1900) 27 Cal. 77; *Kathir v. Maremadissa* (1915) 38 Mad. 450.
 (d) *Periamurugappa v. Manicka Chetty*, A. I. R. (1926) Mad. 50.
 (e) *Govind v. Jijibai* (1912) 36 Bom. 189; *Wigram v. Buckley* (1894) 3 Ch. 483; *Haji Sayed Naimuddin v. Sidkaram Marwari*, 9 C. P. L. R. 22.

word "directly" and further it must be of specific property mentioned in the plaint to come within the meaning of the words "specifically."

S. 52

Administration suits.—To administration suits the rule does not apply. If in such a suit a particular portion of the estate is sought to be effected in a particular way the doctrine would apply. The right to the particular plot must be directly and specifically in question (f). Hence a conveyance of property pending such an action cannot be effected. Though a mere general claim for administration is not enough, a transferee taking subsequent to the registration of an administration suit from a specific devisee who is a defendant would come within the rule if previous to the transfer the property sought to be charged in the action is clearly and specifically indicated (g).

Adoption "pendente lite"—Adoption *pendente lite* is not to be regarded in the same light as alienation *pendente lite* (h).

Attached property.—According to Order 21, rule 63 of the Code of Civil Procedure, 1908, where a claim or objection is preferred to property attached, the party against whom an order is made may institute a suit to establish the right as regards his claim to the property in dispute. Such a suit is a mere continuation of the proceedings and any alienation during the continuance of such proceedings till the disposal of the suit brought to set aside the order is affected by the doctrine formulated in this section (i). A mere application for execution by attachment and sale of the judgment debtor's property is not within the rule (j).

Caveats.—A caveat, warning and appearance do not constitute *lis pendens*. If after this a writ is issued *lis pendens* commences but not till then (k). According to the rule enunciated in the section, although the above facts do not constitute *lis pendens* they would be included within the word "proceedings" in the section so that in this country the above authority would not apply.

Claim proceedings.—A decree-holder had attached the property of his judgment-debtor before decree in his suit, and, while he was seeking to establish his right to attach and sell such property as the property of his judgment-debtor by suit against a successful claimant, another decree-holder attached the same property and brought it to sale during the pendency of the appeal in the claim suit. The judgment-debtor was not made a party to the claim proceedings or the subsequent suit or appeal. The property was again sold in execution of the decree of the former decree-holder who purchased it and sued to recover possession. Held, that the auction purchaser in the prior sale was not affected by the doctrine of *lis pendens* and his purchase was valid as against the purchaser in the subsequent auction sale, as the judgment-debtor was not a party to the claim proceedings or the subsequent suit and could not be considered to be represented in that suit by plaintiff therein. Even if the judgment debtor was a party thereto, there is no *lis pendens* as the doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit; here as the sale in execution proceeded on the very footing that the property belonged to the judgement-debtor, the doctrine was inapplicable (l).

(f) *A. L. A. R. a firm v. Maung Thwe*, A. I. R. (1923) Rang. 69; *Ma Kin v. Ma Bwin* A. I. R. (1927) Rang. 186; *Lee Lin Ma Hook v. Saw Mah Hone* (1924) 2 Rang 4.
(g) *K. Y. Chettyar a firm v. Jamila Bi Bi*, A. I. R. (1930) Rang. 132.
(h) *Rambhal v. Lakshman* (1881) 5 Bom. 630.
(i) *Krishnappa v. Abdul Khader* (1915) 38

Mad. 535; *Khairulla v. Seth Dhanrupmal*, A. I. R. (1925) Nag. 82.
(j) *Chamiyappa v. Rama Iyer* (1921) 40 M. L. J. 65.
(k) *Salter v. Salter* (1896) P. D. 291.
(l) *Pethu Ayyar v. Sankaranarayana Pullai* (1917) 40 Mad. 955.

S. 52 **Co-operative Societies Act (II of 1912).**—Proceedings before the Registrar under this Act are proceedings before the Court to which this section applies (*m*).

Dower debi.—While a suit for dower debt due to a Mahomedan widow was pending on behalf of her heirs, the heirs of her deceased husband mortgaged certain property which belonged to the deceased in his lifetime. The heirs of the widow obtained a decree which could only be executed against the assets of the deceased husband. Held that this decree took priority over the mortgagee's decree and a sale held in execution thereof (*n*). A suit of a Mahomedan woman for dower claiming a charge on the property in the husband's hands is not within the rule (*o*).

Lease.—A lease defined as a transfer of right to enjoy immoveable property is within the rule (*p*). Further, the payment of rent in advance after the filing of a mortgage suit in respect of lease granted by the mortgagor after execution of the mortgage was not binding upon the mortgagee or on the plaintiff as receiver of the mortgage properties (*q*). But a lease pending a suit is not void if it be an ordinary and reasonable incident of interim beneficial enjoyment (*r*). Agricultural leases are included within the rule (*s*).

Suit to recover money lent.—In a suit to recover money borrowed by sale of jewellery pledged and if necessary by sale of property of the debtor is not within the section (*t*).

Lien of purchaser.—When a purchaser claims the return of earnest money owing to defective title of the vendor and who by reason of section 55 (6) (b) of the Transfer of Property Act has a charge upon the property the property becomes subject to this rule.

Lien of unpaid vendor.—Under section 55 (4) (b), the seller has as charge upon the property which becomes subject to the rule in this section.

Maintenance.—According to section 39 of the present Act, it is enacted that where a third person has a right to receive maintenance from the profits of immoveable property and such right is transferred the right may be enforced against the transferee if he has notice thereof, or if the transfer is gratuitous; but not against a transferee for consideration without notice of the right nor against such property in his hands. Mere mention in a suit for maintenance from immoveable property does not by itself bring the property directly and specifically in question. It is otherwise where a charge is created. By itself a Hindu widow's right of maintenance is not a charge upon her husband's estate nor upon the property in the hands of the coparceners (*u*). But a suit in which the widow claims to get the maintenance made a charge on the immoveable property is one in which the right to such immoveable property is directly and specifically in question (*v*). Such a transfer would also be affected if made after a suit for partition in which a widow claims a

(*m*) *Velayuda Mudali v. Co-operative Rural Credit Society* (1934) 57 Mad. 426.

(*n*) *Yasin Khan v. Muhammad* (1897) 19 All. 504.

(*o*) *Abdul Rahman v. Ml. Inayati Bibi*, A. I. R. (1931) Oudh. 63.

(*p*) *Ml. Aziz Fatma v. Mukund Lal*, A. I. R. (1932) All. 480; *Girdharlal v. Liladhar* (1931) 33 Bom. L. R. 1123; *Nisar Husain v. Sundar Lal* (1928) 50 All. 202; *Thakur Prasad v. Gaya Sahu* (1898) 20 All. 349; *Kiran Chandra v. Dutt & Co.* (1925) 29 C. W. N. 94; *Macleod v. Kissan* (1906) 30 Bom. 250; *Rustomji v. Keshavji* (1926) 28 Bom. L. R. 1162.

(*q*) *Kiran Chandra Bose v. Dutt & Co.*, A. I. R. (1925) Cal. 251.

(*r*) *Karu v. Pandia*, A. I. R. (1924) Nag. 226; *Ml. Aziz Fatma v. Mukund Lal*, A. I. R. (1932) All. 480.

(*s*) *Chandan Singh v. Fakirgir* (1915) 11 Nag. 21; *Shri Ganesh v. Pandurang* (1918) 14 Nag. 133.

(*t*) *Bepin Krishna v. Byomkesh Deb* (1924) 51 Cal. 1033.

(*u*) *Manika v. Ellappa* (1896) 19 Mad. 271; *Official Receiver of Cudappa v. Kalawa Subbamma*, A. I. R. (1927) Mad. 403.

(*v*) *Dose Thimmanna v. Krishna* (1906) 29 Mad. 508.

share in lieu of her maintenance (*w*). The decree creating the charge operates to give her charge as from the date of the plaint and not from the decree unless there be anything in the decree to the contrary (*x*). The same Court held that where a wife brings a suit for maintenance against her husband and asks for a charge on the property belonging to him, she does not ask for any right directly and specifically in respect of the property (*y*).

Mortgages.—A mortgage effected during the prosecution of a suit is ineffectual (*z*). A purchaser *pendente lite* is bound by the final decree though he was not a party to the proceedings making the decree final (*a*). However, a private sale by a mortgagee in exercise of his power of sale pending a redemption action is valid (*b*). Nor is a purchaser bound by a mortgage decree which becomes inoperative (*c*). Though sections 16 and 17 of the Code of Civil Procedure do not apply to High Courts in the exercise of their original civil jurisdiction, clause 12 of the Charter empowers a High Court to try and determine a suit for land if a part of it is within the jurisdiction and leave has first been obtained. In such a case the decree that a High Court passes is in no way different from a decree of the mofussil Court (*d*). It is true that a decree for sale is not a decree *in rem* but it would be a fallacy to conclude from it that a decree is not passed in a suit in which a right to immoveable property is directly and specifically in question as required by section 52 (*e*). To a case of this nature the observations of the Privy Council in *Anundo Moyec Dossee v. Dhonendra Chunder Mookerjee* (*f*) “that a decree for sale made in a Supreme Court at Calcutta had no effect *in rem* and has no effect whatever over a property in the mofussil do not apply.”

Official Assignee.—He is not affected by the rule unless made a party to the suit (*g*).

Ostensible owner, transfer by.—Section 41 of the Transfer of Property Act (*h*) deals with the case of a transfer by ostensible owner. Under that section it is not enough that the transferee should be ostensible owner of the property with the consent, expressed or implied, of the true owner. He must also transfer the same with such consent. The institution of a suit by the real owner prior to the transfer by the ostensible owner is unmistakable proof that consent did not subsist at the time of transfer. Sections 41 and 52 are mutually exclusive. The estoppel arising in section 41 cannot be such as to override the imperative provisions of section 52 in the absence of fraud. Section 42 is a general section dealing with estoppel in the circumstances mentioned therein, while section 52 is a special section applying to transfers *pendente lite* (*i*).

Partition suits.—As regards suits for partition the cases have proceeded on the meaning of the word “contentious” which word, however, has now been omitted

- (*w*) *Jogendra v. Fulkumari* (1900) 27 Cal. 77.
 (*x*) *Seetharamanujacharyulu v. Venkatasubamma* (1930) 54 Mad. 132.
 (*y*) *Rattamma v. Seshchalam*, A. I. R. (1927) Mad. 502.
 (*z*) *Moru Narsu v. Hasan* (1919) 43 Bom. 240; *Girdharlal v. Liladhar* (1931) 33 Bom. L. R. 1123; *Baliramsingh v. Ramchandra*, A. I. R. (1924) Nag. 393.
 (*a*) *Premasukhdas v. Peerkhan* (1927) 23 Nag. 86; *Shib Chandra v. Lachmi Narain* (1929) 51 All. 686, 56 L. A. 339; *Faiz Husain v. Prag Narain* (1907) 29 All. 339; *Pranjivan v. Bajju* (1880) 4 Bom. 34; *Baldeo Sahai v. Baij Nath* (1891) 13 All. 371; *Parvathi*

- Ammal v. Govindaraja*, A. I. R. (1924) Mad. 359; *Ram Charan v. Parmeshwari Din* (1933) 55 All. 235.
 (*b*) *Ramakrishna v. The Official Assignee of Madras* (1922) 45 Mad. 774.
 (*c*) *Gour Sundar v. Hem Chunder* (1889) 16 Cal. 355.
 (*d*) *Kiernander v. Benimadhab* (1931) 58 Cal. 598.
 (*e*) *Kiernander v. Benimadhab* (1931) 58 Cal. 598.
 (*f*) (1871) 14 M. I. A. 101.
 (*g*) *Subramania v. Ramakrishna* (1922) 42 M. L. J. 426.
 (*h*) IV of 1882.
 (*i*) *Shafiq-ullah Khan v. Sami Ullah Khan* (1930) 52 All. 139.

S. 52 from the section (j). It can scarcely be said, however, that in a partition suit the right to immoveable property is not directly and specifically in question and this would be independent of the question whether the shares be admitted or disputed and whether the parties have adopted proceedings with the object that a formal record should be made by the Revenue Court of the arrangement they desired effected. A partition suit would therefore fall within the rule (k) and if a charge be created by the Court for working out the partition such charge would bind alienees *pendente lite* (l) and so would a purchaser in execution at a sale at the instance of a mortgagee who took the mortgage pending the partition proceedings (m). But the principle in *Jogendra v. Fulkumari* (n) does not apply to a sale during the pendency of a partition suit filed by one of the sons of a deceased owner governed by the Bengal School of Hindu Law after a preliminary decree in a suit on mortgage executed by all the sons followed by a decree absolute pursuant to which such a sale takes place (o).

Pledgee.—Where a creditor suing for money lent on pledge of certain ornaments incidentally presses for the sale of the property of the deceased debtor by the appointment of a receiver if necessary, the property cannot be said to be directly and specifically in question within the meaning of this section (p).

Application of the doctrine to pre-emption.—The doctrine applies to pre-emption suits and consequently no transfer made during the pendency of a pre-emption suit can have any effect on the right of the plaintiff as it stood at the moment when the suit was brought (q) unless made to a purchaser having a preferential claim to that of a pre-emptor (r) provided that the person claiming the superior pre-emptive right is not barred from enforcing his claim by reason of limitation (s) nor has lost his right by failure to exercise it (t). The defendant purchaser, however, in suit for pre-emption cannot escape the result of the suit by re-transferring the property purchased by him to the vendor (u).

Alienation by receiver.—A party cannot repudiate a transaction because the receiver in his suit acted beyond his power in sanctioning the same, after the transaction had been carried through and after the receiver and party in suit had taken advantage thereof (v). A receiver is not bound by the rule, and in order to bind him he must be made a party to the suit (w).

Rent suit.—A suit for rent is primarily a suit for money and although rent is a first charge on the property, none is created before decree. In the case of *ex-parte*

- (j) *Khan Ali v. Pestonji* (1896) 1 C. W. N. 62;
Jogendra v. Fulkumari (1900) 27 Cal. 77;
Ramchandra v. Jaideo, A. I. R. (1928) Nag. 198; *Chandan v. Fakirgir* (1915) 11 Nag. 21.
 (k) *Ishwar v. Dattu* (1913) 37 Bom. 427; *Nand Kishore v. Lallu*, A. I. R. (1931) All. 45;
Jogendra v. Fulkumari (1900) 27 Cal. 77;
Amrital v. Kantilal (1931) 33 Bom. L. R. 266; but see *Ramchandra v. Jaideo*, A. I. R. (1928) Nag. 198.
 (l) *Arunachalam v. Pratapasimha*, A. I. R. (1930) Mad. 988; *Basappa v. Bhiman-gouda* (1928) 52 Bom. 208.
 (m) *Jogendra Nath v. Debendra Nath* (1899) 26 Cal. 127.
 (n) (1900) 27 Cal. 77.
 (o) *Baldeodas v. Sarojini* (1930) 57 Cal. 597.
 (p) *Bepin Krishna v. Byomkesh Deb* (1924) 51 Cal. 1033.
 (q) *Bharwan v. Nanak Chand* (1927) 49 All. 516;

- Ghasitey v. Gobind* (1908) 30 All. 467;
Manpal v. Sahib Ram (1905) 27 All. 544;
Bachan Singh v. Bijai Singh (1926) 48 All. 221; *Hazara Singh v. Bube Khan* (1922) 3 Lah. 264.
 (r) *Malik Singh v. Shiam Lal*, A. I. R. (1929) All. 440.
 (s) *Kamla Prasad v. Ram Jag* (1914) 36 All. 60.
 (t) *Asa Singh v. Nanbat* (1921) 19 A. L. J. 143.
 (u) *Kehar Singh v. Jahangir Singh* (1925) 47 All. 625; *Bhikhai Mal v. Debi Sahi* (1925) 47 All. 923; *Mt. Raijai v. Irbhan* (1909) 5 Nag. 136; *Ganpatsa v. Joomabhai* (1906) 2 Nag. 150; *Durga Prasad v. Gangadin*, A. I. R. (1925) All. 502.
 (v) *Tiloke Chand Surana v. Beattie & Co.*, A. I. R. (1926) Cal. 204.
 (w) *Subramania v. Ramakrishna* (1922) 42 M.L.J. 426.

Thornton (x), Lord Cairns said, "Then the *lis pendens* being a technical expression well known, it seems to me to be perfectly clear that it always implied a claim of right, or a claim to charge some specific property." A suit for rent can hardly be regarded as a claim to charge specific property (y).

Specific performance.—In a suit for specific performance of contract to grant a lease the property is directly and specifically in question. Consequently when such a suit results in a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based and the Court will not permit its decree to be rendered nugatory by intermediate conveyances (z). Similarly, pending such a suit a vendor cannot give a valid title to a third party not claiming in the suit (a).

Surrender "pendente lite."—Under a surrender *pendente lite* between a preliminary and final decree, the alienee is bound by the final decree in terms of the adjustment made between the parties (b). Even after the final decree and pending certain proceedings the same principle would apply (c).

Trust to administer.—In a suit to ascertain and to administer trust under a deed, a decree was made declaring one of the parties entitled to one-sixth share in the surplus income and that the trustees should have their cost out of the trust property. The beneficiary thereupon mortgaged his share. Under a later order in the suit, part of the property was sold to realize the trustee's costs. It was held that the mortgagee's right was subject to the sale and the mortgage was consequently not an encumbrance upon the title of the purchasers. The rule was also applied where the prayer was for cancellation of a deed of trust (d).

Wills.—In bills for establishing a will, and perpetuating the testimony of witnesses, the advantage ought to be mutual, and the heir-at-law is as much at liberty to invalidate the will, as the devisees are to establish it, and must be considered, to all intents and purposes, as a *lis pendens*, or otherwise it would make the only method, which by the law of England is pointed out for proving a will, vain and nugatory (e).

The property cannot be transferred.—The section fetters the transfer of property during the pendency of a suit or other proceeding wherein the right to such immovable property is directly and specifically in question (f). As to what transactions amount to transfer, see (g). Where an agricultural lease made by a mortgagor benefits the mortgagee, the section does not apply (h).

Transfer by defendant to himself.—The rule was held to apply to a transfer by the defendant of the suit property to himself. But the other Judge who formed the Division Bench in that case expressed the opinion that he was not clear as to the application of the section to that case (i). The case was, however, overruled by a

(x) (1867) 2 Ch. 171.

(y) *Jaynal Abedin v. Hyderali* (1928) 55 Cal. 701; *Dhirendra Nath v. Charushashi*, A. I. R. (1926) Cal. 191.

(z) *Jahar Lal v. Bhupendra Nath* (1922) 49 Cal. 495; *Promotha Nath v. Jagannath* (1913) 17 C. L. J. 427.

(a) *Bhaskar v. Shankar* (1924) 26 Bom. L. R. 418; *Vedachari v. Narasimha*, A. I. R. (1924) Mad. 307.

(b) *Lachiram v. Bholu* (1926) 22 Nag. 110.

(c) See explanation to sec. 52, Transfer of Property Act, 1882.

(d) *Puran Chand v. Monmotho Nath* (1928) 55 Cal. 532, 55 I. A. 81; *Chatterput Singh v. Maharaj Bahadur* (1905) 32 Cal. 198, 32 I. A. 1; *Bhola Nath v. Bhuthnath Sen*, A. I. R. (1925) Cal. 239.

(e) *Garth v. Ward* (1741) 2 Atk. 175, 26 E. R. 509.

(f) Sec. 5, Transfer of Property Act, IV of 1882.

(g) See notes of section 5 of the Act.

(h) *Sakharam v. Tukaram*, A. I. R. (1927) Nag. 316.

(i) *Subba Rama v. Venkatasubba* (1924) 48 Bom. 435.

S. 52 subsequent Full Bench of the same High Court which held that in such a case the donor had no power to revoke the gift prior to the registration of the instrument (j).

No contest between co-defendants.—The prohibition contained in the section is like *res judicata* inapplicable between parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. In a previous suit by A to set aside a sale made by him to B as void and invalid and consequently to set aside a mortgage made by B to C also as invalid, the plea of B and C that both the sale and mortgage were good was upheld. Pending the suit D bought B's rights in a Court auction. In a subsequent suit by C to enforce the mortgage, held that D's purchase was not affected by *lis pendens* as there was no contest between B and C in the previous suit as to the validity of the mortgage and that D was entitled to plead that the mortgage was invalid as having no consideration (k).

So as to affect the rights.—The word "rights" in this rule has reference not only to the substantive rights of the parties but also to matter of procedure (l). A complete right needs a person of incidence as well as a person of inherence. No party during the conduct of a suit has any power by dealing with the property to charge the person of incidence or inherence to the detriment of the other (m).

Any other party.—The rule is enacted for the benefit of the "other party" and not for the benefit of the party making the transfer (n). Any other party means, party between whom and the party alienating there is an issue for decision which may be prejudiced by alienation (o).

Representative character of transferee.—The question whether a transferee is the representative of the transferor under section 47 of the Civil Procedure Code was raised in second appeal for the first time, but being a question of law it was considered by the Court which held that the transferee *pendente lite* is not a representative of the transferor within the meaning of section 47 of the Civil Procedure Code, 1908. A separate suit can lie against such an alienee to recover possession of the property (p).

Whether transfer void or voidable.—The alienation *pendente lite* is not absolutely void. It is voidable at the instance of the party affected thereby (q). The plaintiff was mortgagee, defendant 1 the mortgagor. Defendant claimed ownership in respect of item 2 of the property, the subject-matter of the suit. The plaintiff was granted a decree in respect of half of item 2. The mortgage in favour of the plaintiff was during the pendency of the suit for partition instituted by defendant 3. Defendant 3 being declared entitled to one-half of the mortgage property, the mortgagee was only entitled to the extent of one-half (r).

Alienee how far bound.—An alienee *pendente lite* is bound by the result of the suit although he is not a party to it, for the section says that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein. *Pendente lite* neither party to the litigation can alienate the property

(j) *Atmaram v. Vaman* (1925) 49 Bom. 388 F. B.;
Kalyanasundaram Pillai v. Karuppa Mooppanar (1927) 50 Mad. 193, 54 I. A. 89;
Guru Basappa v. Santhappa, A. I. R. (1925) Mad. 710.
 (k) *Krishnaya v. Mallaya* (1918) 41 Mad. 458.
 (l) *Krishnabai v. Sawlaram* (1927) 51 Bom. 37.
 (m) *Ishwar v. Dattu* (1913) 37 Bom. 427.
 (n) *Shiam Lal v. Sohan Lal* (1928) 50 All. 290.
 (o) *Krishnaya v. Mallaya* (1918) 41 Mad. 458;
Bala v. Daulu (1925) 27 Bom. L. R. 38.

(p) *Basappa Budappa v. Bhiman Gowda* (1928) 52 Bom. 208; *Madho Das v. Ramji* (1894) 16 All. 286; *Sheo Narain v. Chunni Lal* (1900) 22 All. 243.
 (q) *Sheokisan v. Doma*, A. I. R. (1925) Nag. 341; *Nathaji Anandray v. Nana Sarjerao* (1907) 9 Bom. L. R. 1173; *Chandan Singh v. Fakirgir* (1915) 11 Nag. 21.
 (r) *Rangaswami v. Sundarapandia*, A. I. R. (1928) Mad. 635; *Shiam Lal v. Sohan Lal* (1928) 50 All. 290.

in dispute so as to affect his opponent and it is immaterial whether the alienees *pendente lite* had or had no notice of the pending proceedings for if that were not so there would be no certainty that the litigation would come to an end (s). A separate suit can lie against such an alienee to recover possession of the property (t).

Permitted alienation.—An alienation made under an authority of the Court is not prohibited (u). The Court must be one in which the suit or proceeding is pending.

Commencement, continuance and termination of any suit or proceeding.—To remove the conflict of decisions on this subject an explanation has been added to the section by the Transfer of Property Amendment Act (v).

Competent jurisdiction.—To attract the doctrine a suit or proceeding referred to in the section must be in a Court of competent jurisdiction.

The doctrine of "lis pendens" differs from the doctrine of notice.—The doctrine of *lis pendens* is not based on the equitable doctrine of notice, but on the ground that it is necessary in the administration of justice that the decision of the Court should be binding on litigants and those deriving title from them *pendente lite*, whether with notice of the suit or not (w). A similar observation was made in *Nathaji Anandray v. Nana* (x).

The doctrine of contribution is affected by the doctrine of "lis pendens."—Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and having obtained a decree caused property A to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage debt. Before such sale, however, X had, in execution of a simple money decree, acquired a share in property A. X accordingly sued for contribution from property B in that, so far as his share in property A went, he had satisfied the mortgage debt, and ultimately obtained a decree in his favour; but during the pendency of that litigation, property B had been transferred to Y. Held that Y must take the property subject to X's right to contribution from it in respect of the loss of his share in property A (y).

Dismissal of suit.—When a suit or proceeding is dismissed for technical defect and it is revived the *lis* would be deemed to be pending between the date of dismissal and restoration.

O. 22, r. 10 of the Code of Civil Procedure, 1908.—This prescribes the rule of procedure in case of assignment before final order in a suit. Here in this rule interest means interest in the property in suit (z). This rule can only apply to assignment of interest by defendant on record and not the assignment of interest by the person who is not a party to the suit at the time of the assignment but was subsequently joined. The doctrine of *lis pendens* does not apply to such assignment (a). An applicant who invokes the aid of O. 22, r. 10 is not entitled, as a matter of right, to an order in his favour regardless of delay or laches. The Court has undoubtedly a discretion in the matter which must be judicially exercised (b).

(s) *Bellamy v. Sabine* (1847) 26 L. J. Ch. 797, 41 E. R. 1007; *Basappa Budappa v. Bhiman-Gowda* (1928) 52 Bom. 208; *Faiyaz Husain Khan v. Prag Narain* (1907) 29 All. 339, 34 I. A. 102; *Gulabchand v. Dhondi* (1874) 11 Bom. H. C. 64; *Luxmandas v. Dasrat* (1882) 6 Bom. 168.

(t) *Basappa v. Bhimangowda* (1928) 52 Bom. 208.

(u) *Sripat Singh v. Naresh Chandra*, A. I. R. (1926) Pat. 94.

(v) XX of 1929.

(w) *Bellamy v. Sabine* (1847) 26 L. J. Ch. 797

41 E. R. 1007; *Krishnabai v. Sawlaram* (1927) 51 Bom. 37; *Basappa Budappa v. Bhimangowda* (1928) 52 Bom. 208.

(x) (1907) 9 Bom. L. R. 1173.

(y) *Baldeo Sahai v. Baij Nath* (1891) 13 All. 371.

(z) *Harish Chandra v. Chandpore Co., Ltd.* (1903) 30 Cal. 961.

(a) *Ammayya v. Narayana*, A. I. R. (1925) Mad. 487.

(b) *Lakshan Chunder v. Sm. Nikunjamoni*, A. I. R. (1924) Cal. 188.

S. 52 No doubt the Courts exercise great caution in permitting a purchaser of this kind to become a party. But when brought on record he is entitled to conduct all proceedings from the date he is added a party, though he would be bound by all previous orders and could not raise a defence not open to his transferor (c). An order dismissing on merits an application by the assignee of a party to a suit to be brought on record is a judgment within the meaning of clause 15 of the Letters Patent and an appeal lies therefrom (d). An alienee *pendente lite* though not a party to the suit is bound by the decree (e). He is not a representative within the meaning of section 47 of the Code of Civil Procedure of the alienor (f). The Allahabad decisions to the contrary limit his representative character as being competent to raise under that section in execution of that decree any of the questions mentioned in that section (g).

Extension of the doctrine to execution proceedings.—The protection afforded against resistance to delivery of possession to decree-holder or purchaser of property sold in execution of a decree under O.21, rules 99 and 101 is denied under O.21, r. 102 to a person to whom the judgment debtor has transferred the property against institution of the suit in which the decree was passed unless he be a transferee under a possessory mortgage anterior in date to the suit (h). Again, relief granted by way of injunction though purely personal and which had ceased to be operative by reason of the judgment-debtor's death was held binding on a transferee as the transfer was not made under an authority of the Court (i). In a later case the same Court held that a decree for injunction did not run with the land, and in the absence of any statutory provision such a decree cannot be executed against the purchaser from the judgment-debtor (j).

Time for raising the plea.—Being a point of law, though not raised in the written statement, it should be considered even by the Court of Appeal (k).

Not an encumbrance.—*Lis pendens* is not an encumbrance. It only amounts to a notice of a claim upon the subject of the suit which may be unfounded. It is no ground for resisting specific performance (l).

No charge or lien.—*Lis pendens* does not create a charge or lien on the property. It only puts the alienee upon an inquiry into the validity of the alienor's claim (m).

Description of property.—The property must be described in the pleading with sufficient accuracy. A misdescription will render the section inapplicable (n). But this principle cannot be invoked by a person who has knowledge or notice of the true description (o). Nor will an amendment of the plaint by a change in the description of a portion of the property in suit for the purpose of the rule of *lis pendens* relate back to the date of institution of the suit (p).

(c) *Veeraraghava Reddi v. Subba Reddi* (1920) 43 Mad. 37; *Chuni Lal v. Abdul Ali Khan* (1901) 23 All. 331; *Afzal Begam v. Akbari Khanum* (1915) 37 All. 326.

(d) *Commercial Bank, Ltd. v. Sabju Saheb* (1901) 24 Mad. 252.

(e) *Ram Charan v. Parmeshwari Din* (1933) 55 All. 235; *Basappa v. Bhimangowda* (1928) 52 Bom. 208; *Gulabchand Manickchand v. Dhondi Valad Bhau* (1873) 11 Bom. H. C. 64; *Lakshmandas Sarupchand v. Dasrat* (1880) 6 Bom. 168; *Faiyaz Husain Khan v. Prag Narain* (1907) 29 All. 339, 34 I. A. 102.

(f) *Basappa v. Bhimangowda* (1928) 52 Bom. 208.

(g) *Madho Das v. Ramji Patak* (1894) 16 All. 286; *Sheo Narain v. Chunni Lal* (1900) 22 All. 243.

(h) *Mt. Fatima v. Raza Ali Khan* (1927) 2 Luck. 269.

(i) *Krishnabai v. Saclaram* (1927) 51 Bom. 37.

(j) *Amritlal v. Kantilal* (1931) 33 Bom. L. R. 266; *Dahyabhai v. Bapalal* (1901) 26 Bom. 140; *Vithal v. Sakharani* (1899) 1 Bom. L. R. 854; *Jamsetji Manekji v. Hari Dayal* (1907) 32 Bom. 181; *Chunilal Harilal v. Bai Mani* (1918) 42 Bom. 504.

(k) *Kathir v. Maremadissa* (1915) 38 Mad. 450.

(l) *Bull v. Hutchens* (1863) 32 Beav. 615, 55 E. R. 242.

(m) *Bull v. Hutchens* (1863) 32 Beav. 615, 55 E. R. 242.

(n) *Loke Nath v. Achutananda* (1912) 15 C. L. J. 391; *Periamurugappa v. Manicka Chetty*, A. I. R. (1926) Mad. 50; *Venkatrama v. Elumalal*, A. I. R. (1923) Mad. 442.

(o) *Bepin Krishna v. Priya Brata Bose* (1921) 26 C. W. N. 36; *Bepin Krishna Jakeshwar Roy* (1922) 44 All. 325.

(p) *Wali Bandi Bibi v. Tabeya Bibi* (1919) 41 All. 534.

Amendment to pleading.—In 1908 a Mahomedan lady executed a deed of gift, transferring seven items of a house property to S. In February 1912 the donor filed a suit for revocation and alleged in the plaint that gift had been cancelled as regards items Nos. 1, 6 and 7 as a result of decree in litigation between the heir of the donor's husband and the donee. The plaintiff sued for cancellation of the gift in respect of the remaining items including Nos. 2 and 5. On 16th May 1912 item No. 6 was sold by donee to T. for Rs. 1,000. On 21st May 1912 the plaintiff asked for and obtained leave to amend her plaint by substituting item No. 6 for item No. 5. To this the defendant added a plea to the written statement that No. 6 had been sold by her to T. on 16th May 1912. No steps were taken to bring T. on record. The decree was passed in favour of the plaintiff. In 1915 T., the vendee of item No. 6, sued for possession of the property sold to her, impleading as defendants the original donor and W., her niece, to whom the house had been transferred by a deed of gift in April 1914. Held that the plaintiff was entitled to succeed. The claim was not barred by the doctrine of *lis pendens* inasmuch as the amendment of a plaint such as that obtained would not relate back to the date of the filing of the suit (q).

Applicability to Court sale and revenue sales by Government.—The rule in this section applies not merely to sales by private parties, but also to sale through Civil Courts or by Government including revenue sales (r).

53. (1) *Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.*

Fraudulent transfer.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been

(q) *Wali Bandi v. Tabeya Bibi* (1919) 41 All. 534.
(r) *Narayan Kondaji v. Govind Krishna* (1929) 31 Bom. L. R. 345 (sale by order of a Magistrate under sec. 88, Criminal Procedure Code); *Har Shankar v. Sheo Govind* (1899) 26 Cal. 966 (sale for arrears of Government revenue); *Sukhdeo Prasad v. Jamna* (1901) 23 All. 60 (sale in execution pending appeal in a suit under O. 21, r. 63); *Mathura Prasad v. Dasai Sahu* (1922) 1 Pat. 287; *Bhaskar v. Shankar* (1924) 26 Bom. L. R. 418; *Moti Lal v. Kanabuddin* (1898) 25 Cal. 179 P. C. (Two judicial sales of the same property each in execution of the same decree); *Byramji v. Chunilal* (1903) 27 Bom. 266 (auction purchaser at execution sale); *Gobind v. Guru Churn* (1888) 15 Cal. 94 (auction purchaser at execution sale); *Parvati v. Kisansing* (1882) 6 Bom. 567 (auction purchaser at execution sale); *Kunhi Umah*

v. Amed (1890) 14 Mad. 491 (auction purchaser at execution sale); *Raj Kishen v. Radha Mahdub* (1874) 21 W. R. 349 (sale in execution); *Jharoo v. Raj Chunder* (1885) 12 Cal. 299 (sale in execution); *Dinonath v. Shama Bibi* (1901) 28 Cal. 23 (auction purchaser); *Thammayya v. Ramanna*, A. I. R. (1926) Mad. 1161; *Pethu Ayyar v. Sankarabaiyana* (1917) 40 Mad. 955; *Krishnaya v. Mallu* (1918) 41 Mad. 458; *Vedachari v. Narasimha*, A. I. R. (1924) Mad. 307; *Quadratulla v. Gulgandi*, A. I. R. (1925) Oudh 496; *Abid Husain v. Munno Bibi*, A. I. R. (1927) Oudh 261; *K. Y. Chettyar Firm v. Jamila Bibi*, A. I. R. (1930) Rang. 132; *Mathura Prasad v. Dasai Sahu* (1922) 1 Pat. 287; *Ramdulari v. Upendra* (1925) 4 Pat. 619; *Seetharamanujacharyulu v. Venkatasubamma*, A. I. R. (1930) Mad. 824 (Hindu widow claiming charge for maintenance).

S. 53 *made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.*

(2) *Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.*

For the purposes of this section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Unequal disposition in the mofussil.—Prior to the introduction of the Act in the Presidency of Bombay it was held that an unequal disposition of property in the mofussil by a person in insolvent circumstances and known to be so by the disposee will be set aside if impeached by creditors, except where the transferee has simply pressed a valid claim or made a purchase in good faith (s).

The Punjab.—The principles of the section have been applied to the Punjab (t).

Fraudulent transfer.—This section deals with the subject known as fraudulent transfers of immoveable property. Subject to savings hereinafter mentioned, a transfer is fraudulent when it is made with intent to defeat or delay the creditors of the transferor or to defraud a subsequent transferee. In the first instance consideration may or may not be present. In the second case consideration is non-existent. In either case the transaction is voidable at the instance of the creditor defeated or delayed or the transferee defrauded. The Law of Property Act, 1925, on which the present section is based, is wider; instead of the creditor being entitled to avoid the transaction the person prejudiced is given the right. The original section was founded on two statutes of Elizabeth, namely, 13 Eliz., c. 5 and 27 Eliz., c. 4. These two statutes were repealed and re-enacted as sections 172 and 173 of the Law of Property Act, 1925.

Savings.—This section does not affect:

- (i) The rights of a transferee in good faith and for consideration (u).
- (ii) Any law for the time being in force relating to insolvency (v).
- (iii) Any rule of Mahomedan Law (w).
- (iv) Any fraudulent assurance where the fraud has not been carried out (x).

Extent to which the section applies.—Section 53, so far as it deals with defeating or delaying creditors, is aimed not at a debtor who chooses to prefer one creditor to another to transfer his property in satisfaction of one debt rather than another, but a debtor who transfers his property with intent to screen it permanently or temporarily from all his creditors, who uses the transfer as a cloak to preserve the

(s) *Rangilbhai v. Vinayak* (1887) 11 Bom. 666;
Abdul Hye v. Mir Mohammed (1883) 10
 Cal. 616.
 (t) *Tapassi Ram v. Raja Ram*, A. I. R. (1930)
 Lah. 136; *Mohammad Ishaq v. Mohammad*
Yusuf, A. I. R. (1927) Lah. 420; *Ibrahim*
v. Jivan Das, A. I. R. (1924) Lah. 707.

(u) Para 2 of sec. 53 of the Transfer of Property
 Act, IV of 1882.
 (v) Para 3 of sec. 53 of the Transfer of Property
 Act, IV of 1882.
 (w) Para 2 of sec. 2 (d) of the Transfer of Property
 Act, IV of 1882.
 (x) See this subject discussed later.

benefit of the property for himself or for some person in whom he is interested instead of letting it go towards the payment of any of his debts (*y*).

It is not fraudulent to shield some particular property from being proceeded against by creditors so long as there are other properties from which the just dues of the creditors may be realized and mere delay caused to the creditors in the realization of their dues is not of any consequence so long as there has been no deprivation of the creditors in respect of their just dues. An intention to delay creditors is not necessarily fraudulent or unlawful. Fraud involves an element of loss or injury of a substantial character and not merely inconvenience caused by delay in the realization of what is due (*z*).

The principle of the section applies even where the party bases his title on a transfer by decree of the Court to which the provisions of the section do not apply (*a*). Nor does the mere fact that a judgment-debtor has other property to meet the decree prevent the application of the section (*b*). The rule applies even though one creditor has in effect though not necessarily been intentionally defeated, hindered or delayed (*c*). A fraudulent transfer differs from a fraudulent preference in bankruptcy (*d*) which is outside the limits of this work. The principles embodied in the section are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the Courts even in cases where the provisions of section 53 do not in terms apply (*e*).

Twyne's case (*f*).—This has been regarded as the leading case on the statute 13 Eliz., c. 5. Pierce was indebted to Twyne in four hundred pounds and was indebted also to C. in two hundred pounds. C. sued Pierce and, pending the writ, Pierce made in secret a general deed of gift of all his goods and chattels to Twyne without exception in satisfaction of his debt. Notwithstanding this Pierce continued in possession and sold some of the goods. He sold some sheep and set his mark on others. Held that the gift was fraudulent within the statute of 13 Eliz. for diverse reasons, viz., (1) because the gift had signs and marks of fraud was general without exception, (2) the donor continued in possession and used them as his own, (3) it was made in secret; (4) it was made pending the writ; (5) there was a trust between the parties; for the donor possessed all and used them as his proper goods and fraud is always apparelled and clad with a trust and a trust is the cover of fraud, and the deed contained an unusual clause that it was made honestly, truly and *bona fide*; (6) that a good consideration is not sufficient to take a case out of the statute, unless the deed be made *bona fide* also, for no gift is *bona fide* which is accompanied with a trust.

Property to which the section applies.—Chapter II of the Transfer of Property Act is divided into two groups, A and B. The latter, which includes sections 38 to 53A, relates to immoveable property. Section 53 deals with transfer of immoveable property only. The Madras High Court has held that it does not apply to transfers of moveable property (*g*). The case went up to the Privy Council (*h*). In a later case it was observed that there was no distinction (*i*). The High Court

(*y*) *Nagarathna Mudaliar v. Chidambaram Chettiar*, A. I. R. (1928) Mad. 860.
 (*z*) *Rajani v. Abani*, A. I. R. (1926) Cal. 850.
 (*a*) *Mt. Akram-un-Nissa v. Mt. Mustafa-un-Nissa*, A. I. R. (1929) All. 238.
 (*b*) *Gopi Chand v. Jodhraj*, A. I. R. (1929) All. 458; *Meenakshi Ammal v. Ammini Ammal*, A. I. R. (1927) Mad. 657.
 (*c*) *Edmunds v. Edmunds* (1904) P. 362.
 (*d*) *Re. Hirth* (1899) 1 Q. B. 612; *Re. Fasey*

(1923) 1 Ch. 1, Smith L. C., 13th Ed., p. 21.
 (*e*) *Akram-un-Nissa v. Mustafa-un-Nissa* (1929) 51 All. 595.
 (*f*) (1603) 3 Co. Rep. 806, 76 E. R. 809.
 (*g*) *Chidambaram Chettiar v. Sami Aiyar* (1907) 30 Mad. 6.
 (*h*) *Chidambaram Chettiar v. Srinivasa* (1914) 37 Mad. 227.
 (*i*) *Kunhu Pothanassiar v. Raru Nair* (1923) 46 Mad. 478.

S. 53 of Calcutta (*j*) and the Chief Court of Rangoon (*k*) have held that section 53 fastens itself to transactions relating to moveable property.

Onus.—The onus is on the plaintiffs who wish to avoid the transfer. If the transfer is for valuable consideration and is made with the full intention that the title in the property should pass to the transferee and if no benefit be retained to the transferor then the transfer will be valid as against an attaching creditor, even though the object of the transfer might have been to defeat an impending execution. The general creditors are not defeated in such a case, for instead of the property there remains the money representing the price and the creditors could proceed against the same (*l*). In case of a voluntary conveyance or gift the onus is on the plaintiff to prove that at the date of gift he was a creditor of the donor, that the transfer was voluntary and that his claim was defeated or delayed thereby and then the Court would presume that the transfer had been made with intent to defeat or delay the creditor. If there are debts due at the time of a gratuitous transfer the presumption is that it was made with intent to defeat or delay the creditors. But where there are no debts due at the time and the transferor runs into indebtedness subsequently the presumption will be regulated by the circumstances of each particular case. If, for instance, the transfer was made to ward off the effect of a threatened litigation or in anticipation of the transferor embarking upon a commercial venture or on the eve of his going into trade, the intent to defeat or delay future creditors will be presumed (*m*).

Transfer.—Transfer is defined in section 5 of the Act. It includes a settlement (*n*), surrender of a life-interest (*o*), a settlement of an equitable reversionary interest (*p*). The transfer may be with or without consideration and may be by act *inter vivos* or by operation of law such as a transfer pursuant to a decree based on an award. An ostensible dispute between a Mahomedan husband and wife for dower was referred to arbitration. A colourable award was made on which the decree was based, pursuant to which the property was transferred by the husband to the wife with the object of saving it from an impending claim of certain creditors. It was held that the principle of section 53 applied and the transfer was voidable by creditors (*q*). It also includes a lease of mortgaged property (*r*), partition (*s*), gift (*t*), exchange and *wakf* under Mahomedan Law (*u*), a transfer by heir or executor or administrator (*v*), a mortgage made by a debtor with the intent mentioned in the section would be a fraudulent transfer. So also a deposit of title-deeds by a debtor with the like intent.

Mahomedan Law.—There is no rule of Mahomedan Law which allows an indebted person to make a *wakf* with intent to defeat or delay creditors. To dedication by a person in debt under Mahomedan Law no protection is afforded by section 2 of the Transfer of Property Act. The provisions of the section in no way

- (j) *Abdul Hye v. Mir Mahomed* (1884) 10 Cal. 616.
- (k) *Ali Foon v. Hoe Lai Pat*, A. I. R. (1932) Rang. 13.
- (l) *Mohideen v. Muhammad Mustappah*, A. I. R. (1930) Mad. 665.
- (m) *Mohammad Ishaq v. Mohammad Yusuf*, A. I. R. (1927) Lah. 420.
- (n) *Nauratan Lal v. Stephen*, A. I. R. (1922) Patna 572.
- (o) *Natha v. Dhunbaiji* (1899) 23 Bom. 1.
- (p) *Ideal Bedding Co. v. Holland* (1907) 2 Ch. 157.
- (q) *Akram-un-Nissa v. Mustafa-un-Nissa* (1929) 51 All. 595.
- (r) *Seth Misrilal v. Bhimrao*, A. I. R. (1927) Nag. 295.

- (s) *Chhotalal v. Seth Lakmichand*, A. I. R. (1926) Nag. 355; *Rasa Goundan v. Arunachala Goundan*, A. I. R. (1923) Mad. 577.
- (t) *Mohammad Ishaq v. Mohammad Yusuf*, A. I. R. (1927) Lah. 420.
- (u) *Mohammad Ali v. Bismillah Begum* (1930) 35 C. W. N. 324 P. C.; *Bismillah Begum v. Tahsin Ali Khan* (1930) 52 All. 710; *Ahamad v. Kallu*, A. I. R. (1929) All. 277.
- (v) *Apharry v. Bedingham* (1594) Cro. Eliz. 350 78 E. R. 598; *Gooch's case* (1590) 5 Co. Rep. 60a, 77 E. R. 146; *Re. Troughton, Rent and General Collecting and Estate Co. v. Troughton* (1894) 71 L. T. 427.

offends against any rule of Mahomedan Law (*w*). Transfer by husband in lieu of prompt dower is not void (*x*). S. 53

Amendments to the section.—The old section 53 has been re-cast. The original first paragraph has been disrupted. The latter portion is relegated to sub-clause (1) in the altered section and the first part thereof is sub-clause (2). The change in the paragraph relating to creditors consists in omitting the word “defrauded.” As to subsequent transferee, considerable change has been made in the first part. The word “prior” has been omitted, so also the words “co-owners or other persons having an interest in such property,” as being meaningless. The original second para has been deleted on the ground that it was a matter of evidence and one which found no place in the English statutes, 27 Eliz., c. 4 and 13 Eliz., c. 5. and one which gave rise to conflict of decisions. The third paragraph of the original section is made the second paragraph of sub-section (1). Paragraphs 3 and 4 of sub-section (1) are newly added. So also paragraph 2 of sub-section (2). The Report of the Select Committee explains the alterations.

Law of Property Act, 1925.—The present section 53 is drafted on the lines of sections 172 and 173 of 15 Geo. 5, c. 20. Formerly section 53 was based on 13 Eliz., c. 5 and 27 Eliz., c. 4. Both these statutes applied to Presidency towns prior to the Transfer of Property Act.

Who can avoid.—Creditors and persons claiming through or under them are entitled to impeach transactions under this section. As between transferor and transferee the transaction can only be impeached if the fraud be not carried out. In no other case can the transaction be set aside as between transferor and transferee.

With intent to defeat or delay creditors.—It is settled that a transfer of property made with a deliberate object of avoiding payment of just debts is not in itself a good ground of setting aside the transaction. The knowledge and intention of the transferee are the determining factors. If the transferee buys in good faith and for valid consideration the purchase cannot be set aside merely because the transferor sold the property to defeat or delay his creditors (*y*).

The essential ingredient of a fraudulent transfer is evidence of intention to defeat or delay creditors. Without such proof to be established by the general law of evidence the transfer is not fraudulent. Intent to defeat or delay creditors is a question of fact (*z*). There are no rules establishing particular circumstances to be indelible badges of fraud. Secrecy of transfer is a mark of fraud (*a*), whilst notoriety rebuts such presumption (*b*). In transactions for value there must be evidence of an actual or express intent to defeat or delay, as distinguished from a voluntary settlement where it is only necessary that the settlement had a tendency to defeat and delay creditors (*c*). Continuance of possession is a strong fact of fraudulent intention though not conclusive (*d*), for when the conveyance is not absolute such continuance is not evidence of fraud as, for instance, in mortgages,

(*w*) Sec. 2, Transfer of Property Act, IV of 1882 ; *Bismillah Begam v. Tahsin Ali Khan*, A. I. R. (1930) All. 462 ; *Ahamad v. Kallu*, A. I. R. (1929) All. 277.
(*x*) *Razina v. Abida* (1937) All. 153.
(*y*) *Ibrahim v. Jivan Das*, A. I. R. (1924) Lah. 707.
(*z*) *Glegg v. Bromley* (1912) 3 K. B. 474 ; *Denny (Trustee) v. Denny* (1919) 1 K. B. 583 ; *Martindale v. Booth* (1832) 3 B. & Ad. 498, 110 E. R. 180 ; *Martyn v. Podger* (1770) 5 Burr. 2631m. 98 E. R. 384.

(*a*) *Twyne's case* (1602) 3 Co. Rep. 80 b, 76 E. R. 809.
(*b*) *Watkins v. Birch* (1813) 4 Taunt. 823, 128 E. R. 555 ; *Jezeeph v. Ingram* (1817) 8 Taunt. 838, 129 E. R. 609.
(*c*) *Re. Tetley ex-parte Jeffrey* (1896) 66 L. J. Q. B. 111 ; *Re. Johnson, Golden v. Gillam*, (1881) 20 Ch. D. 389.
(*d*) *Lindon v. Sharp* (1843) 13 L. J. C. P. 67, 134 E. R. 1154 ; *Jezeeph v. Ingram* (1817) 8 Taunt. 838, 129 E. R. 609.

S. 53 nor where permission is given to the vendor for his convenience (e), nor is the transaction tainted owing to an interval between execution and possession. So also a power of revocation in a deed sought to be impeached is constant evidence of fraud (f). If the intention be to convert land into cash and place it beyond the reach of creditors there is an intention to defeat or delay (g). The word "intent" connotes the one object for which the effort is made and this has reference to what has been called the dominant motive (h). The motive of the executing party is of importance. If his motive and that of the purchaser be to effect a genuine sale, although any particular creditor or all the remaining creditors are put at a disadvantage thereby, the transaction is not voidable. So also if motive be to defeat a particular execution it is not by itself fraudulent (i). In determining the nature of a transaction the conduct of the parties must be taken into consideration as a whole. The incidents of the transactions must be examined in their cumulative and not in their individual effect (j). The transferor's fraud apart, there must be a want of good faith in the transferee and the instrument must be such as to remove property from the creditors for the benefit of the debtor (k). The transaction comes within the rule if assets be removed from the reach of creditors and is not saved by reason of the fact that one of the creditors incidentally obtained a benefit from the transaction (l). But where insolvency of a partnership business was concealed and moneys were borrowed which were applied in the reduction of the overdraft of the surviving partners it was held that the deed was not void for there was no intent to defeat or delay the creditors but the object was to carry on the business and pay the debts by such means (m).

In case of a partnership firm consisting of W. & G. in insolvent circumstances where by a deed G. assigned to W. his interest in the assets of the partnership and the latter covenanted to pay the debts of the partnership and indemnify G. against the liabilities of the firm but 14 days thereafter both were adjudged bankrupts it was held that the deed of dissolution was fraudulent and void as against joint creditors and the whole of the partnership property as it existed at the date of the deed still continued to be joint property (n). In *Musahar Sahu v. Hakim Lal* (o) their Lordships of the Judicial Committee held that a transfer of property is not made with intent to defeat or delay the creditors because its effect or object is to prefer one creditor to another even if it is made with intention to defeat an anticipated execution.

The authorities establish, if valuable consideration is given at the time of the execution of the deed, if the consideration be not grossly inadequate or illusory and it was not proved that it was the direct intention of the parties to defeat and delay the creditors, and if the parties were acting in good faith, and if there is no knowledge and much less intention on the part of the persons from whom the consideration moved to defeat any of the creditors then the deed would be valid, otherwise not. Where, however, the consideration is a barred debt or debt not due the effect is to defeat or delay creditors (p). In the absence of any express intention to defeat, a

(e) *Leonard v. Baker* (1813) 1 M. & S. 251, 105 E. R. 94; *Gullrie v. Wood* (1816) 1 Stark 367 N. P.
 (f) *Peacock v. Monk* (1748) 1 Ves. Sen. 127, 27 E. R. 934.
 (g) *Palamalai Mudaliyar v. The South Indian Export Co., Ltd.* (1910) 33 Mad. 334.
 (h) *Bhagwant v. Kedari* (1901) 25 Bom. 202, 226.
 (i) *Riches v. Evans* (1840) 9 C. & P. 640 N. P.; *Hazarimal v. Ganpatrao*, A. I. R. (1927) Nag. 205.
 (j) *Ladhomal v. Fleming Shaw & Co.*, A. I. R. (1926) Sind 109.

(k) *Re. Holland, Gregg v. Holland* (1902) 2 Ch. 360; *Pearce v. Bulleel* (1916) 2 Ch. 544.
Re. Fasey (1923) 2 Ch. 1.
 (l) *Re. Fasey, ex parte Trustees* (1923) 2 Ch. 1.
 (m) *Pearce v. Bulleel* (1916) 2 Ch. 544.
 (n) *Re. Edwards-Wood, ex parte Mayou* (1865) 12 L. T. 254, 46 E. R. 1076.
 (o) (1916) 43 Cal. 521, 43 I. A. 104.
 (p) *Narayana v. Viraraghavan* (1900) 23 Mad. 184; *Rangilbhai v. Vinayak* (1887) 11 Bom. 666; *Banwari Lal v. Bhagmal*, A. I. R. (1931) Lah. 213; *Hanifa Bibi v. Punamma* (1907) 17 M. L. J. 11.

voluntary deed cannot be set aside at the instance of a creditor whose debt comes into existence after its date if all the creditors existing at the date of the debt have been paid off; although the latter circumstance may not be conclusive it affords a very strong evidence negating the intention to defraud (*q*). A provision for debts in such a settlement will support it against all future creditors (*r*). A gift was covenous which appeared to be a mere pocket instrument not intended to operate according to its tenure and effect but by which the property was put in the name of the donee for the benefit of the donor in whose possession it remained and he acted as uncontrolled owner for his sole benefit (*s*). The covenous assignments referred to in 13 Eliz. are mock assignments whereby in some form or other the assignor reserves some benefit to himself (*t*).

Assuming that according to Mahomedan Law a gift in fraud of creditors might be impeached, the present existence of debts due by the donor at the time of the gift would not be sufficient to establish such fraud (*u*). Where a transfer, though in part, for valuable consideration is, as regards the other part, only an arrangement to defeat creditors, it is wholly void (*v*). Similarly, where a substantial portion of the consideration for the transfer is fraudulent and fictitious the whole transfer must be treated as fraudulent (*w*). So also where the value of the property is grossly in excess of the amount of the debt (*x*). The fact that the parties to the deed were aware of the plaintiff's decree and his efforts to obtain satisfaction by attachment of the property and where the consideration is grossly inadequate, the object is apparently to protect the property from the creditors and, therefore, the transfer is fraudulent and void. Further, the transferee's minority is sufficient evidence of the transaction being fraudulent although the settlement be ratified on his attaining majority after knowledge of the decree in favour of the creditor of the transferor (*y*). A deed of arrangement with creditors does not defeat because of some reservation of benefit to the debtor or of exclusion of some creditors (*z*). If a creditor having a real demand against his debtor takes security from other persons jointly with the debtor for his debt, that cannot be considered as a fraudulent transaction (*a*). Again, if the transfer be for valuable consideration made with the full intention that the title in the property should pass to the transferee, and if no benefit be intended to be retained to the grantor, then the transfer will be valid as against an attaching creditor even though the object of the transfer might have been to defeat an impending execution (*b*). So also if the transfer be to an existing creditor to whom the transferor already owed money, then even though the transferee had notice that the effect of the transfer would be to remove that property not only from the reach of the executing decree-holder's expected execution, but also from the reach of other creditors, the transfer would nevertheless be valid and not open to objection under section 53. It is open to every creditor to try his best to realize his debt from the common debtor and ordinarily in the case between the creditors he who lags behind could not complain of him who proceeded fast and succeeded in

(*q*) *Zahir Ahmad v. Debi Dayal*, A. I. R. (1931) Oudh 134.

(*r*) *George v. Millbanke* (1803) 9 Ves. 190, 32 E. R. 575.

(*s*) *Abdul Hye v. Mir Mohammed* (1883) 10 Cal. 616.

(*t*) Per Fletcher Moulton, L. J., in *Glegg v. Bromley* (1912) 3 K. B. 474, 485.

(*u*) *Azim-un-Nissa v. Clement Dale* (1868) 6 Mad. H. C. 455, 468.

(*v*) *Chidambaram v. Sami Aiyar* (1907) 30 Mad. 6.

(*w*) *Mula Ram v. Jivinda Ram*, A. I. R. (1923)

Lah. 423.

(*x*) *Hanifa Bibi v. Punnamma* (1907) 17 M. L. J. 11; *Vivvanada v. Raja Venkata* (1927) M. W. N. 1; *Appalaraju v. Krishnamurthy*, A. I. R. (1932) Mad. 182.

(*y*) *Natha v. Dhunbaiji* (1899) 23 Bom. 1.

(*z*) *Maskeylene & Cooke v. Smith* (1903) 1 K. B. 671.

(*a*) *Solema Bibi v. Hafez Mahammad Hossein* (1927) 54 Cal. 687.

(*b*) *Mohideen v. Muhammad*, A. I. R. (1930) Mad. 665.

- S. 53** getting at the property of the debtor (c). It is no part of the duty of a purchaser to see to the application of the purchase-money, and even if the full consideration be not paid it is no ground for holding that the transaction was fraudulent (d). Mere knowledge of an impending execution against the transferor is not sufficient to vitiate the transfer (e). A provision for debts in a voluntary settlement will support it against all future creditors (f).

Creditors.—The section is intended to protect creditors of the transferor not only existing at the date of the transfer but even those who become creditors thereafter. It is not necessary that there must be creditors who are defeated or delayed. Even a single creditor if defeated or delayed would be entitled to protection of the statute (g). A creditor includes a decree-holder by virtue of para 4 of sub-section (1) which follows the definition in section 2 (a) of the Presidency Towns Insolvency Act, III of 1909, and the Provincial Insolvency Act, V of 1920. It further enacts that it is not necessary that the decree-holder should have applied for execution. Creditors need not be decree-holders (h). The absence of a lien or charging order or decree is not fatal but such a creditor can only sue on behalf of himself and all other creditors (i). The distinction formerly between a judgment-creditor and a creditor who had not obtained any decree or order was that the former was not bound to bring a representative suit on behalf of all creditors while the latter was (j). This distinction has been abolished by the express provisions of the statute (k). If there be only one creditor the act of the debtor would nevertheless be fraudulent (l); a single creditor is included in the term creditors (m). The creditor must be the one who is injured. If he be privy to the transaction neither he (n) nor his representative (o) can take advantage. A creditor under a voluntary *post obit* bond is as much entitled as any other creditor (p). So is a wife under Mahomedan Law to whom dower is due (q).

Valid until impeached.—As against creditors the deed becomes void as soon as they claim to treat it as such by asserting their claim to the property though not until then (r).

Impeachment by subsequent creditors.—The section is not restricted in its benefit to existing creditors. Subsequent creditors are within the mischief of the Act and a settlement can be avoided at the instance of subsequent creditors (s). Where a deed is set aside against creditors as fraudulent the property becomes assets and subsequent creditors are let in (t).

- (c) *Mohideen v. Muhammad*, A. I. R. (1930) Mad. 665.
 (d) *Deoki v. Saiyed Jawad*, A. I. R. (1928) Pat. 199.
 (e) *Ladhomal v. Fleming Shaw & Co.*, A. I. R. (1926) Sind 109 (1898) 25 Cal. 825 relied on.
 (f) *George v. Millbanke* (1803) 9 Ves. 190, 32 E. R. 575.
 (g) *Zahir Ahmad v. Debi Dayal*, A. I. R. (1931) Oudh 134.
 (h) *China Mal v. Gul Ahmad*, A. I. R. (1923) Lah. 478; *Gamu v. Nathu*, A. I. R. (1926) Nag. 494; *Faiz Ali v. Harkuar*, A. I. R. (1923) Nag. 334; *Ishvar v. Devar* (1903) 27 Bom. 146; *Reese River Silver Mining Co. v. Atwell* (1869) L. R. 7 Eq. 347.
 (i) *Ishvar Timappa v. Devar Venkappa* (1903) 27 Bom. 146; *China Mal v. Gul Ahmad*, A. I. R. (1923) Lah. 478; *Reese Silver Mining Co. v. Atwell* (1869) L. R. 7 Eq. 347; *Gamu v. Nathu*, A. I. R. (1926) Nag. 494.
 (j) *China Mal v. Gul Ahmad*, A. I. R. (1923) Lah. 478.
 (k) Sec. 53, para 4 of the Transfer of Property

- Act, IV of 1882.
 (l) *Mohideen v. Muhammad Mustappah*, A. I. R. (1930) Mad. 665.
 (m) Sec. 13 (2) General Clauses Act, X of 1897.
 (n) *Steel v. Brown & Parry* (1808) 1 Taunt. 381, 127 E. R. 881; *Oliver v. King* (1856) 25 L. J. Ch. 427, 44 E. R. 331.
 (o) *Robinson v. M'Donnell* (1818) 2 B. & Ald. 134, 106 E. R. 316.
 (p) *Adames v. Hallett* (1868) 18 L. T. 789.
 (q) *Khodija Bibi v. Shah Muhammas* (1901) A. W. N. 64; *Mst. Amira Bibi v. Shaikh Mahomed*, A. I. R. (1929) Oudh 520.
 (r) *Shears v. Rogers* (1832) 3 B. & Ad. 362, 110 E. R. 137; *Harrods, Ltd. v. Stanton* (1923) I. K. B. 516; *Parsharam v. Sadashiv* (1937) Nag. 94.
 (s) *Thomas Pillai v. Muthuraman* (1910) 33 Mad. 205; *Hooseinbhai v. Haji Ismail Saif* (1903) 5 Bom. L. R. 255; *Sadashiv v. Trimbak* (1899) 23 Bom. 146; *Ebrahimbhai v. Fulbai* (1902) 26 Bom. 577.
 (t) *Richardson v. Smallwood* (1822) Jac. 552, 37 E. R. 958.

Giving preference to one creditor.—There is nothing in section 53 to prevent a debtor giving preference to a creditor if nothing is done to affect the other creditors injuriously (u). Hence transactions defeating or delaying creditors are distinguishable from those giving preference to a creditor. The latter are tolerated by law. Mere preference of one creditor over another is no evidence of fraudulent intent. But if the creditor's purpose is not to realize his debt but to help the debtor to cover up his property, he cannot shield himself by showing that his debt was *bona fide*. This view is supported by the case of *In re Moroney* (v) in which Palles, C. B., observed as follows:—With reference to the statute of Elizabeth, "its object was to protect the rights of creditors as against the property of their debtor and not to regulate the rights of creditors *inter se* or to entitle them to an equal distribution of their property."

As differing from the Bankruptcy Act the object of section 53 is not to secure equality of distribution of property amongst creditors. It is firmly settled in England that a debtor, provided the transaction is not invalidated as a fraudulent preference under Bankruptcy Law, may openly prefer a particular creditor to the rest and may transfer property to him for the *bona fide* purpose of discharging his debt even after the other creditors have brought actions or recovered judgment and such transfers are not void under the statute of Elizabeth against the preferred creditors (w). The creditor of an insolvent debtor who dies without having been adjudicated a bankrupt is entitled to the benefit of any payment or security made or given by the debtor although such payment or security would in case of bankruptcy have been set aside as a fraudulent preference.

E. placed for investment certain moneys in the hands of her solicitor who died insolvent without investing the same. After his death a memorandum was found in his safe dated a fortnight before his death the contents of which were not known to E. Thereby the solicitor declared himself a trustee of certain leaseholds then in mortgage to himself and of a bill which he had endorsed to E. to secure repayment of the sum placed in his hands. In a creditor's writ for the administration of the solicitor's estate it was held that even if the solicitor executed a memorandum with the knowledge of his insolvency still E. was entitled to the benefit of the security as against other creditors for as the solicitor retained no benefit for himself the gift was *bona fide* within 13 Eliz., c. 5 (x).

If a debtor with the purpose of cheating his creditors, knowing that money is more easily shuffled out of sight than land, makes a sale and his object is known to the purchaser, the purchaser's title is worthless though he may have paid the full price owing to want of good faith. But the rule is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. If the assets are not large enough to pay all somebody must suffer. The preferring of one creditor to another by a judgment-debtor did not make a transfer a fraudulent one. A debtor may pay his debts in any order he chooses preferring any creditor

(u) *Chidambaram v. Sami Aiyar* (1907) 30 Mad. 6; *Narayana Pattar v. Viraraghavan* (1900) 23 Mad. 184; *Clegg v. Bromley* (1912) 3 K. B. 474; *Re Lloyds' Furniture Palace* (1925) 1 Ch. 853.
(v) (1888) L. R. 21 Ir. 27.
(w) *Hakim Lal v. Mooshahar Sahu* (1907) 34 Cal. 999 (1015); *Alton v. Harrison* (1869) 4 Ch. 622; *Halbird v. Anderson* (1793)

5 Term R. 235; *Estwick v. Caillaud* (1793) 5 Term R. 420; *Ex-parte Elliott* (1876) 2 Ch. D. 104; *Ex-parte Games* (1879) 12 Ch. D. 314; *Maskelyne & Cooke v. Smith* (1902) 2 K. B. 158; *Morris v. Morris* (1895) A. C. 625.
(x) *Middleton v. Pollock, ex-parte Elliot* (1875) 2 Ch. 104.

S. 53 he pleases for all that is contained in section 53 (y). The decided cases seem to go further and shew that though a creditor may consciously and even intentionally obtain a preference over other creditors by a transfer from a judgment-debtor, the transaction cannot on that ground alone be impeached by any one creditor if it be for good consideration and retains no benefit for the debtor.

A debtor expecting attachment executed a deed of mortgage registered as a bill of sale vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession for six months and if any execution be levied his possession was to cease. A writ of sequestration was issued. It was held that the deed was not void under the statute of 13 Eliz., c. 5, notwithstanding that it conveyed the whole of the debtor's property for the benefit of some of his creditors and that it contained a proviso as above (z). Hence the reservation of a benefit to the debtor or intentional exclusion of some creditors from the operation of the deed does not render it void (a). A father being anxious to save his son (who was of extravagant and dissolute habits) from moral and financial ruin entered into a deed under which the son transferred such property as he had to the father, the father agreed to pay all his son's debts and to pay him, the bankrupt, an annuity of £800 on conditions (restraining his freedom) contained in the deed. In an action of the trustee in bankruptcy it was held that the deed was not covenous, it neither hindered nor delayed nor defrauded creditors nor was it so intended. Its object was to pay all creditors and that object was achieved (b). If we turn, therefore, to the leading authorities in England upon the matter, we find that in *Middleton v. Pollock* (c), Sir George Jessel observed that the meaning of the statute is that the debtor must not retain a benefit for himself; it has no regard whatever to the question of preference or priority among the creditors of the debtor. A settlement, therefore, which preferred certain creditors and tended to defeat others, might be good under the statute of Elizabeth. Nor again is it material under that statute whether the assignment by the debtor is of the whole of his property, present or future, or of any part of it. Again, Lord Justice Thesiger in *ex-parte Games* (d) quotes with approval the words of Giffard, L. J., in *Alton v. Harrison* (e). "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bona fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth." The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors as a body for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.

When it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff (appellant) who also was a creditor, was a loser by payment being made to

(y) *Mina Kumari v. Bijoy Singh* (1917) 44 Cal. 662; *Bhagwant v. Kedari* (1901) 25 Bom. 203; *Ishan Chunder v. Bishu Sirdar* (1897) 24 Cal. 825; *Motilal v. Utam* (1889) 13 Bom. 434; *Gopal v. Bank of Madras* (1893) 16 Mad. 397.

(z) *Alton v. Harrison* (1869) 4 Ch. 622; *Clegg v.*

Bromley (1912) 3 K. B. 474.

(a) *Maskelyne & Cooke v. Smith* (1902) 2 K. B. 158.

(b) *Denny (Trustee) v. Denny & Warr* (1919) 1 K. B. 583.

(c) (1876) 2 Ch. D. 104, 108.

(d) (1879) 12 Ch. D. 314.

(e) (1869) 4 Ch. App. 622.

the preferred creditor there being in the case no question of bankruptcy (*f*). And this is so even though in the result his remaining assets may not suffice to satisfy the balance of his debts. Even a time-barred debt is a valid consideration for a transfer of property (*g*). A debtor unable to pay his debts must not make a trust-deed creating preferences as it will be void (*h*). If *bona fide* it is an act of insolvency. If voluntary, it is void if made within two years of the insolvency of the assignor (*i*). But a trust is void against others who are not parties in the following cases:—

(1) When the deed imposed terms which might have constituted a partnership among the persons executing it (*j*).

(2) Where debtor has power to revoke and attempts to use it as a shield against his creditors (*k*).

(3) Where between the trustees and debtor there is a secret bargain to keep back a part of the estate (*l*).

(4) Where the deed contained a proviso that a dividend should only be paid to a creditor on his executing or assenting to the deed and that if within a certain time any creditor did not execute or assent his dividend should be paid by the trustees to the debtor (*m*).

Suit to set aside a transfer in fraud of creditors.—Para 4 of section 53 enacts that a suit for a declaration to avoid a transfer on the grounds set out in sub-section (1) para (1) shall be instituted by any one creditor on behalf of or for the benefit of all and not some creditors. It further enacts that a decree-holder, whether he has applied for execution or not, has a similar right. Such a suit should be instituted by one or more plaintiffs in accordance with O.1, r.8 of the Code of Civil Procedure, 1908. An order of the Court should be obtained by the plaintiff desiring to sue prior to institution of the suit though such leave is not a condition precedent and may be applied for and obtained after its institution (*n*). Death of a plaintiff whose representatives have not been brought on record within time does not cause the appeal to abate (*o*).

Limit of suit by creditor.—Article 120 of the Indian Limitation Act, 1908, applies, and the starting point is the date on which the circumstances entitling the creditor to avoid the transfer first becomes known to him (*p*). Article 91 does not apply. That article is restricted to suits between parties to the instrument or their successors in interest (*q*).

(*f*) *Musahar Sahu v. Lala Hakim Lal* (1917) 44 Cal. 521; *In re Moroney* (1887) L. R. 21 Ir. 27; *Middleton v. Pollock* (1876) 2 Ch. D. 104, 108; *Badri Singh v. Hazari Singh*, A. I. R. (1930) Oudh 93; *Ma Pua Mat v. Cheltiar Firm* (1929) 34 C. W. N. 6 P. C.
 (*g*) *Mt. Zohra Bibi v. Ganesh Prasad*, A. I. R. (1925) Oudh 267.
 (*h*) Sec. 56, Presidency Towns Insolvency Act, III of 1909; sec. 54, Provincial Insolvency Act, V of 1920.
 (*i*) Sec. 55, Presidency Towns Insolvency Act, III of 1909; sec. 53, Provincial Insolvency Act, V of 1920.
 (*j*) *Owen v. Body* (1836) 5 L. J. K. B. 191, 111 E. R. 1077.
 (*k*) *Smith v. Hurst* (1852) 10 Hare 30, 68 E. R. 826; *New Prance & Garrard's Trustee v. Hunting* (1897) 2 Q. B. 19.
 (*l*) *Blacklock v. Dobie* (1876) 1 C. P. D. 265.
 (*m*) *Spencer v. Slater* (1878) 4 Q. B. D. 13.
 (*n*) *Chennu v. Krishnan* (1902) 25 Mad. 399;

Srinivasa v. Raghava (1900) 23 Mad. 28; *Fernandez v. Rodrigues* (1897) 21 Bom. 784; *Ahmed Ali v. Abdul Majid* (1917) 44 Cal. 258; *Baldeo v. Bir Gir* (1900) 22 All. 269.
 (*o*) *Sunder Singh v. Ram Nath*, A. I. R. (1926) Lah. 167.
 (*p*) *Lal Singh v. Jaichand*, A. I. R. (1931) Lah. 70; *Narasinh v. Narayana*, A. I. R. (1926) Mad. 66 (the Judges differed as to the starting point); *Venkateswara Iyer v. Somasundaram* (1918) M. W. N. 244; *Parkash v. Raja Birendra*, A. I. R. (1931) Oudh 333.
 (*q*) *Lal Singh v. Jai Chand*, A. I. R. (1931) Lah. 70; *Ganapathi v. Sivamalai* (1913) 36 Mad. 575; *Churamani v. Baidya* (1905) 32 Cal. 473; *Din Dial v. Har Narain* (1894) 16 All. 73; *Muhammad v. Mango* (1900) 22 All. 90; *Abdul Rahim v. Kirparam Daji* (1892) 16 Bom. 186; *Narsagounda v. Chawagounda* (1918) 42 Bom. 638; *Ikram Singh v. Intizam Ali* (1884) 6 All. 260.

S. 53

Voidable.—Fraud does not render the transaction void but only voidable at the instance of the party defrauded (*r*). Hence the section renders the transaction voidable at the option of the person defrauded, defeated or delayed. On avoidance, relief will only be granted on principles of justice, equity and good conscience (*s*). Such a person has a double option either to avoid or affirm the transaction. If he affirms or does any act amounting to ratification it is destructive of his right to avoid (*t*). His intention to avoid may be manifested not only by institution of a suit but by an open or unequivocal declaration of an intention to avoid (*u*). Delay on the part of a creditor to set aside a transaction on the ground of fraud is an equitable reply to the equitable defence but it cannot amount to a statutory bar. In *Rangnath v. Govind* (*v*), Sir Lawrence Jenkins said: “A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging that plea by the lapse of time.” This was followed by a Full Bench of the Madras High Court where it was said, “we do not think it follows that because a party’s remedy as plaintiff to have an instrument avoided is time-barred, his right to say, by way of equitable defence if sued, that the instrument ought not to be enforced, is equally time-barred” (*w*). This view was adopted by a later Full Bench of the same Court which held that it was open to a creditor to plead in defence that the transfer was in fraud of creditors (*x*). The practice in the Indian Courts has been to consider the question in defence and in execution (*y*). See also *Seth Ghunsham Dass v. Uma Pershad* (*z*), decided by the Privy Council. The English practice is the same. In England a transaction in fraud of creditors has been allowed to be impeached in garnishee proceedings (*a*). Reference may also be made to section 86 of the Trust Act, to Guardian and Wards Act and to Probate and Administration Act. Order 8, rule 2 of the Code of Civil Procedure declares that the defendant must raise specifically in question that the transaction is void or voidable in point of law.

Good faith.—In considering whether the transferor has defeated or delayed creditors, the section lays down an exception in para 2 that notwithstanding fraudulent intent of the transferor to defeat or delay his creditors the transferee’s rights shall not be impaired if he has acted in good faith and for consideration. Both ingredients are essential. A thing shall be deemed to be done in “good faith” where it is in fact done honestly; on the point whether it is done negligently or not (*b*) every case stands on its own merits (*c*). The test of good faith which has been applied in English decisions is whether the transfer is “a mere cloak for

- (*r*) *Rangnath v. Govind* (1904) 28 Bom. 639, secs. 17 and 19, Indian Contract, Act IV of 1872.
 (*s*) *Krishna v. Jaikrishna* (1916) 23 C. L. J. 570; *Mt. Krishna Bai v. Debisingh*, A. I. R. (1923) Nag. 195.
 (*t*) *Satchidanand v. Radhapat*, A. I. R. (1928) All. 234.
 (*u*) *Abdul Kadir v. Ali Mia* (1912) 15 C. L. J. 649; *Oakes v. Turquand and Harding* (1867) 2 H. L. 325; *Ramaswami v. Mallappa* (1920) 43 Mad. 760.
 (*v*) (1904) 28 Bom. 639.
 (*w*) *Lakshmi Doss v. Roop Laul* (1907) 30 Mad. 169.
 (*x*) *Ramaswami v. Mallappa* (1920) 43 Mad. 760; *Subramania Ayyar v. Muthia Chettiar*

- (1918) 41 Mad. 612, overruled; *Palaniandi Chetty v. Appavu Chettiar* (1916) 30 M. L. J., 565 overruled; *Dhansukhdas v. Jhango* (1920) 16 Nag. L. R. 3; *Ram Chand v. Mathura Chand* (1921) 19 A. L. J. 299.
 (*y*) *Chidambaram Chettiar v. Sami Ayyar* (1907) 30 Mad. 6; *Rajani Kumar Dass v. Gaur Kishore Shaha* (1908) 35 Cal. 1051.
 (*z*) (1922) 36 M. L. J. 483 P. C.
 (*a*) *Edmunds v Edmunds* (1904) P. D. 362, 376.
 (*b*) Sec. 3, sub-clause (20), the General Clauses Act (X of 1897).
 (*c*) *Hale v. Saloon Omnibus Co.* (1859) 28 L. J. Ch. 777, 62 E. R. 189; *Daulat Ram v. Ghulam Fatima*, A. I. R. (1926) Lah. 25; *R. M. A. R. Firm v. Maung San Myun*, A. I. R. (1927) Rang. 331.

retaining a benefit to the grantor " (d). Even a transferee with constructive notice is affected (e). The transferor's intent to defeat or delay calls for no attention. It is the knowledge and intention of the transferee which is the determining factor as to the validity of the transaction. His *mala fides* vitiates the transfer (f). It is a question of fact in each case whether the transferee acted in good faith and without knowledge of the transferor's intent for selling (g), though the conclusions to be drawn from such an instrument are questions of law. Mere knowledge of an impending execution against the transferor is not sufficient to make the transferee a transferee otherwise than in good faith when he does not share the transferor's intention to defeat or delay creditors (h). Again, a settlement made for the protection of the settlor's family and for the correction of the settlor's evil habits has been held to be *bona fide* (i). A conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with intent to hinder, delay or defraud creditors, is void. It is not enough in order to support a conveyance or transfer as against creditors that it be made for a valuable consideration. Consideration of itself is not enough. There must also be good faith (j). If fair value be paid the Court will lean towards holding that the transaction was *bona fide* (k). Indebtedness of the vendor and purchaser's knowledge that the sale may defeat or delay creditors is not enough to negative *bona fides*. The transfer is valid if it is not shewn that it was to benefit the transferor. But if the object of the transferor is to defeat or delay his creditors and that object is known to the transferee and he aids and assists in its execution then the transfer is not in good faith (l). In the absence of good faith existence of consideration is valueless for "a good consideration doth not suffice if it be not also *bona fide*" (m). A transferee for value who takes the transfer with the intention of helping the transferor to convert his immoveable property into cash to defeat or delay his creditors cannot be treated as a transferee in good faith (n). The burden of proving *bona fides* and adequate consideration is shifted to the transferee on fraud being presumed (o).

Bona fide purchaser for value from fraudulent transferee.—The proviso to the section protects not only a *bona fide* transferee from an original fraudulent transferor but also a *bona fide* transferee from a fraudulent transferee (p). The object of this

- (d) *Natha v. Maganchand* (1903) 27 Bom. 322; *Allon v. Harrison* (1869) 4 Ch. 622 (626); *Ramasamia v. Adinarayana* (1897) 20 Mad. 465; *Ibrahim v. Jivan Das*, A. I. R. (1924) Lah. 707; *Daulat Ram v. Ghulam Fatima*, A. I. R. (1926) Lah. 25; *Kamini Kumar Roy v. Hira Lal* (1919) 23 C. W. N. 769; *Bhagwant v. Kedari* (1901) 25 Bom. 202; *Ishan Chunder Das v. Bishu Sirdar* (1897) 24 Cal. 825; *Gopal v. Bank of Madras* (1893) 16 Mad. 397; *Motilal v. Utam* (1889) 13 Bom. 434; *Kunhu Pottanassiar v. Raru Nair* (1923) 46 Mad. 478.
- (e) *Kunhu Pottanassiar v. Raru Nair* (1923) 46 Mad. 478.
- (f) *Daulat Ram v. Ghulam Fatima*, A. I. R. (1926) Lah. 25; *Shikar Chand v. Jagmandar*, A. I. R. (1928) All. 29; *Kunhu Pottanassiar v. Raru Nair* (1923) 46 Mad. 478.
- (g) *Ibrahim v. Jivan Das*, A. I. R. (1924) Lah. 707; *Daulat Ram v. Ghulam Fatima*, A. I. R. (1926) Lah. 25; *Hale v. Saloon Omnibus Co.* (1859) 4 Drew. 492, 62 E. R. 189; *Re. Holland*, *Gregg v. Holland* (1902) 2 Ch. 360.
- (h) *Ali Foon v. Hoe Lai*, A. I. R. (1932) Rang. 13.
- (i) *Ebrahimhai v. Fulhai* (1902) 26 Bom. 577.
- (j) *Hakim Lal v. Mooshahar Sahu* (1907) 34 Cal. 999 (1017); *Bott v. Smith* (1856) 21

- Beav.* 511, 52 E. R. 957; *Harman v. Richards* (1852) 10 Hare 81, 68 E. R. 847; *Corbett v. Radcliff*, 14 Moo. P. C. 121.
- (k) *Ali Foon v. Hoe Lai*, Pat. A. I. R. (1932) Rang. 13.
- (l) *Kamini Kumar Roy v. Hira Lal* (1919) 23 C. W. N. 769.
- (m) *Twyne's case* (1602) 3 Co. Rep. 806, 76 E. R. 809; *Sunder Singh v. Ram Nath*, A. I. R. (1926) Lah. 167; *Viswananda v. Raja Venkata*, A. I. R. (1927) Mad. 278; *Hakim Lal v. Mooshahar* (1907) 34 Cal. 909; *Kamini Kumar v. Hira Lal* (1919) 23 C. W. N. 769; *Bhikabhai v. Panachand* (1919) 43 Bom. 707; *Hamidunnissa v. Nazir-un-nissa* (1909) 31 All. 170; *Chidambaram v. Srinivasa* (1914) 37 Mad. 227 P. C.; *Aftabuddin v. Basanta* (1918) 22 C. W. N. 427.
- (n) *Palamalai Mudaliyar v. South Indian Export Co., Ltd.* (1910) 33 Mad. 334; *Ali Foon v. Hoe Lai*, Pat. A. I. R. (1932) Rang. 13; *Gannu v. Natha*, A. I. R. (1926) Nag. 494.
- (o) *R. M. A. R. M. Firm v. Maung San Myun*, A. I. R. (1927) Rang. 331; *Amarchand v. Gokul* (1903) 5 Bom. L. R. 142.
- (p) *Kunhu Pottanassiar v. Raru Nair* (1923) 46 Mad. 478; *Pearce v. Bulleel* (1916) 2 Ch. 544.

S. 53 paragraph is to protect an innocent transferee for value notwithstanding that the transferor may be actuated by a desire to defeat or delay his creditors (*q*).

Consideration.—In order to take the case out of the section paragraph 2 of sub-section (1) enacts the transferee must not only act in good faith but he must pay consideration for it. Both good faith and consideration must co-exist (*r*). Consideration is defined in the Indian Contract Act, section 2 (*d*). By section 25 of the same Act natural love and affection is no consideration nor is a statute barred debt, though as to statute-barred debts there are dicta to the contrary (*s*). The payment of such debts is commendable in a debtor but payment of them by the transfer of an insolvent's whole estate to the disappointment of creditors whose claims are not barred is in itself a fraud. The consideration is wholly inadequate and inadequacy is an indication, though not conclusive, of fraud (*t*).

A sale of property for good consideration is not fraudulent and void merely because it is made with intention to defeat the expected execution of a judgment-creditor (*u*) but a deed may be void as against creditors though full consideration is given for it, if it be in such a form as to defeat the creditors and be executed with that intention (*v*). Existence of an antecedent debt is not (*w*), though coupled with present advance (*x*), or agreement for future advances (*y*), sufficient consideration. As to forbearance forming the consideration for a promise it is not necessary that there should be any arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance and that forbearance for a reasonable time was in fact extended to the person who asked for it (*z*). A vendee's deferred dower debt is valid consideration (*a*). A purchase at an undervalue from one who was outlawed and has absconded pending prosecution and with notice thereof is void (*b*). So also when consideration is feigned as when a man indicted for recusancy in order to defeat the King of his forfeiture conveys his properties and goods and then flees overseas (*c*). A plaintiff in an action in tort is not a creditor (*d*), but a wife in a divorce proceedings for alimony *pendente lite* is (*e*), and where a sentence of divorce was pronounced, in respect of arrears of permanent alimony and costs the Court declared the deed fraudulent and void but reserved the question as to whether the decree was right in giving plaintiff a charge on the estate for future alimony (*f*). But where an action was pending for trespass defendant executed a voluntary conveyance of real estate to his daughter and became insolvent after the verdict went against him, the conveyance was held void (*g*). The fact that a small part of the consideration is still legally due is not sufficient to vitiate the sale

- (*q*) *Ishan Chunder v. Bishu Sirdar* (1897) 24 Cal. 825.
 (*r*) *Madan Gopal v. Lahiri Mal*, A. I. R. (1930) Lah. 1027; *Gopal Singh v. Sheokumar*, A. I. R. (1937) Nag. 85.
 (*s*) *Motumal v. Manghomal*, A. I. R. (1930) Sind 284; *Hanifa Bibi v. Punnamma* (1907) 17 M. L. J. 11.
 (*t*) *Rangilbhai v. Vinayak* (1887) 11 Bom. 666 (677); *Doe Lessee of Parry v. James* (1812) 16 East 212, 104 E. R. 1069. See sec. 28 (*a*) of the Specific Relief Act, 1 of 1877.
 (*u*) *Wood v. Dixie* (1845) 7 Q.B. 892, 115 E. R. 724.
 (*v*) *Bolt v. Smith* (1856) 21 Beav. 511, 52 E. R. 957; *Alagappa v. Dasappa* (1913) 24 M. L. J. 293.
 (*w*) *Wigan v. English & Scottish Law Life Assurance Association* (1909) 1 Ch. 207.
 (*x*) *Marlindale v. Booth* (1832) 3 B. & Ad. 498,

- 110 E. R. 180.
 (*y*) *Re. Bamford ex-parte Games* (1879) 12 Ch. D. 314.
 (*z*) *Falluton v. Provincial Bank of Ireland* (1903) A. C. 309; *Alliance Bank v. Broom* (1864) 2 Dr. & S. 289, 62 E. R. 631.
 (*a*) *Suba Bibi v. Balgobind Das* (1886) 8 All. 178.
 (*b*) *Herne v. Merres* (1687) 1 Vern. 465, 23 E. R. 591.
 (*c*) *Pauncefoot v. Blunt* (1593) cited in 3 Co. Rep. at p. 82, 76 E. R. 816.
 (*d*) *Leckner v. Freeman* (1699) 1 Eq. Cas. Abi. 149, 24 E. R. 51.
 (*e*) *Brown v. Brown* (1828) 2 Hay. Ecc. 5, 162. E. R. 766.
 (*f*) *Blenkinsopp v. Blenkinsopp* (1852) 21 L. J., Ch. 401, 42 E. R. 644.
 (*g*) *Barling v. Bishop* (1860) 29 Beav. 417, 54 E. R. 689.

for want of consideration (*h*). Effect may be given to the instrument to the extent of the amount of the consideration that is valuable (*i*). It has, however, been observed that even if the full consideration be not paid it would not be a ground for holding the transaction fraudulent (*j*). Another view is that where part of the consideration is fictitious the transaction is wholly void and cannot be upheld even to the extent of the consideration actually advanced (*k*). But where the transferee has discharged a valid prior mortgage the transfer will be set aside only on his being given a charge for the amount spent by him in discharging such mortgage. The transferee is not entitled to the money debts of the transferor discharged by him (*l*).

Onus.—Where the transferee seeks to support the transaction on the ground of good faith and valuable consideration the burden is on the party who challenges the deed (*m*). If that onus be discharged it is for the transferee to prove both and where consideration is proved the Court will be slow to hold there was absence of good faith (*n*).

Conflicting equities.—The proviso to section 53 not only protects a *bona fide* transferee from an original fraudulent transferor but also a *bona fide* transferee from a fraudulent transferee (*o*). What seems to have been decided differently by the High Court of Allahabad (*p*) is due to the case being misunderstood. There was a fictitious mortgage without any consideration and as such totally inoperative so that the second transferee took with the defects in title of the first transferee who took nothing.

Marriage settlement.—Where marriage is entered into and the settlement executed as a part of a scheme to defeat or delay creditors in which the husband and wife are both implicated to protect the property from their claims the consideration of marriage cannot support such a settlement (*q*). The wife must be shewn as privy to the fraud (*r*). So when a wife had no knowledge of the contents of the deed and her husband's insolvent circumstances the settlement was held valid notwithstanding the falsity of the recitals as to the husband's indebtedness to the wife (*s*). A general covenant in an ante-nuptial settlement to settle all after-acquired property except business assets upon wife and children is not void (*t*) and a settlement though post-nuptial and voluntary is not void if there be no intent to defeat, hinder or delay creditors (*u*).

(*h*) *Rajani Kumar v. Gaur Kishore* (1908) 35 Cal. 1051; *China Pitchiah v. Pedakotiah* (1913) 36 Mad. 29; *Natha v. Magan Chand* (1903) 27 Bom. 322.

(*i*) *Rajani Kumar v. Gaur Kishore* (1908) 35 Cal. 1051.

(*j*) *Deoki Nandan v. Saiyed Jawad*, A. I. R. (1928) Pat. 199.

(*k*) *Sama Row v. Doraisami* (1913) 24 M. L. J. 266; *Visvananda v. Raja Venkata*, A. I. R. (1927) Mad. 278; *Chidambaram v. Sami Aiyar* (1907) 30 Mad. 6; *Bhikabhai v. Panachand* (1919) 43 Bom. 707; *Madan Gopal v. Lahiri Mal*, A. I. R. (1930) Lah. 1027; *Mula Ram v. Jiwind Ram*, A. I. R. (1923) Lah. 423; *Appalarajee v. Krishna Murthy*, A. I. R. (1932) Mad. 182; *Waryam Singh v. Thakor Das Dhamali* (1935) 16 Lah. 680.

(*l*) *Palamalai v. The South Indian Export Co. Ltd.* (1910) 33 Mad. 334; *Visvananda v. Raja Venkata*, A. I. R. (1927) Mad. 278; *Gangama v. Veerappa*, A. I. R. (1931) Mad. 513.

(*m*) *Daulat Ram v. Ghulam Fatima*, A. I. R. (1926) Lah. 25; *Amarchand v. Gokul* (1903) 5 Bom. L. R. 142.

(*n*) *Palamalai v. The South Indian Export Co.* (1910) 33 Mad. 334; *Mohileera v. Muhammad*, A. I. R. (1930) Mad. 665; *Amarchand v. Gokul* (1903) 5 Bom. L. R. 142.

(*o*) *Kunhu Pottanassiar v. Raru Nair* (1923) 46 Mad. 478; *Parthasarathy v. Subbaraya*, A. I. R. (1924) Mad. 67; *Shikar Chand v. Jogmandar*, A. I. R. (1928) All. 29.

(*p*) *Basti Begum v. Banarsi Prasad* (1908) 30 All. 297.

(*q*) *Colombine v. Penhall* (1853) 1 Sin. & G. H. 228, 65 E. R. 98; *Bulmer v. Hunter* (1869) L. R. 8 Eq. 46; *Re. Pennington ex parte Cooper* (1888) 59 L. T. 774; *Jagger v. Jagger* (1926) P. D. 93.

(*r*) *Kewan v. Crawford* (1877) 6 Ch. D. 29; *Re. Reis ex parte Clough* (1904) 2 K. B. 769.

(*s*) *Kewan v. Crawford* (1877) 6 Ch. D. 29.

(*t*) *Re. Reis ex parte Clough* (1904) 2 K. B. 769.

(*u*) *Re. Holland, Gregg v. Holland* (1902) 2 Ch. 360; *Jagger v. Jagger* (1926) P. D. 93.

S. 53

Separation deed.—On separation a trust for creditors reserving surplus for benefit of wife is *bona fide* and supported by valuable consideration (*v*).

Law relating to insolvency.—Sub-section 1 is qualified by para 3 which enacts that it shall be subject to the law of insolvency. The Presidency Towns Insolvency Act, III of 1909, enacts in sections 53 to 57 what is the effect of insolvency on antecedent transactions. Amongst them section 55 avoids a voluntary transfer if the transferor is adjudged insolvent within two years from the date thereof and section 56 avoids a fraudulent preference made three months anterior to the petition on which the transferor is adjudged insolvent. Section 55 protects a transferee in good faith and for valuable consideration while section 56 protects a similar transferee from a creditor obtaining preference from the debtor. Connected with these sections is section 9 of the same Act which enumerates the numerous instances when a man is deemed to have committed an act of insolvency wherein is included sub-clause (b) whereby a debtor commits an act of insolvency, "if in British India or elsewhere he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditor." Unlike section 53 of the Transfer of Property Act which renders transfers coming within its operation voidable all transfers made under sections 55 and 56 are void as against the Official Assignee. The fundamental distinction between section 53 of the Transfer of Property Act and section 56 of the Presidency Towns Insolvency Act is that under the first Act one creditor may be preferred to another while under the latter Act such a transaction is void on the ground that the transferee cannot be said to be acting in good faith (*w*). A debtor commits an act of insolvency on execution of a composition deed in favour of trustees for the benefit of his creditors (*x*). In ascertaining property available for debts it has been provided that the Official Assignee's title shall be deemed to have relation back to and to commence at (a) the time of the commencement of the act of insolvency on which an order of adjudication is made against him or (b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition (*y*), and therefore the original transferee cannot convey any saleable interest to a subsequent transferee (*z*). When the execution of a sale deed requiring registration is relied upon as an act of insolvency the three months must be calculated from the date of registration (*a*). The onus of proving that a particular transfer effected by the insolvent is void as against the Official Assignee under section 56 of the Presidency Towns Insolvency Act is on the Official Assignee whereas the onus of proving good faith and valuable consideration in a case coming under section 55 is on the transferee (*b*).

Proceeding to set aside the transfer.—A transaction under section 53 is voidable at the instance of a creditor, whilst under sections 55 and 56 of the Presidency Towns Insolvency Act, III of 1909, and sections 53 and 54 of the Provincial Insolvency Act, V of 1920, it is void against the Official Assignee, and any creditor may

(v) *Nunn v. Wilsmore* (1800) 8 Term Rep. 521, 101 E. R. 1524.

(w) *The Official Assignee of Madras v. Sheikh Moideen* (1927) 50 Mad. 948; in *ex-parte Jerkes*, *In re Official Receiver* (1902) 2 K. B. 58.

(x) *Lalchand v. Hussainio*, A. I. R. (1927) Sind 78; *Karsandas v. Maganlal* (1901) 28 Bom. 476; *ex-parte Hughes* (1893) 1 Q. B. 595; *In re Wood* (1872) 7 Ch. A. 302.

(y) Sec. 51, Presidency Towns Insolvency Act, III of 1909.

(z) *Ala Mohammad v. Official Receiver* (1935) 16 Lah. 1013.

(a) *Iswarayya v. Subbanna* (1935) 58 Mad. 166.

(b) *The Official Assignee of Madras v. Sheikh Moideen* (1927) 50 Mad. 948; *the Official Assignee of Madras v. Sambanda Mudaliar* (1920) 43 Mad. 739; *Nripendra v. Ashutosh* (1914) 19 C. W. N. 157; *Nilmoni v. Bashanta* (1914) 19 C. W. N. 865; *the Official Assignee of Bengal v. the Yokohama Specie Bank, Ltd.* (1924) 29 C. W. N. 374.

take proceedings to avoid the transaction. The word "void" in section 53 of the Provincial Insolvency Act and section 55 of the Presidency Towns Insolvency Act means only "voidable." It is only the Official Receiver or the Official Assignee and not anybody else, i.e., a purchaser from him that can get such a transfer set aside (c). Just as section 4 of the Provincial Insolvency Act confers powers to determine the question of title no such express power is conferred by the corresponding section 7 of the Presidency Towns Insolvency Act.

Under the first-mentioned Act the remedy is necessarily by a suit, whilst under the Insolvency Acts on the question of procedure there has been a divergence of opinion between the different Courts in India. The Calcutta High Court has held that the Legislature has invested the Insolvency Court with extensive powers under section 4 of the Provincial Insolvency Act to investigate questions of title raised by a stranger when possession is to be given to a purchaser from an Official Receiver. It does not, however, follow from this that the Court has exclusive jurisdiction to deal with all questions of title that may possibly be but are not actually raised by a stranger. But if a stranger raises a question of title for its decision, that decision is binding on him. It is true that the circumstances under which questions of title should or should not be investigated or determined have not been defined in the Acts and the Legislature has left the matter to the discretion of the Court itself (d). The same Court in an earlier case held that a question as to whether a purchase ten years ago in the name of a lady was a purchase *benami*, is a long way from bringing within anything that section 36 of the Presidency Towns Insolvency Act contemplates, observing that the correct course in such a case where there is any real conflict is either to proceed by way of a motion before the Insolvency Judge or to proceed by way of suit (e). The Allahabad and the Madras High Courts have held that any question as to the invalidity of a transaction raised by the Official Assignee can be determined only by the Insolvency ordinary Civil Court (f). These decisions are under the Provincial Towns Insolvency Act which empowers the Insolvency Court to adjudicate on the question of title. A later decision of the Madras High Court has, however, taken a different view. It was there held that there was nothing in the Provincial Insolvency Act or in *Mariappa Pillai v. Raman Chettiya* (g) to prevent the creditors, and therefore the Official Receiver, from proceeding under section 53 of the Transfer of Property Act if they wish and the fact that they have another remedy under section 53 of the Provincial Insolvency Act does not deprive them of their right of suit under section 53 of the Transfer of Property Act (h). The same Court when the question arose under the Presidency Towns Insolvency Act observed that these decisions proceeded on the ground that when a special forum is constituted by a special Act questions arising under that Act must be determined by that forum. Sections 55 and 56 are special provisions relating to insolvency and it is only in insolvency that these transactions can be impeached as voidable if they do not fall under section 53 of the Transfer of Property Act, so that a transaction not falling under the Transfer of Property Act can only be avoided

(c) *Mariappa v. Raman Chettiya* (1919) 42 Mad. 322.

(d) *Shree Shree Radhakrishna v. the Official Receiver* (1932) 59 Cal. 1135.

(e) *Jnanendra v. Official Assignee of Calcutta*, A. I. R. (1926) Cal. 597.

(f) *Kaniz Fatima v. Narain Singh* (1927) 49 All. 71; *Maharana Kunwar v. E. V. David* (1924) 46 All. 16; *Shikri Prasad v. Aziz Ali* (1922) 44 All. 71; *Shahzada Begum v.*

Gokulchand, A. I. R. (1927) Oudh 357; *Offical Assignee of Bombay v. Sundara chari* (1927) 50 Mad. 776; *Official Receiver, Coimbatore v. Palaniswami* (1925) 48 Mad. 750; *Mariappa v. Rama Chettiya* (1919) 42 Mad. 322.

(g) (1919) 42 Mad. 322.

(h) *Offical Receiver v. Bastiao Souza*, A. I. R. (1926) Mad. 826.

S 53

by sections 55 and 56 of the Presidency Towns Insolvency Act (i). With respect, it is submitted that these decisions of the Madras High Court do not seem to be sound.

The Calcutta High Court has adopted the English decisions. Section 72 of the Bankruptcy Act, 1869, effected a change in the law as it stood under the earlier Act of 1849. In the Bankruptcy Act of 1883, section 72 of the Act of 1869 was re-enacted as section 105 (1) of the Bankruptcy Act, 1914. The diversity of judicial opinion such as there existed prior to 1883 has been pointed out in the case of *Fool Kumari v. Khirod Chandra* (j). In that case the present state of the law as established by decisions under the Acts of 1883 and 1914 has been said to be this :—"That the jurisdiction of the Bankruptcy Courts to adjudicate on the rights of third parties is now fully recognized though it has also been laid down that there is a discretion in the Bankruptcy Courts to direct the trustee to institute or defend in the ordinary Civil Courts suits concerning the rights of third parties." The words of section 4 of the Provincial Insolvency Act are, if at all, wider than those of section 105 (1) of the Bankruptcy Act, 1914. The word "title" is expressly mentioned in section 4 of the Provincial Insolvency Act while in section 7 of the Presidency Towns Insolvency Act it is not.

Presumption of fraud.—Except when parties stand on unequal footing fraud is never presumed in law though prior to the Amending Act, 20 of 1929, a rule of presumption since abrogated was laid down in paragraph 2 of sub-section (1) in cases of gratuitous transfers and transfers for grossly inadequate consideration to bring the law in India in conformity with the decisions of the English Courts.

In *Spirett v. Willows* (k) Lord Westbury, in setting aside a settlement made by a man reserving other property for payments to creditors who were, however, not paid, said, if the debt of the creditor by whom the voluntary settlement is impeached, existed at the date of the settlement and the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to "delay, hinder or defraud creditors," or that after the settlement the settlor had no sufficient means or reasonable expectations of being able to pay his then existing debts."

In *Holmes v. Penney* (l), Wood, V. C., said : "Where, in order to evade the statute, a person being considerably indebted makes a voluntary settlement which would be void if impeached by those who were then his creditors and afterwards pays them off, and a new set of creditors stand in their places, such a settlement would be void against the subsequent creditors because it would be a fraud upon the statute." The above dicta were considered and commented on in *Freeman v. Pope* (m), where in setting aside a voluntary settlement by the execution of which the settlor was rendered absolutely insolvent it was laid down that the intention to defeat or delay creditors by such an instrument may be inferred in many ways and amongst these where, after deducting from the settlor's property, the particulars settled, he is not left with enough to pay his debts. This doctrine of inference that a man intends the natural and necessary result of his acts was entirely abjured

(i) *The Official Assignee of Bombay v. Sundara Chari* (1927) 50 Mad. 776.
(j) (1927) 31 C. W. N. 502.

(k) (1865) 34 L. J. Ch. 365, 46 E. R. 649.
(l) (1857) 26 L. J. Ch. 179, 69 E. R. 1035.
(m) (1870) 5 Ch. App. 538.

by Lord Esher, M.R., in *ex-parte Mercer in re Wise* (n). There an honest man not in fact indebted at all made a voluntary settlement in favour of his wife, marriage with whom constituted a breach of promise of marriage with another who sued him and succeeded in obtaining damages for the breach. It was held there was not sufficient evidence to find that the settlement was intended to delay, hinder or defeat creditors and that such delay, hindrance or defeat was not a necessary consequence of the settlement. *Ex-parte Mercer* was approved in *Re. Holland* (o), in which it was held that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance and then ask yourself the question whether the conveyance was in fact executed with intent to defeat and delay creditors. The principle now established is that in each particular case the Court is to decide whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder or delay his creditors (p). The facts should be considered in relation to each other and weighed as a whole. It is a fallacious method to consider separately each fact which militates against the *bona fide* nature of the transaction and which by itself may be susceptible of explanation. Secrecy, haste in execution and unsatisfactory nature of the evidence as to settlement of accounts were held to raise an irresistible inference of fraud on creditors (q). Fraud is not capable of being established in a majority of cases by positive proof being in its very nature secret. In the generality of cases circumstantial evidence is the only resource in dealing with questions of fraud (r).

The circumstances that on sale the vendor reserved nothing to himself, that the purchaser bought the property without seeing it or taking care to value it, that the consideration consisted of debts time-barred, that it was grossly inadequate, and possession remained with the vendor were considered as *indicia* of fraud (s).

Fraudulent attempt defeated.—Section 53 (1) has been enacted for the benefit of creditors. Only a creditor can take advantage of this sub-section to defeat fraudulent transfer.

The transferee, however, is given the benefit when he acts *bona fide* for valuable consideration and the creditors' right is subject to the law relating to insolvency, but a third exception is to be found in the case of the transferor entitled to avoid the transaction on the ground that the purpose of the fraud has not been accomplished. The maxim "*in pari delicto potior est conditio possidentis*" has no application as the parties are not *in pari delicto*. The leading case on this subject is *Pether-permal Chetty v. Muniandi Servai* (t), a decision of the Judicial Committee in which their Lordships held that the purpose of the fraud having not only not been effected but absolutely defeated, there was nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of his property. The decision of the Court of Appeal in *Taylor v. Bowers* (u) and the authorities upon which that is based clearly establishes this. *Symes v. Hughes* (v) and *In re Great Berlin Steam Boat Co.* (w) are to the same effect.

(n) (1886) 17 Q. B. D. 290.

(o) (1902) 2 Ch. 360.

(p) *Thompson v. Webster* (1859) 4 Drew 628; 82 E. R. 241; *Godfrey v. Poole* (1888) 13 A. C. 497; *In re Holland, Gregg v. Holland* (1902) 2 Ch. 360.

(q) *Ghunsham Das v. Uma Pershad* (1919) 21 Bom. L. R. 472 P. C.

(r) *Parkash Narain v. Raja Bircendra*, A. I. R. (1931) Oudh 333.

(s) *Nana v. Rautmal* (1898) 22 Bom. 255.

(t) (1908) 35 Cal. 551, 35 I. A. 98.

(u) (1876) 1 Q. B. D. 291.

(v) (1870) L. R. 9 Eq. 475.

(w) (1884) 26 Ch. D. 616.

S. 53

The authorities have been fully reviewed in *Jadunath v. Rup Lal* (x). If the fraudulent object is accomplished, or accomplished even partially, the general rule of equity is that the transferee would not be disturbed in order to enable the fraudulent confederate to retain the property transferred to him. The Law lays no *locus pœnitentiæ* (y). In order to be effective the fraud or contemplated fraud must, according to the authorities, be effected (z). This distinction between the effect of fraud merely intended and a fraudulent purpose actually accomplished has been recognized by the Indian Legislature in section 84 of the Indian Trust Act, II of 1882, which enables the fraudulent grantor to contend that the deed is a nullity. In India a transaction by which property is conveyed in the name of a person other than the one paying the consideration is by no means uncommon, a dealing common to Hindus and Mahomedans alike and much in use in India. Known as *benami* transactions they bear a curious resemblance to what are known to English Law as resulting trusts recognized in India by section 82 of the Indian Trust Act, II of 1882. The rule of English Law is very nearly the same. The English Law has engrafted an exception on this rule where the transferee is the wife or the child (a) which, however, does not extend to India as the presumption, not irrebutable (b), of English Law of advancement or gift does not obtain in this country (c) unless the parties, though permanent residents of India, were born of English parents to whom the English Law with rebuttable presumption of advancement is applicable (d). But the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not (e). The general rule in India, in the absence of all other relevant circumstances, is to consider from what source the money proceeded with which the purchase-money was paid (f), an important fact but not the only test of ownership (g). All the surrounding circumstances may be evidence to support or rebut the presumption of suggested advancement or gift.

Rights of transferee under the section.—If he has participated in the fraud of his transferor he is entitled to no relief. It is otherwise where he is a transferee in good faith and for consideration. So also a fraudulent conveyance is purged by a good one. If a conveyance be made by fraud and afterwards the land is conveyed over upon valuable consideration *bona fide* the fraud is purged (h).

Transferor possessed of properties other than those forming the subject of transfer impeached—The mere fact that the transferor has other properties to

(x) (1906) 33 Cal. 967.

(y) *Alexander v. Rayson* (1936) 52 T. L. R. 131.

(z) *Petherpermal Chetty v. Muniandi Servai* (1908) 35 Cal. 551, 35 I. A. 98; *Jadu Nath v. Rup Lal* (1906) 33 Cal. 967; *Raghuvalu v. Adinarayana* (1909) 32 Mad. 323; *Bai Devmani v. Ravishankar* (1929) 53 Bom. 321; *Girdharlal v. Manikamma* (1914) 38 Bom. 10; *Honapa v. Narasapa* (1899) 23 Bom. 406; *Sheikh Ismail v. Wasudeo* (1920) 16 Nag. L. R. 129; *Ragho Atmaram v. Purshoam* (1903) 4 Nag. L. R. 26.

(a) *Williams v. Williams* (1863) 32 Beav. 370; 55 E. R. 145; *Hepworth v. Hepworth* (1870) L. R. 11 Eq. 10; *Bennet v. Bennet* (1879) 10 Ch. D. 478; *Lamplugh v. Lamplugh* (1709) 1 P. Wms. 111, 24 E. R. 316; *Re Richardson, Weston v. Richardson* (1882) 47 L. T. 514; *Mercier v. Mercier* (1903) 2 Ch. D. 98.

(b) *Crabb v. Crabb* (1834) 1 Mt. & K. 511, 39 E. R. 774; *Stock v. McAvoy* (1872) L. R. 15 Eq. 55; *Forest v. Forest* (1885) 11 L. T. 763.

(c) *Bissessur v. Luchmessur* (1879) 5 C. L. R. 477,

6 I. A. 233; *Gopeekrist v. Gungapersaud*

(1854) 6 M. I. A. 53 (59); *Dharani Kant*

v. Kristo Kumari (1886) 13 Cal. 181,

13 I. A. 70; *Thakro v. Ganga Pershad* (1888)

10 All. 197; 15 I. A. 29; *Moulvie Sayyud*

v. Mt. Bebee (1861) 13 M. I. A. 232 (247);

Chunder Nath v. Kristo Komul (1871)

15 W. R. 357; *Motivahu v. Purshotam*

(1905) 29 Bom. 306; *Lakshmiah v.*

Kothandarama (1925) 48 Mad. 605, 52 I. A.

286; *Guran Ditta v. Ram Ditta* (1928)

55 Cal. 944, 55 I. A. 235; *Bilas Kunwar*

v. Desraj (1915) 37 All. 557, 42 I. A. 202.

(d) *Kerwick v. Kerwick* (1921) 48 Cal. 260, 47 I. A.

275.

(e) *Bilas Kunwar v. Desraj* (1915) 37 All. 557,

42 I. A. 202.

(f) *Dhurum Das v. Shama Soondri* (1843) 3 M. I. A.

229; *Ram Narain v. Muhammad Hadi*

(1899) 26 Cal. 227, 26 I. A. 38; *De Silva*

v. De Silva (1903) 27 Bom. 103.

(g) *Ram Narain v. Muhammad Hadi* (1899)

26 Cal. 227, 26 I. A. 38.

(h) *Porter v. Clinton* (1693) Comb. 222, 90 E. R.

441.

satisfy the creditors does not prevent the application of section 53 (i). In *Alton v. Harrison (j)*, Giffard, L. J., observed: "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property."

Second appeal.—Although intent to defeat, hinder or delay has been said to be a question of fact, questions which arise for construction under section 53 of the Transfer of Property Act may be described as "mixed questions of law and fact—a phrase not unhappy if it carries with it the warning that in so far as it depends upon fact the finding of the Court of first appeal must be accepted" (k). Without seeking to abridge the effect of sections 100 and 101 of the Code of Civil Procedure or weaken the strict rule that on second appeal the Appellate Court is bound by the findings of fact of the Court below, "the facts found need not be questioned. It is the soundness of the conclusion from them that is in question and this is a matter of law." Thus remarked the Privy Council (l) which pointed out elsewhere (m) that "questions of law and fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law." Unless there has been misconstruction a mistaken inference from documents is an error not of law but of fact (n). When the facts proved were that the transfer was with intent to defraud, the consideration was not proved, and the transferee could not plead good faith, it was held these were questions of fact and in second appeal it was not open to the appellant to question these findings (o). A contrary view has been taken by the Court of the Judicial Commissioner at Nagpur, namely, that a second appeal lies (p).

Third parties.—The benefit of the statute has been extended where the transferee makes payment not for his own benefit but for the benefit of the settlor's family or wife or child resulting in the withdrawal from the creditors of all the settlor's property. Although the circumstances shew an intent to defeat or delay if there were nothing more and if it were the settlor's spontaneous act, nevertheless, when taken with other circumstances and the evidence shews that the condition on which the settlement was made had never occurred to the settlor till made, there is no intention to defeat or delay and particularly so where the parties who took part in the transaction were not aware of any other debts besides the one about to be paid (q).

Laches.—The defence of delay is not effectual. The creditor has a legal right which cannot be lost by mere delay to enforce it, unless the delay is such as to cause a statutory bar (r).

Surety.—The liability of the surety is co-extensive with that of the principal debtor (s). Hence he is not justified in placing his property beyond the reach of creditors of the principal debtor (t).

- (i) *(Lala) Gopi Chand v. Jodhraj Deojit*, A. I. R. (1929) All. 458; *Meenakshi Ammal v. Ammini Ammal*, A. I. R. (1927) Mad. 657.
- (j) (1869) 38 L. J. Ch. 669.
- (k) *Dhanna Mal v. Moti Sagar* (1927) 54 I. A. 178; *Sabal Singh v. Salik Ram* (1922) 44 All. 602; *Beti v. Sikhdar Singh* (1928) 50 All. 180; *Lachmeswar Singh v. Manowar Hossein* (1891) 19 Cal. 253, 19 I. A. 48; *Ishan Chunder v. Bishu Sirdar* (1897) 24 Cal. 825.
- (l) *Ramgopal v. Shamskhaton* (1893) 20 Cal. 93, 19 I. A. 228.
- (m) *Nafar Chandra v. Shukur Sheikh* (1918) 46 Cal. 189, 45 I. A. 183.
- (n) *Sakebrao v. Jaiwantrao* (1933) 35 Bom. L. R. 816 P. C.

- (o) *Lala Gopi Chand v. Jodhraj Deojit*, A. I. R. (1929) All. 458.
- (p) *Gannu v. Nathu*, A. I. R. (1926) Nag. 494.
- (q) *Thomson v. Webster* (1859) 4 Drew. 628, 62 E. R. 241; *Bayspoole v. Collins* (1871) 6 Ch. App. 228; *Re Tetley ex-parte Jeffrey* (1896) 66 L. J. Q. B. 111 (grantor of extravagant habits); *Holmes v. Penney* (1856) 3 K. & J. 90, 69 E. R. 1035 (settlor heavily indebted); *Ebrahim v. Foolbai* (1902) 26 Bom. 577 (settlor of extravagant and dissolute habits).
- (r) *In re Maddever, Three Towns Banking Co. v. Maddever* (1884) 27 Ch. 523.
- (s) Sec. 128, Indian Contract Act, IX of 1872.
- (t) *Goodricke v. Taylor* (1864) 2 D. J. & S. 135, 46 E. R. 326.

S. 53

Costs.—On avoidance of settlement trustees who have acted properly in discharge of their duties and not put plaintiff to unnecessary expense are entitled to attorney and client costs (*u*). Where a *cestui que trust* was concerned, a decree without costs was made (*v*). In another creditor's action his costs were given priority over the debts of the testator and the costs of the trustees (*w*).

Interlocutory injunction.—The Court has power to grant an interim injunction *quia timet* brought by an execution creditor under Order 39, rule 1 (b) of the Code of Civil Procedure, 1908, but will not at the instance of a non-judgment-creditor interfere by an injunction to prevent a transfer of the property by debtor unless interference is warranted by the application of Order 38, rule 5. Nor would the Court to protect the wife's right to alimony restrain the husband from removing the property *quia timet* (*x*). The doctrine of *lis pendens* would not apply, for in a petition for maintenance there is no dispute as to the rights to the property of the husband.

To restrain dealings with property no injunction can be granted until the plaintiff has under Order 39, rule 1 (b) of the Code of Civil Procedure of 1908, proved by definite evidence that the defendant threatened or intended to remove or dispose of his property with a view to defraud his creditors (*y*). A testator voluntarily assigned two policies of insurance to his niece who received the moneys on his death and invested them on mortgage with other moneys of her own. The Court exacted an undertaking from the assignee not to receive the moneys secured (*z*). And where a receiver has been appointed at the instance of a judgment-creditor an injunction will be granted against the assignee receiving the debtor's property (*a*).

Mesne profits.—Profits back against the debtor will not be decreed. The Court only removes fraudulent conveyances (*b*).

Form of decree in setting aside deeds partially, viz., as against creditors only.—Declare that the indentures are void as against the plaintiff and all other creditors of the defendant and order the defendant to join in and concur in all necessary acts, conveyances, etc., for the purpose of raising the amount due to the plaintiff and all other creditors, out of the estates, and the rents; direct an account to be taken of the rents. The defendant to pay the costs (*c*).

Partition after decree obtained against the father.—It has been laid down that the sons of a Hindu father at any time upto attachment of the joint family property can enter into a partition with their father with the express object of avoiding attachment of what upto the time of the partition has been the joint family property. If they do so their individual property acquired by the partition escapes liability. In order, however, to rid himself of his liability to pay his father's debt the partition by the son must take place before the property has been actually attached. The partition can only be set aside on evidence shewing fraud and the mere fact of the desire to save their property will not be sufficient to justify an inference of fraud (*d*).

(*u*) *Meerry v. Pownall* (1898) 1 Ch. 306.
 (*v*) *Elsey v. Cox* (1858) 26 Beav. 95, 53 E. R. 832.
 (*w*) *Adames v. Hallett* (1868) 18 L. T. 789.
 (*x*) *Jagger v. Jagger* (1926) P. D. 93.
 (*y*) *Kalian Singh v. Mt. Shanno*, A. I. R. (1924) Lah. 718.
 (*z*) *Re. Mouat, Kingston Cotton Mills Co. v. Mouat* (1899) 1 Ch. 831; *Beyfus v. Bullock* (1869) 7 Ec. 391.

(*a*) *Ideal Bedding Co., Ltd. v. Holland* (1907) 2 Ch. 157.
 (*b*) *Higgins v. York Building Co.* (1740) 2 Atk. 207, 26 E. R. 467.
 (*c*) *Bott v. Smith* (1856) 21 Beav. 511, 52 E. R. 957.
 (*d*) *Gaya Prasad v. Murlidhar* (1928) 50 All. 137; *Krishnasami v. Ramasami* (1899) 22 Mad. 519; *Peda Venkanna v. Sreenivasa* (1917) 41 Mad. 136.

Subsequent transferee.—Sub-section 2 of section 53 deals with transfers made without consideration with intent to defraud a subsequent transferee. As explained in the statement of objects and reasons for amendment of the section, the law in England relating to transfers made with intent to defraud subsequent transferee for value was altered by section 2 of the Voluntary Conveyances Act, 1893 (56 and 57 Vict., c. 21) by which it was provided that a voluntary conveyance if made *bona fide* and without fraudulent intent should not be deemed fraudulent within the meaning of 27 Eliz., c. 4, by reason of any subsequent purchase for value. Section 2 of the Voluntary Conveyances Act was repealed by section 173 of the Law of Property Act, 1925. Clause 2 of sub-section 2, following the rule in section 173, sub-section 2, enacts that the mere existence of a subsequent transfer for consideration shall not by itself be evidence that a previous transfer made without consideration was made with intent to defraud. The section deals with transfers by act *inter vivos* so that a person who steps in by operation of law and not by any act of the owner is not subsequent transferee within the meaning of this sub-section (e). The section is silent as to the rights of a transferee impaired by such a transaction.

Transfer fraudulent against purchasers.—Section 53, sub-section (2) has been enacted for the protection of the purchasers just as sub-section (1) has been enacted for the benefit of the creditors. Originally founded upon the statute 27 Eliz., c. 4, to which was added a proviso similar to clause (2) of sub-section (2) by the Voluntary Conveyances Act, 1893, repealed by the Law of Property Act, 1925, and substituted by section 173 of that Act, it runs as follows :—

(1) Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

(2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after the twenty-eighth day of June, eighteen hundred and ninety-three.

Voluntary conveyance.—The object of enacting sub-section (2) is somewhat difficult to understand for cases contemplated can hardly arise in this country. Every voluntary transfer as contemplated by the section is compulsorily registrable both under the Indian Registration Act as also under section 123 of the Transfer of Property Act so that registration would be notice to the subsequent transferee. Founded on 27 Eliz., c. 4, and the Voluntary Conveyances Act, 1893, repealed and re-enacted as section 173 of the Law of Property Act, 1925, the fact that England is not like India universally registrable seems to have been overlooked and this is one of the reasons why there has been no decision on the subject in this country upto the present time. The distinction between good and valuable consideration is this, that the former is good between the parties but the latter makes the transfer good against a subsequent transferee (f). When consideration is good a conveyance is not fraudulent under statute 27 Eliz., c. 4, though made secretly and kept concealed (g). The statute binds the fraudulent grantor and persons claiming under him as volunteers. A purchaser from the devisee of one who has made a voluntary transfer in his lifetime was not entitled under the statute 27 Eliz., c. 4, to avoid

(e) *Vasudeo v. Janardhan* (1915) 39 Bom. 507.
(f) *Gully v. Exeter* (1830) 10 B. & C. 584, 109 E.
R. 588.

(g) *Griffin v. Stanhope* (1617) Cro. Jac. 454,
79 E. R. 389; *Colville v. Parker* (1607) Cro.
Jac. 158, 79 E. R. 138.

S. 53 the voluntary transfer (*h*). The voluntary transfer under this sub-section is voidable at the option of the transferee who may claim specific performance of the contract (*i*). The transferor cannot (*j*), nor can he resist the transferee's demand for the return of the deposit (*k*). An assignment of a leasehold is not a voluntary conveyance within the statute (*l*) even though the consideration be natural love and affection (*m*) but such an assignment will not support a concurrent conveyance of freehold (*n*). A post-nuptial settlement in pursuance of an ante-nuptial arrangement is not a voluntary settlement (*o*), otherwise if the agreement be parol (*p*), the transferee who claims benefit under this section must be *bona fide* transferee for value and not for inadequate consideration.

Not a subsequent transferee.—Having regard to the preamble as well as section 5 of the Transfer of Property Act, a purchaser at a Court auction who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53, sub-section (2) (*q*).

Persons who may impeach.—Only purchasers for value who come in after the fraudulent conveyance can avoid. Indirectly it enables a settlor to defeat a settlement made by him by letting in a subsequent purchaser for value. A mortgagee is a purchaser within the statute (*r*). A lessee at a rack rent is a purchaser for valuable consideration (*s*). So is an equitable mortgagee by deposit of title-deeds (*t*) and chargee (*u*).

Persons whose title may not be impeached.—The title of a purchaser for valuable consideration cannot be defeated by a prior voluntary settlement of which he had no notice though he purchased of one who had obtained a conveyance by fraud, but of which fraud he the purchaser was ignorant (*v*).

Effect of notice of prior grant.—A purchaser who previously to the contract had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force, is disentitled to specific performance (*w*). According to English decisions a voluntary conveyance is void against a subsequent purchaser under 27 Eliz., c. 4, whether with or without notice (*x*), though *Butterfield v. Heath* (*y*), disapproved in *In re Foster and Lister* (*z*) on another point, decided that a purchaser must take a title though depending on the invalidity of a voluntary conveyance as against a purchaser for valuable consideration with notice.

Specific performance of contract to sell by voluntary settlor.—A vendor who previous to entering into the contract has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract is not entitled

- (*h*) *Doe d Newman v. Rusham* (1852) 17 Q. B. 723, 117 E. R. 1459.
- (*i*) *Buckle v. Mitchell* (1812) 18 Ves. 100, 34 E. R. 255; *Rosher v. Williams* (1875) L. R. 20 Eq. 210.
- (*j*) *Smith v. Garland* (1817) 2 Mer. 123, 35 E. R. 887; *Butterfield v. Heath* (1852) 15 Beav. 408, 51 E. R. 595.
- (*k*) *Clarke v. Willott* (1872) L. R. 7 Exch. 313.
- (*l*) *Harris v. Tubb* (1889) 42 Ch. D. 79.
- (*m*) *Price v. Jenkins* (1877) 5 Ch. D. 619; *Re Doble ex-parte Doble* (1878) 38 L. T. 183.
- (*n*) *Re Marsh and Granville (Earl)* (1883) 24 Ch. D. 11.
- (*o*) *Ralph Bovy's case* (1672) 1 Vent. 193, 86 E. R. 131; *Re Holland, Gregg v. Holland* (1902) 2 Ch. 360.
- (*p*) *Spurgeon v. Collier* (1758) 1 Eden 55, 28 E. R. 605.

- (*q*) *Vasudeo v. Janardhan* (1915) 39 Bom. 507.
- (*r*) *Dolphin v. Aylward* (1863) 23 L. T. 636.
- (*s*) *Goodright d. Humphreys v. Moses* (1775) 2 Wm. Bl. 1019, 96 E. R. 599.
- (*t*) *Ede v. Knowles* (1843) 2 Y. & C. Ch. case 172, 63 E. R. 76; *Lister v. Turner* (1846) 5 Hare 281, 67 E. R. 919.
- (*u*) *Garth v. Ersfield* (1616) 6 Bridge 22, 123 E. R. 1171.
- (*v*) *Doe d Bothell v. Martyr* (1805) 1 Bos. & P. N. R. 332, 127 E. R. 492.
- (*w*) Sec. 24, Specific Relief Act, I of 1887.
- (*x*) *Butterfield v. Heath* (1852) 15 Beav. 408, 51 E. R. 595; *Buckle v. Mitchell* (1812) 18 Ves. 100, 34 E. R. 255; *Tonkins v. Ennis* (1727) 1 Eq. Cas. Abr. 334, 21 E. R. 1084.
- (*y*) (1852) 15 Beav. 408, 51 E. R. 595.
- (*z*) (1877) 6 Ch. App. 87.

to specific performance (a) for a Court of Equity will not assist a vendor in setting aside a prior voluntary settlement executed by him (b). It is otherwise when on the vendor making out a good title the purchaser is willing to complete (c). Ss. 53-53A

Voluntary charitable gifts.—Voluntary gifts for charitable purposes are not covenous within 27 Eliz., c. 4, and are not avoided by a subsequent conveyance for value, the presumption being that a charity is charitable and not fraudulent (d).

No fraud.—The last para added by way of explanation to sub-section (2) enacts that a conveyance for value following a voluntary settlement is no evidence of fraud. On the construction of the English statute a voluntary conveyance has been presumed to be fraudulent against a subsequent purchaser (e).

53A. *Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*

Part performance.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

The section.—This enactment is an attempt to lay down a standard with regard to the application, of what has been known to English Law as “ the doctrine of part

(a) Sec. 25, Specific Relief Act, I of 1877.

(b) *Smith v. Garland* (1817) 2 Mer. 123, 25 E. R. 887.

(c) *Peter v. Nicolls* (1871) L. R. 11 Eq. 391.

(d) *Ramsay v. Gilchrist* (1892) A. C. 412.

(e) *Ralph Bovy's case* (1672) 1 Vent. 193, 86 E. R. 131.

S. 53A

performance adopted and followed by the Courts in India." In doing so, however, it seems that the Indian Legislature has by one sweeping stroke tried to override several other positive enactments. This is bound to result in an unsatisfactory working of the present section. The English doctrine of part performance arose out of the Statute of Frauds which required contracts relating to lands, in writing. When not reduced to writing, Courts of Equity in England did not permit the statute to be made an instrument of fraud. So that in spite of the absence of writing, it regarded the contract as executed and gave relief. In India section 54 of the Transfer of Property Act required a transfer of immoveable property to be not only in writing but also to be registered. The present section enacts that an instrument in writing relating to immoveable property could be admitted in evidence though not registered. In England the law of registration does not apply. The English doctrine may be said to be an encroachment on the Statute of Frauds and the Indian doctrine an encroachment on the law of registration. The first supplies the omission of the written contract, the second cures the defect of registration. The English doctrine is wider as letting in parol evidence, where writing is required. In India section 92 of the Evidence Act was a bar to such parol evidence being admitted. In England the doctrine of part performance is applied to any act of part performance, which is shewn to have been performed by the defendant, whereas under the present section, the taking of possession or the continuing in possession, if already in possession, by the transferee must be in part performance of the contract. Further, the section not only attempts to get over the want of registration of a deed but also any act necessary for its completion, as where a document was required to be attested, non-attestation would not render the document void. In enacting that want of registration shall not enable the transferor to enforce against the transferee any other right than that expressly provided by the terms of the contract, the framers of the Act seem to have overlooked the provisions of sections 23 and 25 of the Registration Act. For in case of an instrument of transfer, the deed must be registered within the time prescribed by those sections. Again, in India no contract of immoveable property requires registration, so that this subject of the law of transfer of immoveable property is distinctly at an advantage by the enactment of this section. If a contract is not in writing but the transferee has taken possession, and done acts in furtherance of the contract, the doctrine of part performance is not to be applied. On this subject it seems that the law as existing prior to the enactment of section 53A, would apply. In England the doctrine of part performance was applied because the Statute of Charles II required writing in case of transfer of interest in land and Courts of Equity applied the doctrine, when there was no writing, and to refuse relief would be to enable the parties to be charged to commit a fraud. In India writing is insisted upon by the section, so that the English doctrine of part performance is now the reverse of section 53A. The Indian Legislature in effect, enacts the Statute of Frauds which so far as it relates to interest in land has been repealed and re-enacted by the Law of Property Act of 1925, but the later Act has taken care to exclude part performance by section 40, sub-section (2).

The enactment with its additional legislation.—Introduced into the Act by section 16 of the Transfer of Property (Amendment) Act (20 of 1929) to give statutory recognition to the equitable doctrine of part performance as understood by the English Courts in *Lester v. Foxcroft* (f), exhaustively dealt with in *Maddison v.*

(f) Colles. Par. Cas., 108, 1 E. R., 205.

Alderson (g) and, adopted by the Privy Council in *Mahomed Musa's* case (*h*), it has been found necessary by the Legislature to add section 27A to the Specific Relief Act, I of 1877, and a saving clause to section 49 of the Indian Registration Act, XVI of 1908.

Section not exhaustive.—Section 53A applies the doctrine of part performance to cases within its scope. The section is not exhaustive and there are still a number of cases which would be outside the section, to which the English Law of part performance would apply.

Retrospective effect of the section.—Decisions of the High Court on this subject are not uniform. The Madras (*i*), Allahabad (*j*), Nagpur (*k*) and Bombay (*l*) High Courts have held that it is not. The Patna High Court appears to hold that the section does not apply to pending actions (*m*), while the Bombay High Court has applied it to a suit instituted before it came into operation (*n*). The Allahabad High Court has applied the new section to a case started after it came into force (*o*). The Calcutta High Court, while assuming that it was retrospective, held that it did not apply to pending actions (*p*). Its omission from section 63 of the Amending Act, XX of 1929, and the case of *Young v. Adams (q)*, has led to diversity of opinion. That it is not retrospective as to pending actions is supported by the observations of the Judicial Committee in *Pir Baksh's* case (*r*). As to how far a statute is retrospective, reference may be made to the commentaries on the preamble and the undermentioned cases (*s*).

Transactions to which section 53A does not apply.—Section 53A does not apply to the following transactions :—

- (1) To contracts without consideration.
- (2) To moveable property.
- (3) To verbal transfers.
- (4) To a transfer the terms of which cannot be ascertained with reasonable certainty.
- (5) To transfers, where the transferee has not obtained possession of the property or any part thereof, or being already in possession continues in possession and has not done some act which would constitute an act of part performance.
- (6) Where the transferee has not performed or is not willing to perform his part of the contract.
- (7) To a right other than a right expressly provided by the terms of the contract.
- (8) Where it would affect a transferee for consideration who has no notice of the contract.

(g) (1883) 8 A. C. 467.

(h) (1914) 42 Cal. 801, 42 I. A. 1

(i) *Muthuswami v. Loganatha*, A. I. R. (1935) Mad. 404; *Kanjee v. Shanmugam* (1932) 56 Mad. 169.

(j) *Gauri Shankar v. Gopal Das*, A. I. R. (1934) All. 701.

(k) *Hari Prashad v. Hanumantrao*, A. I. R. (1937) Nag. 74; *Krishna Bai v. Parwati Bai* A. I. R. (1937) Nag. 242.

(l) *Cooverjee v. Vasant, etc., Society* (1934) 36 Bom. L. R. 1245.

(m) *Mukteswar Trigunait v. Barakar Coal Co., Ltd.*, A. I. R. (1934) Pat. 546; *Ramkrishna*

v. Jainandan, A. I. R. (1935) Pat. 291; *Wakefield v. Sayeeda Khatoon*, A. I. R. (1937) Pat. 36.

(n) *Suleman v. Patell* (1933) 35 Bom. L. R. 722.

(o) *Gajadhar v. Bechan*, A. I. R. (1934) All. 768; *Shyam Sunder v. Din Shah* (1937) All. 313.

(p) *Durgapada v. Nrishinghachandra* (1935) 62 Cal. 492.

(q) (1898) A. C. 469.

(r) (1934) 58 Bom. 650, 61 I. A. 358.

(s) *Brajendrakumar v. Shusheelchandra* (1936) 63 Cal. 368; *Balaji Singh v. Chakka Gangamma*, A. I. R. (1927) Mad. 85.

S. 53A

- (9) Where it would affect a transferee for consideration who has no notice of the part performance.
- (10) Where the transferee has acquired a title by adverse possession.
- (11) For the purpose of obtaining damages in substitution for or in addition to specific performance, when specific performance has become barred.
- (12) To contracts which according to section 21 of the Specific Relief Act cannot be specifically enforced.

Statute of Frauds (t).—Equity Courts applied the doctrine of part performance to prevent section 4 of this statute being made an instrument of fraud. The section provided: "And be it further enacted that from and after the said 24th day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, or to charge any person upon any agreement made upon consideration or marriage; *or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them* or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The words in italics have been repealed by the Law of Property Act, 1925 (u).

Law of Property Act, 1925 (v).—The words of the Statute of Frauds "or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them" were repealed and re-enacted by section 40 of this Act which is as follows:—

(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized.

(2) This section applies to contracts whether made before or after the commencement of this Act, and does not affect the law relating to part performance, or sale by the Court.

The grounds and established limits of the equitable doctrine of part performance.—It is not easy to ascertain from the authorities earlier than the case of *Maddison v. Alderson* (w) what precisely was the ground of the equitable doctrine as to part performance. In that case the Lord Chancellor the Earl of Selbourne exhaustively dealt with the subject. The appellant in that case lived for many years as house-keeper in the service of Thomas Alderson who died on the 16th December 1877. She originally entered his service in 1845 and having become his house-keeper some years before 1863, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate of Moulton in Yorkshire called the Manor House Farm. It is certain that he intended to leave the appellant (subject to a small annuity) a life-interest in the estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation. The appellant had possessed herself of the title-deeds, and the heir-at-law to whom the estate descended, brought

(t) (1677) 29 Car. 2 C. 3, sec. 4.
(u) 15 Geo. V., c. 20.

(v) 15 Geo. V., c. 20, sec. 40.
(w) (1883) 8 A. C. 467.

the present action to recover them. Her defence was that she was entitled to the same benefit which she would have taken under the will if duly executed, by virtue of the parol agreement, alleged to have been made with her by her master for sufficient consideration and to have been on her part performed. The question which went to the jury was "whether the defendant was induced to serve Thomas Alderson as his housekeeper, without wages for many years and to give up other prospects of establishment in life by a promise, made by him to her, to make a will leaving her a life estate in Moulton Manor Farm, if and when it became his property." That question the jury answered in the affirmative. Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that the contract was proved in this case on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen, thinking that part performance was sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This made it necessary for the House of Lords to examine the doctrine of equity as to part performance or parol contracts, as to which Lord Selbourne observed, "The cases upon the subject (which are very numerous) are all or which nearly all have arisen upon the words of the fourth section of the Statute of Frauds, which provided that 'no action shall be brought to charge any person upon any contract or sale of lands, etc.' It has recently been decided by the Court of Appeal in *Britain v. Rossiter* (x) that the equity of part performance does not extend and ought not to be extended to contracts concerning any subject-matter other than land. . . . " That equity has been stated by high authority to rest upon the principle of fraud. "Courts of Equity will not permit the statute to be made an instrument of fraud. . . ." "It has been determined at law (and, in this respect there can be no difference between law and equity) that the fourth section of the Statute of Frauds does not avoid parol contracts but only bars the legal remedies by which they might otherwise have been enforced." *Crosby v. Wadsworth* (y), *Leroux v. Brown* (z), *Britain v. Rossiter* (a). "From the law thus stated the equitable consequences of part performance of a parol contract concerning land, seem to me naturally to result. In a suit founded on such part performance, the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation, would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say, in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter, from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached, cannot be administered unless the contract is regarded. The choice is between

(x) (1879) 11 Q. B. D. 123.

(y) (1805) 6 East, 602m, 102 E. R. 1419.

(z) (1852) 12 C. B. 801, 138 E. R. 1119.

(a) (1879) 11 Q. B. D. 123.

S. 53A undoing what has been done (which is not always possible, or if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and rising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved in an executed conveyance founded upon an unsigned agreement."

Earlier than *Lester v. Foxcroft* (b) was the case of *Butcher v. Stapely* (c), in which Lord Guilford "declared that inasmuch as possession was delivered according to the agreement he took the bargain to be executed." This must have been the principle on which the House of Lords proceeded in 1701 when it reversed the decree of Lord Somers in *Lester v. Foxcroft* (d). In that case the appellant stated that Foxcroft was seised of an ancient messuage called "Wildhouse" and possessed of other parts thereof for a long term of years, and agreed with several builders to pull down parts thereof and build new houses thereon. He proposed to make such agreement on the 25th March 1695 for part of the said house with appellant, promising to assist him with money without interest, should he want to complete the building. It was particularly agreed between them that the appellant should at his own cost, pull down a certain part of the messuage and build thereon 14 or more good messuages and in consideration thereof, Foxcroft should lease the said part to him for 99 years at £150 a year. There was no memorandum or note thereof in writing, but in performance of the agreement, appellant entered into that part of the messuage and at his own cost pulled down the same and built the whole 14 and almost finished them, expending thereon £2,000 of his own money and other sums borrowed from Foxcroft. The appellant was all along in possession, acted as sole proprietor and owner and was acknowledged as such by Foxcroft who frequently declared that he had only a ground rent, and that the appellant was the landlord. The appellant demised the same in his own name and received the rents. In 1698 Foxcroft made his will and devised to his second son Issac all his estate in the said ancient messuage called "Wildhouse"; he delivered the will to the appellant's wife to let the appellant see that there was nothing therein inconsistent with the said agreement, and ordered her to get a lease prepared speedily. He, however, died without executing the same, and the respondent refused to execute the lease according to the agreement, and the appellant brought his bill which was dismissed without any relief; he appealed against this decree which was reversed by the House of Lords who ordered the respondent to execute such a lease of the premises in question as was prepared and approved of by the father before his death and that the appellant should hold and enjoy the premises under the covenants and agreements in the said intended lease, discharged of all encumbrances created by Foxcroft and his heirs. The Lord Chancellor further proceeded: "Among later cases I may refer to *Pengall v. Ross* (e), decided by Lord Cowper in 1709; *Lockey v.*

(b) (1701) Colles Par. Cas. 108, 1 E. R. 205.
(c) (1685) 1 Vern. 363, 23 E. R. 524.

(d) (1701) Colles. Par. Cas., 108, 1 E. R. 205.
(e) (1709) 2 Eq. Cas. Abr. 46, 22 E. R. 40.

Lockey (f) by Lord Macclesfield in 1718; and *Potter v. Potter* (g) by Strange, Master of the Rolls, in 1750." "There must be something," said Lord Cowper (h), "more than a bare payment of money on the one part to induce the Court to decree a specific performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, etc. In such case, where the agreement has proceeded so far on one part, the statute never intended to restrain this Court from decreeing a performance of the other." Lord Macclesfield said (i) that an unwritten agreement "if executed on one part, had always been looked upon as so far conclusive as to induce the Court to decree an execution on the other part, not to destroy or avoid the agreement so far as it was already carried into execution." Sir John Strange (j) said, "if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity."

The doctrine, however, so established has been confined by Judges of the greatest authority within limits intended to prevent a recurrence of the mischief, which the statute was passed to suppress.

Lord Hardwicke, in *Gunter v. Halsey* (k), said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement" ("the terms of which," he added, "must be certainly proved"). "He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance: *Lacon v. Mertins* (l), *Owen v. Davies* (m). This Lord Cowper in *Pengall v. Ross* (n) and Lord Macclesfield in *Seagood v. Meale* (o) had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion and it may be taken as now settled that part payment of purchase-money is not enough; and Judges of high authority have said the same even of payment in full: *Clinan v. Cooke* (p), *Hughes v. Morris* (q), *Britain v. Rossiter* (r). "Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case, in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged"; *Cooth v. Jackson* (s), *Frame v. Dawson* (t), *Morphett v. Jones* (u). "The acknowledged possession" (said Sir T. Plumer in *Morphett v. Jones* (u)) "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure."

"It is in general," said Sir James Wigram (*Dale v. Hamilton*) (v) "of the essence of such an act that the Court shall by reason of the act itself, without knowing

(f) (1719) Prec. Ch. 519, 24 E. R. 232.
 (g) (1749) 1 Ves. Sen. 274, 26 E. R. 1212.
 (h) (1709) 2 Eq. Cas. Abr. 46, 22 E. R. 40.
 (i) (1719) Prec. Ch. 519, 24 E. R. 232.
 (j) (1749) 1 Ves. Sen. 274, 26 E. R. 1212.
 (k) (1739) Amb. 586, 27 E. R. 381.
 (l) (1743) 3 Atk. 1, 26 E. R. 803.
 (m) (1748) 1 Ves. Sen. 82, 27 E. R. 905.
 (n) 2 Eq. Cas. Ab. 46, 22 E. R. 40.

(o) (1721) Prec. Ch. 560, 22 E. R. 43.
 (p) 1 Sch. & Lef. 40.
 (q) (1852) 2 D. M. & G. 349, 42 E. R. 907.
 (r) (1879) 11 Q. B. D. 123.
 (s) (1801) 6 Ves. 12, 31 E. R. 913.
 (t) (1807) 14 Ves. 386, 33 E. R. 569.
 (u) (1818) 1 Swan 172, 37 E. R. 45.
 (v) (1846) 5 Hare 369, 67 E. R. 955.

S. 53A

whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract....” See also *Britain v. Rossiter* (*w*) per Lord Justice Cotton. The acts of part performance exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been almost if not quite universally relative to the possession, use or tenure of land. The law of equitable mortgage by deposit of title-deeds is upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in *Clerk v. Wright* (*x*) and *Whaley v. Bagenal* (*y*), where acts preparatory to completion of a contract, were held not to be part performance; in *Wills v. Stradling* (*z*), where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be enough “even to call for an answer”; in *Lamas v. Bayley* (*a*), where the plaintiff being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on agreement that he should have part of it when so bought at a proportionate price, but his “desisting from the prosecution of his purchase,” was held to be no part performance; and in *O’Reilly v. Thompson* (*b*), where the agreement alleged was, that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms....

“.... The law deducible from these authorities is, in my opinion, fatal to the appellant’s case. Her mere continuance in Thomas Alderson’s service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master’s land. It was explicable without supposing any such new contract as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas v. Bayley* (*c*). The alleged acts of part performance preceded, and therefore could not be evidence of, any contract on her part; there performance was [as in *O’Reilly v. Thompson* (*d*)] a condition precedent, without the fulfilment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.” This doctrine cannot be made use of for the purpose of obtaining damages in substitution for or in addition to specific performance, when specific performance has become barred (*e*). In *In re a Bankruptcy notice* (*f*), Aitken, L.J., observed that, “the doctrine applied to contracts relating to an interest in land.” The subject was recently reviewed by Romer, J., in *Robinson v. Ames* (*g*).

The principle in *Walsh v. Lonsdale* (*h*).—Closely resembling the equity in *Maddison v. Alderson* (*i*) is the principle of equity enunciated in *Walsh v. Lonsdale* (*h*). By an agreement of 29th May 1879, the defendant agreed to grant to the plaintiff a lease of a mill for seven years at the rent of 30s. a year for each loom run, the plaintiff not to run less than 540 looms. The lease was to contain such stipulations as were embodied in a certain lease of the 1st May, according to which

(*w*) (1879) 11 Q. B. D. 123, 130.
 (*x*) (1737) 1 Atk. 12, 26 E. R. 9.
 (*y*) (1785) 1 Bro. P. C. 345, 1 E. R. 611.
 (*z*) (1797) 3 Ves. 378, 30 E. R. 1063.
 (*a*) (1708) 2 Vern. 627, 23 E. R. 1011.
 (*b*) (1791) 2 Cox. Eq. Cas. 271, 30 E. R. 126.
 (*c*) (1708) 2 Vern. 627, 23 E. R. 1011.
 (*d*) (1791) 2 Cox. Eq. Cas. 271, 30 E. R. 126.

(*e*) *Lavery v. Pursell* (1888) 39 Ch. D. 508; *In re Northumberland Avenue Hotel Co.* (1882) 33 Ch. D. 60.
 (*f*) (1924) 2 Ch. 76.
 (*g*) (1925) 1 Ch. 96.
 (*h*) (1882) 21 Ch. D. 9.
 (*i*) (1883) 8 A. C. 467.

the rent was fixed and made payable in advance. The plaintiff was let into possession, but paid rent quarterly and not in advance. In March 1882 the defendant demanded payment of certain moneys including, *inter alia*, a whole year's rent payable in advance, and put in a distress. Upon this the plaintiff commenced his action claiming damages for improperly distraining, an injunction to restrain defendant from selling under the distress and from continuing in possession and specific performance of the agreement for a lease. Fry, J., granted the injunction on the terms of the plaintiff paying £1,005-14-0 into Court. The plaintiff appealed. Jessell, M. R., said: "There is an agreement for a lease under which possession has been given. Now since the Judicature Act, the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had, if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say 'I have a lease in equity and you can only re-enter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that being a lease in equity, he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed." Although it has been suggested that the decision in *Walsh v. Lonsdale* (j) takes away all difference between the legal and equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions, (1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of or support at law the action in question? It is to be treated as though before the Judicature Acts there had been, first a suit in equity for specific performance, and then an action at law between the same parties; and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court, and at the same time as the subsequent legal question falls to be determined (k). Thus, in *Walsh v. Lonsdale* (l), the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant: but the agreement between the same parties, if specifically enforced, created that relation. It was clear that such an agreement would be enforced in the same Court and between the same parties; the act of distress was therefore held to be lawful.

The principle in *Maddison v. Alderson* different from the principle in *Walsh v. Lonsdale*.—There is a wide distinction between *Maddison v. Alderson* (m) and

(j) (1882) 21 Ch. D. 9.

(k) *Manchester Brewery Co., Coombs* (1901) 2 Ch. 608, 617.

(l) (1882) 21 Ch. D. 9.

(m) (1883) 8 A. C. 467.

S. 53A

Walsh v. Lonsdale (n) so far as the practical application of the principles which they respectively lay down, is concerned. According to the former, part performance of a contract may give rise to equities which complete the contract, and it will then assume the character of a contract already executed and on the footing of that executed contract, all the equities of the case may be adjusted; on the other hand, there may be cases where to give the necessary reliefs to the parties, a legal right, may have to be established and for the purpose of establishment of that legal right, it may be necessary to invoke the aid of the later case. In other words, if a defendant can bring his action in ejectment within *Maddison v. Alderson* (o), he need not resort to *Walsh v. Lonsdale* (p) as the former case gives him higher rights, making unnecessary for him to have specific performance, so that *Walsh v. Lonsdale* (p) can help a defendant provided his right to specific performance is not barred whilst *Maddison v. Alderson* (o) can be resorted to even if specific performance is barred. Unfortunately the two cases, or rather the principles which they seek to propound, have been considerably mixed up in reported decisions in this country, especially of the Calcutta High Court, and it is on account of misconception of the principles, which these cases respectively lay down that there is a considerable divergence of judicial opinion, whether or not a person who is in possession in performance or part performance of a contract, may successfully resist an action in ejectment, when his right to specific performance of the contract is already barred by efflux of time. In the case of a defendant who has come to be in possession, in performance or part performance of a contract and who is sought to be ejected, there seems to be now a concurrence amongst the High Courts of Allahabad, Bombay and Madras, that notwithstanding that the right of the defendant to enforce performance was barred at the date of the suit, the performance affords a good defence to the action. With reference to these two equities a Full Bench of the Madras High Court observed that these two defences though sometimes they may coincide, are in essence logically distinct (q). It is respectfully submitted that these two defences cannot coincide, for the defence of the equity in *Walsh v. Lonsdale* (r) is dependant upon the possession of a proved right to specific performance, while the defence in *Maddison v. Alderson* (s) can be resorted to when there is part performance of the contract, as would take the case out of the operation of the present statute. They further observed, "What the statute enacts is that a document of title to land—a conveyance, in short—can only acquire validity, can only in fact be provable, on registration. So far from forbidding unregistered contracts for the sale of land, it expressly recognizes their existence, denying to them only the creation of an interest in or charge upon the land itself and, therefore, leaving their contractual effect as between the parties to the contract, unimpaired." In overruling *Ramanathan v. Ranganathan* (t) and the earlier Full Bench case of *Kurri Veerareddi v. Kurri Bapireddi* (u), the learned Judges said that the learned Judges who decided the earlier case, laboured under the same misconception as those whose opinion prevailed in the later one. "They treated a prohibition of unregistered conveyances as being a prohibition of unregistered contracts, and neglected a very clear expression of opinion to the contrary in the Privy Council case of *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami* (v) as being an *obiter dictum*. Strictly speaking, that may be so; it is sufficient for us to say

(n) (1882) 21 Ch. D. 9.

(o) (1883) 8 A. C. 467.

(p) (1882) 21 Ch. D. 9.

(q) *Visagapalam Sugar Development Co., Ltd. v. Muthuramareddi* (1923) 46 Mad. 919.

(r) (1882) 21 Ch. D. 9.

(s) (1883) 8 A. C. 467.

(t) (1917) 40 Mad. 1134.

(u) (1906) 29 Mad. 336.

(v) (1901) 24 Mad. 377, 28 I. A. 46.

that we respectfully agree with it, and consider that the case in *Kurri Veerareddi v. Kurri Bapireddi (w)* was wrongly decided."

S. 53A

Growth in India of the doctrine of part performance.—Prior to 1914 the Indian authorities are much in conflict, as to the application of the doctrine of part performance; it would therefore not be profitable to examine them in detail. In 1914, however, the applicability of the doctrine to India was examined by the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli (x)*, a case before the Transfer of Property Act was enacted. In that case a mortgage was granted by one Fuzlul Karim in 1848 and a conveyance was made to his wife, Khodajanessa, of her husband's zemindari as a gift in lieu of dower. In 1870 a certain agreement was executed by Khodajanessa and the three sons of Ram Chund Mukerji, the mortgagee under the agreement of 1848, in reference to that mortgage. On April 4, 1871, the second mortgage was granted. In 1873 differences arose between Khodajanessa and the mortgagees, who brought a suit to enforce against her the agreement come to. This suit was compromised whereby the three sons of the mortgagee took a twelve annas share and the rest was taken by Khodajanessa. A decree was made on the compromise, which was never registered nor were the transfers contemplated by the compromise, ever executed. The point which was made against giving effect to this compromise, was that a conveyance was not made by Khodajanessa in completion of the contract of purchase, mentioned in the compromise. This was true. But no written conveyance by the Law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882. It was, however, observed that even if a transfer in writing had been omitted or if some other formal defect had occurred, this would have been unavailing to redeem the mortgages for the compromise had been acted upon by all the parties to it, and the property dealt with on the footing of that division, of the extinction of the mortgage debts and of the receipt and enjoyment of rents and profits accordingly. In short, for a period of 30 to 40 years the parties had acted upon the footing as if a conveyance parting with the equity of redemption had been executed. In delivering the judgment of the Privy Council, Lord Shaw referred to the conclusion arrived at in *Maddison v. Alderson (y)* by Lord Selbourne as follows :—

"In a suit founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really charged upon the equities, resulting from the acts done in execution of the contract and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation, would follow." The Courts in India regarded this decision as based on the English equitable doctrine of part performance but the compromise agreement was a good executory agreement to transfer the right to redeem and at the date thereof a transfer of immoveable property could be by parol. Further, the compromise agreement did not come within the agreement referred to in section 17 of the Registration Act, 1871. Its registration was optional under section 18, sub-section (4) of that Act. The provisions of the Indian Evidence Act, 1872, section 92 did not apply, as it did not modify the mortgage-deeds, being only an agreement to transfer part of the property included therein.

(w) (1906) 29 Mad. 336.

(x) (1914) 42 Cal. 801, 42 I. A. 1.

(y) (1883) 8 A. C. 467.

S. 53A

The next case which requires to be noticed in connection with this doctrine is that of *Lakshmi Venkayamma v. Venkata Narasimha Appa Rao* (z), also decided by the Judicial Committee of the Privy Council. In that case, upon the marriage of the appellant in 1886, her aunt, a wealthy Hindu widow with whom she had resided since childhood, promised that if the appellant and her husband would reside with her, she would (*inter alia*) purchase unspecified immovable property for the appellant. The appellant and her husband accordingly resided with the aunt. In 1893 the aunt bought a village in her own name, but, as she stated, for the appellant. Dissatisfaction arose because it was not transferred to the appellant and the husband consequently ceased to reside with the aunt. The aunt in October 1893, wrote to the appellant, stating that the village had been purchased for the appellant and would be transferred to her upon the writer's death. The appellant and her husband thereafter resided with the aunt until the aunt's death in 1899. The Judicial Committee, while holding that the letter of October 1893 constituted a binding contract by the aunt, and that the appellant was entitled to possession of the village, observed that: "Another view of the case would lead precisely to the same result. It is this: Suppose the proof of the acceptance made to the Rani, that is to say, of an acceptance in terms, were considered to be defective, what is the situation of the parties in view of the actings of the plaintiff and her husband? Their Lordships are of opinion, looking to the demand for a definite proposal as a condition of the plaintiff and her husband staying on with the Rani, that their actings did take place upon the footing of the proposal so made and that they were known by Papamma to have taken and to be taking place on that footing. In these circumstances the objection that the contract itself was inchoate or incomplete cannot be maintained. The law in this sense was fully explained by Lord Selbourne in the case of *Maddison v. Alderson* (a), a judgment which was cited at some length by this Board in *Mahomed Musa v. Aghor Kumar Ganguli* (b). After such actings *locus pœnitentiæ*, or the power of resiling from an incomplete agreement or an unaccepted offer, is, to use language borrowed from the Law of Scotland and highly approved in the case referred to, barred by *rei interventus* which raises a personal exception, which excludes the plea of *locus pœnitentiæ*. As was stated in the judgment of the Board in *Mahomed Musa's* case, 'Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but upon the contrary, that these laws follow the same rule.' "

In this case, however, the decision did not rest on the equitable doctrine of part performance, but that a valid contract had been made and was enforceable by the appellant. The decisions of the Indian Courts have been by no means unanimous. The Bombay, Allahabad and Madras view is that performance affords a good defence to the action, though the right to specific performance was barred at the date of the suit. In Calcutta the preponderance is in favour of the limited application of the doctrine, that is to say, in favour of the applicability of the doctrine only to those cases where at the date of the suit there is an enforceable right on the part of the defendant, not extinguished by efflux of time.

In an Allahabad case (c), the facts were these. In 1905 A sold property X with other property by a duly registered deed to B and B sold property Y with other property to A. Possession of items X and Y was, however, not transferred and shortly afterwards A and B agreed to exchange the two properties. No deed of exchange

(z) (1915) 39 Mad. 509, 43 I. A. 138.

(a) (1883) 8 A. C. 467.

(b) (1914) 42 Cal. 801, 42 I. A. 1.

(c) *Salamat-ur-Zamin Begum v. Masha Alla Khan* (1917) 40 All. 187; *Ram Sajan Rai v. Sheo Naik Rai* (1923) 45 All. 388.

was executed but the parties remained in possession from 1905. In 1915 some of the heirs of B sued to recover property X from A in virtue of the sale deed of 1905. It was held that in the circumstances the plaintiffs were not entitled to recover. A Full Bench of the Madras High Court, overruling *Ramanathan v Ranganathan* (d) and the Full Bench case of *Kurri Veerareddi v Kurri Bapireddi* (e), held that part performance by way of delivery of possession and an enforceable right on the purchaser's part to specific performance are each good defences to an action of ejectment on the part of the vendor (f). The same view was adopted by the Bombay High Court (g).

In this state of the authorities Mukerji, J., of the Calcutta High Court discussed at considerable length the views of the different High Courts in *Ariff v. Jadu Nath* (h) that the defendant not having obtained a lease in conformity with the provisions of section 107 of the Transfer of Property Act, read with section 49 of the Registration Act, can resist ejectment only if the case can be brought within the range of one or other of these principles of equity which have been held to apply to this country (i), and came to the conclusion that the defendant could resist ejectment on the principles of *Maddison v. Alderson* (j). The Privy Council (k), however, reversed this judgment, observing that the citation of that set of cases of which *Maddison v. Alderson* (l) was a familiar example, was beside the mark. Their Lordships, referring to the cases of *Mahomed Musa v. Aghore Kumar Ganguli* (m) and *Lakshmi Venkayamma v. Venkata Narsimha Appa Rao* (n), observed, "Neither of these cases, as a decision, affects the case now under consideration by the Board."

Instances in which the doctrine of part performance as laid down in *Maddison v. Alderson* and explained in *Mahomed Musa's* case was applied.—In India the act of part performance is exemplified in a long series of decided cases in which parol contracts concerning land have been enforced. These have been relative to the possession or use of the land or to transfers not registered. The law of equitable mortgage by deposit of title-deeds depends upon the same principles. Circumstances which have been held sufficient for the purpose and to which the doctrine has been applied, are transfer by unregistered deed when possession was with the defendants (o); a compromise of a criminal offence followed by an unregistered transfer in favour of defendant already in possession (p); partition of immoveable property when members have enjoyed certain items as separate property (q); an agreement for sale still capable of specific performance when possession was given to the purchaser (r); where not only possession was given to the purchaser but the whole purchase-money was paid to the vendor and it was held that the vendor had no attachable interest (s); a transfer without written conveyance in execution of a decree (t), and an award (u) for dower; a written statement after marriage in pursuance of a parol agreement before marriage when the daughter

(d) (1917) 40 Mad. 1134.

(e) (1906) 29 Mad. 336 F. B.

(f) *Vizagapatam Sugar Development Co., Ltd. v. Muthuramareddi* (1923) 46 Mad. 919.

(g) *Sandu Valji v. Bhikchand Surajmal* (1922) 25 Bom. L. R. 381.

(h) (1928) 55 Cal. 1090.

(i) *Maddison v. Alderson* (1883) 8 A. C. 467; *Mahomed Musa v. Aghore Kumar Ganguli* (1914) 42 Cal. 801, 42 I. A. 1; *Jorden v. Money* (1854) 5 H. L. C. 185; *Venkayamma v. Appa Rao* (1915) 39 Mad. 509, 43 I. A. 138.

(j) (1883) 8 A. C. 467.

(k) (1931) 58 Cal. 1235, 58 I. A. 91.

(l) (1883) 8 A. C. 467.

(m) (1914) 42 Cal. 801, 42 I. A. 1.

(n) (1915) 39 Mad. 509, 43 I. A. 138.

(o) *Jogamma v. Pothanna*, A. I. R. (1925) Mad. 763.

(p) *Ahmed Hassan v. Hassan Mahomed* (1928) 52 Bom. 693.

(q) *Ahobilachariar v. Thulasi Ammal*, A. I. R. (1927) Mad. 830.

(r) *Ma Myat Tha Zan v. Ma Dun*, A. I. R. (1924) Rang. 214.

(s) *Kuralaia Nanubhai v. Mansukhram* (1900) 24 Bom. 400.

(t) *Ram Baksh v. Mughlani Khanam* (1904) 26 All. 266.

(u) *Muhammad Talib v. Inayati Jan* (1911) 33 All. 683.

S. 53A and her husband remained in possession for more than 10 years (v) ; a transaction of exchange evidenced by two documents being a deed of sale and an undertaking to repay followed by an unregistered deed whereby the defendant agreed to receive certain lands free from the mortgage claim and the plaintiff was to keep up the other free from the defendants' claim (w) ; an agreement for sale in consideration of adjustment of accounts coupled with possession handed over by defendant to the plaintiff (x) ; an agreement for sale capable of specific enforcement, possession being with the defendant (y) ; where the vendor sold the property to a third party who had notice of the purchaser's claim and the fact of his being in possession (z), in spite of the fact that a portion of the purchase-money had been paid (a) ; where out of three brothers two agreed to sell the entire property to the mortgagee coupled with possession (b) ; an agreement for sale where possession had been given and full purchase price had been paid but the right to obtain a specific performance had been barred (c). The principle was also applied where two undivided brothers became divided in status but kept the suit lands undivided from future partition by metes and bounds (d) ; and also to a claim for redemption. A Full Bench of the Allahabad High Court in a claim for pre-emption based upon a transaction which was a good sale under the Mahomedan Law but not according to the Transfer of Property Act, held that a right of pre-emption did arise as the rule of Mahomedan Law was to be applied. But Banerji, J., who formed the Bench, dissenting, held that no such claim could arise unless the sale had been effected according to the provisions of the Transfer of Property Act (e).

The rule in *Walsh v. Lonsdale*.—It has been already pointed out that, in the Calcutta High Court, as to the application of the equity of part performance, the preponderance of cases has been in favour of the limited application of the doctrine, namely, to those cases where at the date of the suit there is an enforceable right on the part of the defendant not extinguished by efflux of time. In applying the rule, the Calcutta High Court followed the rule in *Walsh v. Lonsdale*. As pointed out in *Hari Pada v. Nirod Krishna* (f), the result of these cases may be reached either by the application of the doctrine of part performance in *Maddison v. Alderson* (g) which was followed by the Judicial Committee in *Mahomed Musa v. Aghore Kumar Gangule* (h) or by application of the rule in *Walsh v. Lonsdale* (i). The rule in the latter case is of no greater efficacy unless the contract for renewal is valid and operative. For though on the assumption made in *Secretary of State v. Forbes* (j), *Lanmia v. Mahomed Easin* (k), *Secretary of State v. Digamber* (l), *Secretary of State v. Sibaprasad* (m), the position of a lessee, who has always been ready and willing to accept a renewal on proper terms, is the same in equity as if a proper lease had been granted, it is essential that the covenant for renewal should be such

(v) *Pran Mohan v. Hari Mohan* (1925) 52 Cal. 425; *Surcome v. Pinniger* (1853) 22 L. J. Ch. 419, 43 E. R. 224; *Ungley v. Ungley* (1876) 4 Ch. D. 73.
 (w) *Sandu v. Bhikchand* (1923) 47 Bom. 621; *Mahomed Musa v. Aghore Kumar Ganguli* (1914) 42 Cal. 801, 42 I. A. 1; *Hiralal v. Shankar* (1921) 45 Bom. 1170; *Salamat-ur-Zamin Begam v. Masha Alla Khan* (1917) 40 All. 187 followed; *Kurri Veerareddi v. Kurri Bapireddi* (1906) 29 Mad. 336; *Ramanathan v. Ranganathan* (1917) 40 Mad. 1134, dissented from.
 (x) *Hiralal v. Shankar* (1921) 45 Bom. 1170.
 (y) *Bapu Apaji v. Kashinath* (1917) 41 Bom. 438.
 (z) *Desaibhai v. Ishwar* (1920) 44 Bom. 586.
 (a) *Ganaram v. Luxman Ganoba* (1916) 40 Bom.

498.
 (b) *Ramappa v. Yellappa* (1928) 52 Bom. 307.
 (c) *Venkatesh v. Mallappa* (1922) 46 Bom. 722; *Laxman v. Ravji* (1923) 25 Bom. L. R. 1027.
 (d) *Kankala Kunta v. Mandlem* (1926) 50 M. L. J. 669.
 (e) *Begam v. Muhammad Yakub* (1894) 16 All. 344.
 (f) (1920) 33 C. L. J. 437.
 (g) (1883) 8 A. C. 467.
 (h) (1914) 42 Cal. 801, 42 I. A. 1.
 (i) (1882) 21 Ch. D. 9.
 (j) (1912) 16 C. L. J. 217.
 (k) (1915) 20 C. W. N. 948.
 (l) (1917) 46 Cal. 160.
 (m) (1917) 27 C. L. J. 447.

as may be specifically enforced. The rule in *Walsh v. Lonsdale* is based upon the maxim, "equity regards that as done which should have been done." The rule has been applied where in presence of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents have not been executed and registered, as to which Mookerjee, J., observed, "It is now well established by a long series of decisions in this Court from *Bibi Jawahir v. Chhattearpur* (n) to *Syamkisor v. Dines* (o) and *Haripada v. Nirod* (p) that when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined (q). A similar view was expressed in *Ariff v. Jadunath* (r) by the Privy Council in which their Lordships said, "they were in agreement with the High Court in the view that *Walsh v. Lonsdale* (s) has no application to this case owing to the fact that the respondent's right to enforce the verbal contract had been barred long ago, before the commencement of the present suit." The rule, however, has been held not to apply to a contract for a lease in excess of the transferor's power (t). It has been applied to an arrangement for lease accompanied by possession (u). The rule has also been applied to an exchange transaction (v). It was also applied to an oral sale (w). In all the above cases the application of the doctrine rested on the ground that specific performance was not barred. This principle was followed in cases without reference to the question whether the right to claim specific performance was or was not subsisting (x).

Section 53A conflicts with *Walsh v. Lonsdale*.—To invoke the aid of section 53A the contract must be in writing and possession must have been taken by the defendant in part performance of the contract or if already in possession the transferee must continue to be in possession in part performance of the contract and do some act in furtherance of the contract. But it is irrespective of the question whether the claim of the transferee to specific performance is barred or not. To invoke the aid of *Walsh v. Lonsdale* (y) it is necessary to shew that the defendant's right to specific enforcement is not barred. Again, under the section the contract must be in writing, whilst in applying the equity in *Walsh v. Lonsdale* the contract may be oral.

Classification of judicial opinion prior to section 53A.—Indian decisions before the section was introduced fall into one or other of the groups mentioned. The result of one group of cases may be reached by the application of the doctrine of part performance in *Maddison v. Alderson*; others were decided on the rule in *Walsh v. Lonsdale* based on the maxim "equity looks on that as done which ought to have been done." A third group is based on the fiduciary capacity of the vendor, whilst the solitary instance of a plaintiff seeking relief on the ground of part performance forms the fourth group. The first rests on the principle that no equitable

(n) (1905) 2 C. L. J. 343.

(o) (1919) 24 C. W. N. 463.

(p) (1920) 33 C. L. J. 437.

(q) *Jogendra v. Kurpal* (1922) 49 Cal. 345.

(r) (1931) 58 Cal. 1235, 58 I. A. 91.

(s) (1882) 21 Ch. D. 9.

(t) *Gajendra v. Ashraf Hossain*, A. I. R. (1923) Cal. 130.

(u) *Jogendra v. Kurpal* (1922) 49 Cal. 345; *Kanti Chandra v. Brojendra Mohan*, A. I. R.

(1929) Cal. 186.

(v) *Meher Ali v. Artunnessa* (1920) 25 C. W. N. 905.

(w) *Puchiha Lal v. Kunj Behari Lal* (1913) 18 C. W. N. 445.

(x) *Khogendra Nath Chatterjee v. Sonathan Guha* (1915) 20 C. W. N. 149; *Juan Chandra Das v. Hari Mohan Sen* (1917) 22 C. W. N. 522.

(y) (1882) 21 Ch. D. 9.

S. 53A

doctrine could be invoked to contravene the plain provisions of a positive enactment. The remaining two groups are founded on estoppel and limitation. These naturally gave rise to considerable conflict of judicial decisions which the section is intended to remedy.

Groups I and II.—These have already been dealt with.

Group III. Vendor holding constructively in fiduciary character.—A third class of cases deals with the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. Where a vendor has contracted to sell an immoveable property and has under the contract put the prospective vendee in possession, sues the latter in ejectment, he repudiates the contract if the vendee is willing to complete the purchase. He also repudiates the fiduciary obligation arising out of the contract and annexed to the ownership of the property and seeks to treat the vendee as trespasser (z). A similar view was adopted where the purchaser's right to obtain specific performance of the agreement to sell had become time-barred (a). The decisions of the Courts of Allahabad (b), Calcutta (c) and Rangoon (d) are to the same effect. The above view of the various High Courts in India has been exploded by the Privy Council holding that an averment of the existence of a contract of sale whether with or without an averment of possession following upon the contract is not a relevant defence to an action of ejectment in India (e).

Group IV.—Whether acts done by an owner on his own property can constitute part performance.—In England the doctrine of part performance applies equally to suits for specific performance as to defences raised in suits for possession. There acts done by the plaintiff at the request of the defendant have been considered to be sufficient acts of part performance taking the case out of the Statute of Frauds entitling the plaintiff to a judgment for specific performance (f). In India there is no occasion for a plaintiff to institute a suit for specific performance to rely upon this doctrine, as there is no statutory provision similar to the Statute of Frauds requiring an agreement to sell, mortgage or lease property to be in writing. But the doctrine was applied when the defendant by an unstamped writing agreed to sell two of his lands and a house to the plaintiff in consideration of adjustment of accounts between the parties and in pursuance of the agreement defendant handed over to the plaintiff possession of the lands and executed a stamped but unregistered sale deed. In a suit for specific performance by the plaintiff it was held that the agreement of sale having been confessed and in part carried into execution, the matter had advanced beyond the stage of contract and the equities which had arisen could not be administered unless the contract was regarded (g). By the addition of section 27A to the Specific Relief Act, I of 1877, a lessor is now entitled to claim specific performance in a case of part performance of a contract to lease.

Group V.—No equitable doctrine can contravene a statute or punitive enactment.—There is a fourth class of cases in which any such equity as has been

(z) *Bapu Appaji v. Kashinath* (1917) 41 Bom. 438; *Laxman v. Bhagwan Singh* (1921) 45 Bom. 434.

(a) *Venkaresh v. Mallappa* (1922) 46 Bom. 722.

(b) *Begam v. Muhammad Yakub* (1894) 16 All. 344.

(c) *Shafikul Huq v. Krishna Gobind* (1918) 23 C. W. N. 284.

(d) *Pindee v. U Hpa*, A. I. R. (1928) Rang. 237; *Maung Myat Tha Zan v. Ma Dun*, A. I. R. (1924) Rang. 214; *Maung Po Sin v. Ma*

Nyein, A. I. R. (1928) Rang. 182; *Ok Kyi v. Ma Pu*, A. I. R. (1927) Rang. 33; *Ma Ma E. v. Maung Tun*, A. I. R. (1925) Rang. 119; *Ma Pyone v. Ma*, U. A. I. R. (1924) Rang. 89; *Maung Shwee v. Maung Tha*, A. I. R. (1923) Rang. 125.

(e) *Mian Pir Bux v. Sardar Mahomed Takar* (1934) 36 Bom. L. R. 1195, 61 I. A. 388.

(f) *Dickinson v. Barrow* (1904) 2 Ch. 339; *Raeclinson v. Ames* (1925) 1 Ch. 96.

(g) *Hiralal v. Shankar* (1921) 45 Bom. 1170.

discussed in the foregoing pages has been disregarded on the ground that the express words of an Indian statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts (*h*).

S. 53A

Group VI.—The principle of estoppel cannot be invoked to evade the plain provisions of a statute (*i*).

Group VII.—Another group of cases which steers clear of an equitable doctrine and which cures all defects in the defendant's possession, or title is that which is based on limitation, for a 12 years' uninterrupted possession by defendant would give him a perfect title to the property.

Part performance under the section.—

I. Where any person makes a contract

- (i) To transfer for consideration
 - (a) Any immoveable property
 - (b) By writing signed by him or on his behalf.
- (ii) From which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and

II. The transferee

- (a) Has taken possession of the property or any part thereof in part performance of the contract, or
- (b) Being already in possession continues in possession and has done some act in furtherance of the contract, and
- (c) Has performed or is willing to perform his part of the contract.

III. Then the transferor or any person claiming under him

- (a) Shall be debarred from enforcing against the transferee and persons claiming under him any right.
 - (i) In respect of the property of which the transferee has taken or continued in possession.
 - (ii) Other than a right expressly provided by the terms of the contract.

IV. Notwithstanding that

- (a) the contract though required to be registered has not been registered, or
- (b) where there is an instrument of transfer the transfer has not been completed in the manner prescribed therefor by the law for the time being in force.

Proviso.—Nothing in this section shall affect the rights of a transferee

- (i) for consideration
- (ii) who has no notice
 - (a) of the contract or
 - (b) the part performance thereof.

(h) *Kurri Vceerareddi v. Kurri Bapireddi* (1906) 29 Mad. 336, overruled in *Vizagapatam Sugar Development Co., Ltd. v. Muthuramareddi* (1923) 46 Mad. 919; *Timangowda v. Benepgowda* (1915) 39 Bom. 472; *Mulraj Khatau v. Vishwanath* (1913) 37 Bom. 198, 40 I. A. 24; *Ariff v. Jadu Nath* (1931)

58 Cal. 1235, 58 I. A. 91; *Achutan Nambiar v. Koman Nair* (1907) 13 M. L. J. 217; *Lalchand v. Lakshman* (1904) 28 Bom. 466; *Mian Pir Bux v. Sardar Mahomed Tahar* (1934) 36 Bom. L. R. 1195, 61 I. A. 388.
(i) *Jagabhandu v. Radha Krishna* (1909) 36 Cal. 920.

S. 53A

It must be noted that the contract referred to in the section must be in writing but need not be registered. It is necessary, however, that the transferee should take possession of the property or any part thereof and that such possession must be attributable or referable to part performance of the contract on his part, and if he be in possession, such possession is not enough to invoke the doctrine but that he must do some act in furtherance of the contract. In either case the transferee must shew that he has performed or is willing to perform his part of the contract. The words "notwithstanding that the contract...for the time being in force" must be deemed to be in parenthesis.

Essential elements necessary for the application of the doctrine:—

- (1) that the transferee has been put in possession of the property,
- (2) that his possession can be referred to the particular transfer and not to any other relationship,
- (3) that it will amount to a fraud on the part of the transferor to back out of such transfer, and
- (4) that the terms of the transfer can be ascertained with reasonable certainty.

To what contracts applicable.—The equitable doctrine of part performance has not been confined to contracts relating to an interest in land. Probably it would apply to all cases in which the Court would entertain a suit for specific performance if the contract had been in writing (j) but not to a contract of service (k).

Sale by order of the Court.—To a judicial sale the statute is not applicable (l) though sales of land by auction are within the statute (m). Under the Law of Property Act, 1925, sales by Court are excluded from the operation of section 40 which repeals and re-enacts the Statute of Frauds so far as it required contracts relating to land to be in writing.

Voluntary transfers.—Founded upon consideration, the doctrine of part performance as enunciated in the section, excludes from its operation voluntary transfers, for no equity arises in favour of volunteers (n).

Any person contracts to transfer.—The section deals with contracts relating to the transfer of immoveable property, a stage antecedent to the actual "transfer of property" as defined in section 5 of the Act. It has been enacted for the benefit not of the transferor but of the transferee. As to what is a contract reference may be made to sections 2, 10, 11 and 25 and the Indian Contract Act, IX of 1872.

For consideration.—The contract must be supported by valuable consideration as defined in section 2 of the Indian Contract Act, IX of 1872. It therefore excludes gifts. Reference may be made to sections 10 and 25 of the said Act.

Writing signed by him or on his behalf.—The section requires that the contract shall be in writing. The Statute of Frauds and section 40 of the Law of Property Act, 1925, require a memorandum or note in writing signed by the party to be charged or some other person thereunto by him lawfully authorized. Under the statute it has been held that an incomplete document referring to another containing

(j) *McManus v. Cooke* (1887) 35 Ch. D. 681.
 (k) *Britain v. Kossiter* (1879) 48 L. J. Q. B. 362.
 (l) *Attorney-General v. Day* (1749) 1 Ves. Sen. 218, 27 E. R. 992.
 (m) *Blagden v. Bradbear* (1806) 12 Ves. 486, 53

E. R. 176.
 (n) *Maung Hla Maung v. Maung Ho Htai*
 A. I. R. (1929) Rang. 316; *Hiralal v. Gavrishankar* (1928) 30 Bom. L. R. 451.

terms may be connected together (*o*) and to constitute a complete contract two or more papers may be collected together (*p*). A written proposal signed by the party to be charged and assented to by the other party without writing is sufficient (*q*). Under the Transfer of Property Act, the contract may be signed on behalf of the transferor. The agent need not be authorized in writing (*r*), but such an agent cannot authorize another to sign (*s*). One of the contracting parties cannot sign as agent of the other (*t*). Again, section 53A requires the signature on the contract of the party to be charged therewith so that it is not necessary for the signature of the other party to be obtained (*u*). But it has been doubted whether in case of a contract signed only by one of the parties he is not at liberty to recede from it before the other party has done some act to bind himself (*v*).

The terms of the contract.—It is necessary that terms of the contract must not be uncertain or vague. They must be such as to be capable of being ascertained with reasonable certainty.

Possession.—To invoke the doctrine of part performance the transferee must take possession of the property or any part thereof and if he be already in possession and continues as such he must, in furtherance of the contract, do some act which must be such as to constitute an act of part performance. The acts of part performance, if they preceded the contract, could not be evidence of part performance, unless performance be a condition precedent without the fulfilment of which the promise could not be a binding contract (*w*).

1. **Acts which constitute part performance.**—The act done in performance must be such as to be done with no other view or design than to perform the agreement (*x*). They must be unequivocal and in their own nature referable to some such agreement as that alleged, the terms of which may then be proved by parol (*y*) and clearly referable to the contract (*z*). The acknowledged possession of a stranger in the land by another is received as evidence of antecedent contract justifying inquiry into the terms, the Court regarding what has been done as a consequence of the contract or tenure (*a*). As regards possession, the law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract (*b*). The doctrine of part performance is founded on a change of possession which is assented to by that party to the contract who is sought to be charged. A tenant's possession and cultivation of the land would not sustain a parol agreement to purchase (*c*).

2. The Court must find the parties unequivocally in a position different from that which according to their legal rights they would be in, if there were no contract.

3. But the act, which though in truth done in pursuance of a contract admits of explanation without supposing a contract, is not in general admitted to constitute

(*o*) *Ridgway v. Wharton* (1854) 27 L. J. Ch. 46, 10 E. R. 1287.
 (*p*) *Allen v. Bennett* (1810) 3 Taunt. 169, 128 E. R. 67.
 (*q*) *Reuss v. Picksley* (1866) 35 L. J. Ex. 218.
 (*r*) *Emmerson v. Heelis* (1809) 2 Taunt. 48, 127 E. R. 989.
 (*s*) *Blore v. Sutton* (1816) 3 Mer. 237, 36 E. R. 91.
 (*t*) *Sharman v. Brandt* (1871) 40 L. J. Ch. Q. B. 312.
 (*u*) *Laythoarp v. Bryant* (1836) 5 L. J. C. P. 121.
 (*v*) *Martin v. Mitchell* (1820) 2 Jac. & W. 413, 37 E. R. 685.
 (*w*) *O'Reilly v. Thompson* (1791) 2 Cox. Eq. Cas.

271, 30 E. R. 126.
 (*x*) *Gunter v. Halsey* (1739) Amb. 586, 27 E. R. 381.
 (*y*) *Frame v. Dawson* (1807) 14 Ves. 386, 33 E. R. 569.
 (*z*) *Thynne (Lady) v. Glengall (Earl)* (1842) 5 Beav. 245.
 (*a*) *Morphett v. Jones* (1818) 1 Swan 172, 37 E. R. 45.
 (*b*) *Ungley v. Ungley* (1877) 5 Ch. D. 887; *Sharman v. Sharman* (1892) 67 L. T. 834; *Re. Foster, ex-parte Foster* (1883) 23 Ch. D. 797.
 (*c*) *Frame v. Dawson* (1807) 14 Ves. 386, 33 E. R. 569.

S. 53A

an act of part performance taking the case out of the Statute of Frauds, as, for example, the payment of a sum of money alleged to be purchase-money (*d*). Payment of purchase-money is not an act of part performance. An act though in truth done in pursuance of a contract is not in general admitted as an act of part performance to take the case out of the Statute of Frauds, as, for example, the payment of purchase-money (*e*). But where the purchase-money was paid by the wife and the husband was put into possession and for 10 years the moneys were retained by the father without payment of interest and the suit filed by the husband without payment of rent, it was held that the circumstances were sufficient acts of part performance (*f*). So also where the purchaser requested the vendor to give notice to quit to the tenants (*g*), and where the party seeking relief has expended money or otherwise acted in reliance of the execution of the agreement (*h*), but a release procured from an encumbrancer is not part performance (*i*), nor delivery of abstract of title-deeds (*j*) nor measurement on an agreement to exchange lands (*k*).

4. The acts of part performance should not precede unless it be a condition precedent without the fulfilment of which the promise cannot become a binding contract (*l*).

5. An act merely introductory or ancillary to the agreement though attended with expense is not part performance (*m*). The doctrine of part performance applies where there is an agreement between the parties and not to mere negotiations (*n*).

6. The matter has been summed up by Fry (*o*), that in order to constitute sufficient acts of part performance, all the requisite conditions set forth below and approved in *Chaproniere v. Lambert* (*p*) must be present.

First, the acts of part performance must be such as are not only referable to a contract such as that alleged but are referable, to no other title.

Secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing.

Thirdly, the contract to which they refer must be such as in its own nature is enforceable by the Court and

Fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance.

The transferee has performed or is willing to perform his part of the contract.—To prevent a transferor impeaching the validity of the contract the transferee must, in addition to his having taken possession or being in possession and having done some act in furtherance of the contract, shew that he has performed or is willing to perform his part of the contract, for the ground of the doctrine is fraud in refusing to perform after performance by the other party (*q*).

(*d*) *Dale v. Hamilton* (1846) 5 Hare 369, 67 E. R. 955.

(*e*) *Dale v. Hamilton* (1846) 5 Hare 369 67 E. R. 955; *Re. D. Nicols: De Nicols v. Curlier* (1900) 2 Ch. 410.

(*f*) *Millard v. Harvey* (1864) 34 Beav. 237, 55 E. R. 626.

(*g*) *Daniels v. Trefusis* (1914) 1 Ch. 788.

(*h*) *Phillips v. Alderton* (1875) 24 W. R. 8.

(*i*) *O'Reilly v. Thompson* (1791) 2 Cox. Eq. Cas. 271, 30 E. R. 126.

(*j*) *Ahaley v. Baguel* (1765) 1 Bro. Parl. Cas.

345, 1 E. R. 611.

(*k*) *Pembroke v. Thorpe* (1740) 3 Swan 482, 36 E. R. 939.

(*l*) *O'Reilly v. Thompson* (1791) 2 Cox. Eq. Cas. 271, 30 E. R. 126.

(*m*) *Whitbread v. Brockhurst* (1784) 1 Bro. C. C. 404, 28 E. R. 1205.

(*n*) *Biss v. Hygate* (1918) 2 K. B. 314.

(*o*) *Specific Performance*, 6th Ed., p. 276.

(*p*) (1917) 2 Ch. 356.

(*q*) *Buckmaster v. Harrop* (1802) 7 Ves. 341, 32 E. R. 139.

Contract though required to be registered.—According to the section, non-registration does not prevent or preclude the transferee from enforcing his rights under a contract compulsorily registrable. The only contract required by law to be registered is an agreement for a lease creating a present demise. Neither contracts for sale nor a contract to lend money on mortgage requires registration. Section 49 of the Indian Registration Act, XVI of 1908, has been amended (r) to let in an unregistered document affecting immoveable property and required by that Act or the Transfer of Property Act to be registered as evidence of part performance of a contract for the purpose of section 53A of the Transfer of Property Act, 1882.

Transfer has not been completed.—Although the section starts with reference to contracts only, in the fourth paragraph reference is made to a transfer deed which is, however, a stage beyond the contract although there is no previous reference to the instrument of transfer. It enacts that although the instrument of transfer has not been completed in the manner required by law, still the transferor shall be debarred from enforcing against the transferee any right other than a right expressly provided by the terms of the contract. This would save an instrument which requires attestation if unattested, but not if it be unstamped.

Other than the right expressly provided by the terms of the contract.—The transferor cannot enforce, if the circumstances enumerated in the section are existing against the transferee, any right in respect of the property other than a right expressly provided by the terms of the contract.

Proviso.—The rule in the section does not apply to a transferee for valuable consideration :—

- (1) who has had no notice of the contract, or
- (2) who has had no notice of the part performance of the contract.

These exceptions are apt to lead to vexed questions of priority between registered and unregistered documents and also whether the subsequent transferee is with or without notice. Questions of priority between registered and unregistered documents are dealt with in section 50 of the Indian Registration Act, XVI of 1908, whereby documents mentioned in clauses (a), (b), (c) and (d) of sub-clause (1) of section 17 and clauses (a) and (b) of section 18, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. As to notice, reference may be made to section 3 of the Transfer of Property Act, IV of 1882.

Title of the transferee.—It must not be supposed that the section confers or is intended to confer a good title on the transferee (s). All that the section enacts is that the rights and liabilities arising under the contract as expressed in the written contract should be enforceable but no more, and that although on account of non-registration no title has passed, still by reason of part performance, rights have arisen which Courts of Law ought to recognize and enforce. In this view registration would still be necessary in order that the transferee may obtain a marketable title. But the title may be perfected by 12 years' adverse possession. The section does not confer title without registration for the provisions of section 54

(r) Sec. 10 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929).

(s) *Dantmara Tea Co. v. Probodh* (1936) 41 C. W. N. 54.

S. 53A

and other sections of the Transfer of Property Act, which render registration compulsory must be complied with to perfect the title of the transferee. Although under the section the contract is required to be in writing no registration of that contract is compulsory. It makes enforceable a transaction which otherwise compulsorily registrable is not registered. As regards sale and mortgage contracts, they are not registrable, but in case of an agreement for a lease which creates a present demise, such an agreement requires not only to be in writing but also to be registered. If in performance of such an agreement the lessee takes possession, he may not sue for specific performance because he cannot prove the agreement for want of registration. This enables the lessor to practise a fraud on the lessee. It is to secure the lessee against this fraud that the section has been enacted so that in such a case the writing containing the agreement may be proved in Court notwithstanding non-registration under this section, which always requires an agreement to be in writing wherever the doctrine of part performance is sought to be invoked. To enable the Court to admit unregistered documents of which registration is compulsory, a proviso has been added to section 49 of the Indian Registration Act, XVI of 1908, providing that an unregistered document may be received as evidence of part performance of the contract for the purposes of section 53A. Section 53A is, however, defective inasmuch as no provision is made against the rules laid down in section 23 of the Registration Act requiring documents to be registered within four months and under certain circumstances mentioned in section 25 within 8 months of execution.

The period within which equitable relief can be given to parties to a transaction when there has been no registered instrument.—The Indian decisions indicate conflicting views upon this question. One view is that such relief can be given only within the period during which a suit for specific performance would lie, the other view being that such relief can be given even after the expiration of the period during which the suit for specific performance would lie. The first view did not seem to go far enough to afford the relief which the equities arising in cases of part performance required, because even after the expiration of such period the parties stood in the same relation to each other as they did before the period of limitation expired. As a matter of fact, in dealing with cases of part performance a longer possession gave a higher equity. Hence no period is fixed by the section within which the contract may be enforced. It has been noted that the Courts in India applied the equity in *Walsh v. Lonsdale* (t) to cases where specific performance had not been barred and that relief was refused where the defendant's claim for specific performance had been barred. In *Ariff v. Jadu Nath* (u) the Privy Council adopted the former view, stating that the doctrine enunciated in the cases of which *Walsh v. Lonsdale* was the type, had no application when the defendant's right to enforce a verbal contract had been barred long before the commencement of the suit, so that he was not in a position to obtain specific performance of the agreement from the same Court and at the same time as the relief claimed in the action. The section does not limit the time within which defendant must perfect his title.

Defect in written agreement.—Where there is a whole agreement by parol and part of it is executed, the equitable doctrine of part performance will apply but when there is an executed writing any defect in the agreement cannot be

(t) (1882) 21 Ch. D. 9.

(u) (1931) 58 Cal. 1235, 58 I. A. 91.

supplied as being intended to be part of that agreement but not inserted in it, for that would be to evade the Statute of Frauds (v).

Section 27A of the Specific Relief Act, 1877.—Prior to the introduction of this section an agreement for a lease creating a present demise could not be specifically enforced if unregistered, as the agreement creating a present demise was compulsorily registrable, so that the equity in *Walsh v. Lonsdale* (w) could not apply to such an instrument. Now that section 53A recognizes such a contract, it has become necessary to introduce this section in the Specific Relief Act to enable the lessor to claim specific performance if he has delivered possession of the property to the lessee in part performance of the contract to lease in writing. On the other hand, the lessee also can claim specific performance of an unregistered agreement to lease creating a present demise, if he has in part performance of the contract to lease in writing, taken possession of the property or, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract. It must be noted that sub-section (a) of section 27A of the Specific Relief Act enables a plaintiff, that is, a transferor, to seek relief on the ground of part performance which he is not permitted under section 53A to do. But, as already noted, this is recognized by the English Courts even where the contract was verbal and no possession had been delivered to the defendant, but the acts done by the plaintiff at the request of the defendant were acts of part performance (x). The applicability of the section to leases has been recognized (y).

Damages.—The jurisdiction to give damages in substitution for, or in addition to, specific performance, has not been extended to cases where specific performance could not possibly have been directed; and accordingly where a contract from lapse of time, becomes at the hearing incapable of specific performance, the equitable doctrine of part performance does not enable a plaintiff to obtain relief in damages (z).

Knowledge and objection.—According to the section, it is not necessary that the act of part performance should be done with the knowledge of the owner and without objection by him, as was the case in *Ramsden v. Dyson* (a), where Lord Kingsdown said, "If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

(v) *Binstead v. Coleman* (1720) Bunb. 65, 45 E. R. 597.

(w) (1882) 21 Ch. D. 9.

(x) *Rawlinson v. Ames* (1925) 1 Ch. 96; *Hari*

Prasad v. Hanumantrao, A. I. R. (1937) Nag. 74.

(y) *Shyam Sunder v. Din Shah* (1937) All. 312

(z) *Lavery v. Pursell* (1888) 39 Ch. D. 508.

(a) (1866) 1 H. L. at p. 170.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

S. 54 **54.** "Sale" is a transfer of ownership in exchange
"Sale defined." for a price paid or promised or part-paid
and part-promised.

Such transfer, in the case of tangible immoveable
Sale how made. property of the value of one hundred
rupees and upwards, or in the case of a
reversion or other intangible thing, can be made only by
a registered instrument.

In the case of tangible immoveable property, of a
value less than one hundred rupees, such transfer may be
made either by a registered instrument or by delivery of
the property.

Delivery of tangible immoveable property takes place
when the seller places the buyer, or such person as he
directs, in possession of the property.

A contract for the sale of immoveable property is a
Contract for sale. contract that a sale of such property
shall take place on terms settled between
the parties.

It does not, of itself, create any interest in or charge
on such property.

Generally.—Provisions of section 54 are imperative. The express words of
an Indian statute are not to be overridden by reference to equitable principles
which may have been adopted in the English Courts (b).

Section 54 does not exhaust the relations which flow from a contract for sale
of immoveable property according to Indian Statute Law. This section cannot
be read by itself. Sections 40 and 55 of the same Act contain important provisions
relating to sale. Section 27 (b) of the Specific Relief Act provides for specific
performance against a party to a contract or a person claiming under him by title
arising subsequent to contract except a transferee for value without notice who
has paid the money in good faith.

Section 12 of the same Act creates a presumption that in case of breach of
contract to transfer immoveable property compensation in money is not an adequate
relief. Again, section 91 of the Trust Act provides that if a person acquires property

(b) *Tirnangowda v. Benepgowda* (1915) 39 Bom. 472.

with notice that another person has entered into an existing contract affecting that property of which specific performance can be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract and section 95 provides that a person holding property in accordance with that section must perform the same duties and is subject to the same liabilities and disabilities as if he were a trustee of the property for the benefit of a person who holds it. Section 3 of the Specific Relief Act defines "obligation" as including every duty enforceable by law. Illustration (g) to that section enunciates the same rule as section 91 of the Trust Act. Again, section 40 of the Transfer of Property Act lays down that where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property but not amounting to an interest therein, such obligation can be enforced against a transferee with notice thereof. Illustration to it is substantially the same as illustration (g) to section 3 of the Specific Relief Act. Further, section 25 of the Specific Relief Act is a bar to the relief of specific performance by a vendor having no title or having a title not free from reasonable doubt while section 18 gives certain rights to a purchaser against a vendor with an imperfect title. Again, sections 14, 15, 16 and 17 enumerate cases where part performance can be granted. There is a distinction between a contract and a conveyance of immoveable property. The former is regulated by the provisions of the Contract Act, IX of 1872, while the latter by the Transfer of Property Act. Once a document transferring an immoveable property has been registered the transaction passes out of the domain of contract to one of conveyance (c). A contract of sale of immoveable property does not create an equitable interest (d) or charge upon the land (e). There is no settled rule of practice in India. It is prepared by one or other of the parties to the transaction. It should be prepared by the vendor as he is familiar with his own title. The rules of the English Courts of Equity have no application to the sale of real estate in Lower Burma (f) and the English rule of law that on a contract for sale the purchaser becomes equitable owner has no application to places to which the Transfer of Property Act is extended (g).

Trusts are recognized in India, no account being taken of the distinction between legal and equitable estates (h). Where there has been an oral agreement to sell land followed by payment of price and delivery of possession to the purchaser, a right of pre-emption arises according to Mahomedan Law even though there is no registered sale deed executed as required by section 54 of the Transfer of Property Act (i). The essentials of a valid sale are a transfer of ownership and a price paid or promised in exchange (j). There can be no sale unless there are mutual agreements in its inception. A sale is often spoken of as a contract of sale with reference to the mutuality of obligations. It must invariably be preceded by a contract, oral or in writing, for sale of the property. The transfer must

(c) *Dip Narain Singh v. Nageshar Prasad*, A. I. R. (1930) All. 1.

(d) *Rajeshwar Prasad v. Bhupendra Narayan*, A. I. R. (1927) Cal. 956; *Jaddu Nath Poddar v. Rup Lal Poddar* (1906) 33 Cal. 967; *Ram Sarup v. Hardeo*, A. I. R. (1924) All. 396; *Webb v. Macpherson* (1904) 31 Cal. 57, 72, 30 I. A. 238.

(e) *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542, 44 I. A. 15.

(f) *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542, 44 I. A. 15.

(g) *Kalachand v. Jalindra* (1929) 56 Cal. 487; *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542, 44 I. A. 15; *Pir Bakhsh v.*

Mahomed Tahar (1934) 58 Bom. 650, 61 I. A. 388; *Official Assignee v. Moolla*, A. I. R. (1935) Rang. 84.

(h) *Rani Chhatra v. Prince Mohan* (1931) 10 Pat. 851, 58 I. A. 279; *Tagore v. Tagore* (1872) 4 Beng. L. R. 103 (134); *Webb v. Macpherson* (1903) 31 Cal. 57 (72) 30 I. A. 238; *Kherodemoney v. Doorgamoney* (1878) 4 Cal. 455; *Official Assignee v. Moolla*, A. I. R. (1935) Rang. 84.

(i) *Abdulla v. Ismail* (1922) 46 Bom. 302; *Begum v. Mahomed Yakub* (1894) 16 All. 344.

(j) *Navakolli Narayana v. Logalinga Chetty* (1910) 33 Mad. 312.

S. 54

amount to a total alienation of proprietorship. Agreement for sale does not require registration. Neither an exchange (*k*) nor compromise (*l*) nor grant of easements (*m*) is a sale. A transfer of property by husband to wife in lieu of dower debt is a sale in all its legal incidents (*n*). Delivery of documents of title does not constitute a sale (*o*). Under section 11 of the Agra Pre-emption Act a right of pre-emption accrues on the sale of a proprietary interest in land. Section 4, sub-section (10) lays down that a sale means a sale as defined in the Transfer of Property Act of 1882. A transfer of property in exchange for a price but effected by a compromise decree and not by a registered instrument of sale as required by section 54 cannot be treated as a sale as defined in that Act and is therefore not pre-emptible (*p*). A conveyance by the Official Receiver in insolvency is not exempt from the operation of section 54 (*q*). This chapter is not affected by any rules of Mahomedan Law (*r*). A mortgage debt can be validly transferred only in accordance with the provisions of section 54. It should not be treated as validly transferred if the conditions imposed by Statute Law as requisites for the valid transfer of the security have not been complied with (*s*).

Property.—The term “property” as used in Chapter IV of Act IV of 1882 means an actual physical object and does not include mere rights relating to physical objects. It was so held by four out of five Judges constituting a Full Bench of the Allahabad High Court, while the fifth (Mahomood, J.) held: The term “property” throughout the chapter is used in its most generic sense and will include the right known as an “equity of redemption” (*t*).

Act III of 1885.—This was an Amending Act. The effect is to make section 54, paragraph 3, absolute in so far as it prescribes that a transfer of ownership by sale of tangible immoveable properties of a value less than Rs. 100 can be made only by a registered instrument or by delivery of the property, and that if made otherwise, as by an unregistered instrument unaccompanied by possession, the transfer of sale is inoperative and confers no title on the purchaser (*u*).

Price.—This is the consideration in the contract for sale. It means money (*v*) and includes money already due or payable in future (*w*). If the price be not fixed the transaction is not a sale. Sale is defined in section 54 as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Price means not only money in current coin but includes money due on a prior debt and the words “price paid” will cover cases where the vendor’s claim for the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment (*x*). The word “price” as used in the sections of the Transfer of Property

- (*k*) *Talib Ali v. Kaniz Fatima*, A. I. R. (1927) Oudh 204; *Bashir Ahmad v. Zobaida*, A. I. R. (1926) Oudh 186.
 (*l*) *Krishna Thanaji v. Aba Shetti Patil* (1910) 34 Bom. 139.
 (*m*) *Bhagwan Sahai v. Narsingh Sahai* (1909) 31 All. 612; *Satyanarayana v. Lakshmayya*, A. I. R. (1929) Mad. 79; *Sital Chandra v. Delaney* (1916) 20 C. W. N. 1158.
 (*n*) *Fahmidunnisa v. Hiralal* (1921) 17 Nag. 103; *Muhammad Zaki v. Munnu*, A. I. R. (1925) Oudh 407; *Abbas Ali Shikdar v. Karim Baksh Shikdar* (1908) 13 C. W. N. 160; *Saburannessa v. Sabdu Shaikh* (1934) 38 C. W. N. 747.
 (*o*) *Prohlad v. Biswas Nath* (1924) 51 Cal. 972.
 (*p*) *Bindrabau v. Rajpat Singh* (1931) 53 All. 100.
 (*q*) *Abdul Hashim v. Amar Krishna Aama* (1919) 46 Cal. 887.
 (*r*) *Ghafuruddin v. Hamid Husain* (1910) 10

- A. L. J. 154.
 (*s*) *The Official Receiver v. Lakshman* (1921) 41 M. L. J. 463; *Perumal Ammal v. Perumal Naicker* (1921) 44 Mad. 196.
 (*t*) *Mata Din v. Kazim Husain* (1891) 13 All. 432.
 (*u*) *Makhan Lal Pal v. Bunkee Behari Ghose* (1892) 19 Cal. 623.
 (*v*) *Abadi Begam v. Mohammad Khalil*, A. I. R. (1930) Oudh 481; *Talib Ali v. Kaniz Fatima*, A. I. R. (1927) Oudh 204; *Bashir Ahmad v. Mt. Zobaida*, A. I. R. (1926) Oudh 186; *Queen-Empress v. Appavu* (1886) 9 Mad. 141; *Volkart Bros. v. Vellivelu Nadan* (1888) 11 Mad 459; *Kedar Nath v. Emperor* (1903) 30 Cal. 921.
 (*w*) *Madam Pillai v. Badrakali Ammal* (1922) 45 Mad. 612.
 (*x*) *Ariyaputhira v. Muthukomaraswami* (1914) 37 Mad. 423.

Act relating to sales is in the sense of money. Service rendered in the past or to be rendered in future cannot be regarded as price as held by a Full Bench of the Bombay High Court in *Samaratmal v. Govind* (y). A sale of land partly for money and partly for forbearance on the part of the purchaser to take proceedings unfavourable to the vendor will make the transaction neither a sale nor an exchange (z). The transaction cannot be treated as a gift for want of consideration. A transfer in lieu of dower debt has been held to be a sale (a). But it was a decision under the Agra Pre-emption Act wherein is incorporated section 54 of the present Act without the other provisions of the Act. In an earlier case the same Court took the same view where the question was not of pre-emption (b). Where the consideration is partial release from dower (c) or the transaction is styled a gift in lieu of dower, it is not a sale (d); the latter is a *hiba-bil-ewaz*. All cases of *hiba-bil-ewaz* cannot be held to be a sale within the meaning of this section (e). Mere inadequacy of consideration does not vitiate sale (f), nor does it render the sale fictitious though it may be evidence that the deed was not intended to operate (g). Price is of the essence of the contract (h). It need not be ascertained at once. The agreement may stipulate the manner of ascertaining it (i). It must be paid or promised or part-paid and part-promised. If it be neither paid nor promised there is no sale (j).

If conditions be attached to the payment of the purchase-money in the deed they do not prevent the transaction amounting to a sale within the definition (k). If it is to be fixed by arbitrators and they do not fix it there is no contract (l). The time of valuation is of the essence of the contract (m). And where parties had agreed that the valuation should be made "in the usual way" by two valuers, one to be named by each party, and after the appointment, one of the parties refused to allow his valuer to proceed with the valuation, it was held that there was no contract between the parties which could be specifically enforced (n). Nor would the Court grant specific performance where there is an under-valuation by the valuers (o). Discharge of future maintenance is not a price (p). A sale is complete notwithstanding non-payment of the purchase-money and the purchaser can maintain a suit for possession subject to such equities, restrictions or conditions as the nature of the case may require (q). As regards the purchaser's right to possession against an unpaid vendor, the view of the Madras High Court is that as under the Transfer of Property Act the purchaser after completion is entitled to possession and the vendor to a statutory charge on the property for unpaid purchase-money under section 55, it is not competent in a purchaser's suit for possession for the Court to pass a decree for possession conditional on the purchaser paying the balance of the purchase-money, and the vendor should file a separate

(y) (1901) 25 Bom. 696.

(z) *Zamindar of Polavaram v. Maharaja of Pillapuram* (1931) 54 Mad. 163.

(a) *Saifal Bibi v. Abdul Aziz* (1932) 54 All. 22.

(b) *Alli Hasan v. Mt. Rashidan*, A. I. R. (1931) All. 237.

(c) *Talib Ali v. Kaniz Fatima Begam*, A. I. R. (1927) Oudh 204.

(d) *Bashir Ahmad v. Mt. Zubaida*, A. I. R. (1926) Oudh 186.

(e) *Abdul Hamid v. Abdul Ghani*, A. I. R. (1934) Oudh 163.

(f) *Doma v. Govind*, A. I. R. (1924) Nag. 124.

(g) *Alamjar Hussain v. Moti Ram* (1918) 16 A. L. J. 454.

(h) *Bombay Tramways Co. v. Bombay Municipal Corporation* (1902) 4 Bom. L. R. 384; *Abadi Begam v. Mohammad Khalil*, A. I. R. (1930) Oudh 481.

(i) *Ram Sundar v. Kali Narain* A. I. R. (1927) Cal. 889.

(j) *Hemraj v. Trimbak Kunhi*, A. I. R. (1924) Nag. 146.

(k) *Kanleshar v. Abadi* (1915) 37 All. 631.

(l) *Gourlay v. Somerset (Duke)* (1812) 19 Ves. 429, 34 E. R. 576.

(m) *Morse v. Merset* (1821) 6 Mad. 26, 56 E. R. 999.

(n) *Vickers v. Vickers* (1867) L. R. 4 Eq. 526.

(o) *Parken v. Whitby* (1823) Turn. & R. 366, 37 E. R. 1142.

(p) *Madam Pillai v. Badrakali Ammal* (1922) 45 Mad. 612.

(q) *Bajinath Singh v. Paltu* (1908) 30 All. 125; *Sagaji v. Namdev* (1899) 23 Bom. 525; *Umedmal Motiram v. Davu bin Dhandiba* (1878) 2 Bom. 547; *Shib Lal v. Bhagwan Das* (1889) 11 All. 244; *Govindammal v. Gopalachariar* (1896) 16 M. L. J. 524; *Balkrishna v. Shripatsingh* (1910) 6 Nag. 98.

S. 54

suit for the purchase-money (*r*). But the view of the Allahabad (*s*) and Bombay High Courts (*t*) are that the Court can in one suit dispose of both questions and direct that on the purchaser paying the purchase-money within a stated time the vendor do deliver the property to him and in default the purchaser do forfeit his right to recover the property and that his suit do stand dismissed with costs. Failure to pay the consideration for a conveyance does not defeat the conveyance except where there is an agreement that it should take effect only if the consideration is first paid (*u*). Although non-payment of consideration is not a ground for rescission, if the sale is brought about by undue influence or the helpless condition of the vendor who was illiterate and without independent advice, it would be void not only under section 54 read with section 4 of the Transfer of Property Act but also under section 25 of the Contract Act (*v*). In a suit for land it appeared that in 1887 A had executed in favour of B a registered conveyance of the land in question without consideration. The vendor had retained possession and sold the land to C who discharged a mortgage which B was to pay. In the interval between the two transactions the plaintiff purchased the land from B and he now alleged that the persons in possession had executed a rent agreement in fact found to be a forgery. Held that the plaintiff's claim founded on the transaction of 1887 did not prevail against C (*w*).

Burden of proof when price not paid.—Ordinarily, a party to a deed executed and registered, who alleges non-payment, must prove his allegations but when possession of the vendor has been continuous and the claimant and his predecessor have silently submitted to such withholding of possession, it is for the latter to prove payment (*x*). It is settled law that where there has been a false acknowledgment by recital in a deed of sale of payment by the purchaser of the consideration and of its receipt by the vendor it is open to the latter, notwithstanding section 92 of the Evidence Act, to prove that no consideration was actually paid (*y*). Vendee directed to pay certain encumbrances, payment not a condition precedent to vesting of title (*z*). The Court has to see what was the intention of the parties if no consideration passed. Where it appeared that it was the intention of the owner, whether consideration passed or not, to transfer the property to the defendant, who was his concubine, and the plaintiff claimed the property by right of inheritance, the defendant was not bound to prove payment of consideration (*a*). If part of the consideration has not been paid the sale will not thereby be rendered void wholly or partially (*b*). A third party or stranger cannot attack the validity of a sale deed on the ground that consideration was not paid to the vendor (*c*). Where part of the consideration is good the mere fact that a portion has not been paid does not justify the inference that the parties did not intend the sale deed to be enforceable (*d*). Defendant sold immoveable property to plaintiff by a registered conveyance. Plaintiff did not pay the price and sued for possession from the

- (*r*) *Krishnamma v. Mali* (1920) 43 Mad. 712; *Velayutha Chetty v. Govindaswami Naicker* (1911) 34 Mad. 543.
 (*s*) *Baijnath Singh v. Paltu* (1908) 30 All. 125; *Shib Lal v. Bhagwan Das* (1889) 11 All. 244.
 (*t*) *Sagaji v. Namdev* (1899) 23 Bom. 525; *Umedmal Motiram v. Davu bin Dhondiba* (1878) 2 Bom. 547.
 (*u*) *Nitai v. Champaklata* (1919) 29 C. L. J. 250.
 (*v*) *Talia v. Babji* (1898) 22 Bom. 176.
 (*w*) *Sangu Ayyar v. Cumarasami Mudaliar* (1895) 18 Mad. 61.
 (*x*) *Achobandil Kuari v. Mahabir Prasad* (1886) 8 All. 641; *Hargovandas v. Bajibhai* (1890)

- 14 Bom. 222.
 (*y*) *Shah Lal Chand v. Indarjit* (1900) 22 All. 370, 27 I. A. 93.
 (*z*) *Gangi Ammal v. Govinda* (1924) 46 M. L. J. 464.
 (*a*) *Goshito Behary Ghosh v. Rohini Gowalini* (1908) 13 C. W. N. 692; *Nilmadhah v. Haran Prasad* (1912) 17 C. W. N. 1161.
 (*b*) *Kevaldas v. Nagindas* (1909) 11 Bom. L. R. 383; *Umedmal v. Baijnath* (1908) 30 All. 157.
 (*c*) *Sailaja Nath Roy v. Rishee Case Law* (1924) 51 Cal. 135.
 (*d*) *Mt. Muniram Bibi v. Amjad Ali Shah*, A. I. R. (1928) All. 391.

vendor. The lower Court made a conditional decree on payment of the price. Plaintiff appealed. Held, he was entitled to an unconditional decree for possession (e). A sale is not rendered void, wholly or partially, because a part of the consideration is not paid. All that the vendor is legally entitled in that case, is to a lien on the property sold, to the extent of the amount not paid (f).

Consideration, inadequacy of.—By itself inadequacy of price is no ground for setting aside a contract (g) unless combined with misrepresentation and surprise upon parties in distress and not properly protected (h); or made with a poor and ignorant vendor at a considerable undervalue (i); or by imposition on a vendor who had confidence in the purchaser (j); or made in ignorance of rights, under pecuniary pressure and without proper legal advice (k). In India provision is made by section 28 of the Specific Relief Act (I of 1877) which enacts that specific performance of a contract cannot be granted if the consideration is so grossly inadequate with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff (l). Relief was refused where there was no evidence of fraud, though the price for which the property was sold was grossly inadequate. The Court observed that the English rule until the passing of statute 31 Vic., c. 4, that specific performance of an agreement to sell a reversionary interest should not be decreed when the purchase-money was less than the market value of the reversion, has no application to India (m). In India provision is made to meet such cases by the Specific Relief Act (n).

Tangible property.—An undivided share in immoveable property is tangible immoveable property within the meaning of section 54 of the Transfer of Property Act (o). It is characterized by possession. Where tangible immoveable property is of the value of Rs. 100 or upwards the sale must be effected by a registered instrument. Mere possession unaccompanied by a registered instrument will confer no title even though purchase-money has been paid in part (p). A mango tree or a messuage is a tangible thing. In contrast with tangible immoveable property, is an intangible thing or an interest in immoveable property, which cannot be the subject of possession, such as a reversion or remainder. An incorporeal hereditament is compulsorily registrable. Hence the right to cut and appropriate plants, standing or which may grow on certain land, must be registered. The interest of a simple mortgagee is an intangible thing (q). Equity of redemption in a usufructuary mortgage is an intangible thing (r). An earlier decision of the Allahabad High Court took the same view (s) but this was subsequently altered by a Full Bench of the same Court (t). Where the interest conveyed is a reversion in the property, as when the property is in possession of tenants, the deed should be registered even though the value be less than Rs. 100 (u).

(e) *Yalla Krishnamma v. Kotipalli Mali* (1918) 38 M. L. J. 467.

(f) *Kevaldas v. Nagindas* (1909) 11 Bom. L. R. 383; *Umedmal v. Baijnath* (1908) 30 All. 157 followed.

(g) *Curson v. Belworthy* (1852) 3 H. L. C. 742, 10 E. R. 294.

(h) *Pickett v. Loggon* (1807) 14 Ves. 25, 33 E. R. 503.

(i) *Fry v. Lane* (1888) 40 Ch. D. 312.

(j) *Taylor v. Obee* (1816) 3 Price 83, 146 E. R. 198.

(k) *Stunge v. Stunge* (1849) 12 Beav. 229, 50 E. R. 1049.

(l) *Bhimbat v. Yeshwantrao* (1901) 25 Bom. 126.

(m) *Gitabai v. Balaji* (1893) 17 Bom. 232.

(n) Act I of 1877, sec. 28 (a).

(o) *Maung Hoe Kyin v. Pe Hla Gyi*, A. I. R. (1924) Rang. 267.

(p) *Papireddi v. Narasareddi* (1893) 16 Mad. 464; *Kurri Veerareddi v. Kurri Bapireddi* (1906) 29 Mad. 336.

(q) *Mutsaddi Lal v. Mohammed Hanif* (1912) 10 A. L. J. 167; *Bank of Upper India, Ltd. v. Fanny Skinner* (1929) 51 All. 494.

(r) *Ramasami v. Chinnan* (1901) 24 Mad. 449; *Sheikh Hushmat v. Sheik Jamir* (1918) 23 C. W. N. 513.

(s) *Rahmat Ali v. Muhammad Mazhar Husain* (1913) 11 A. L. J. 407.

(t) *Sohan Lal v. Mohan Lal* (1928) 50 All. 986.

(u) *Bhaskar v. Padman* (1916) 40 Bom. 313.

S. 54

Mortgage debt.—A debt secured by mortgage of immoveable property can only be transferred in accordance with section 54 of the Transfer of Property Act (v). For the purpose of section 54, a mortgage debt is immoveable property (w). An unregistered agreement, for consideration, to transfer a debt with the benefit of the immoveable security for it, is ineffectual to transfer the security. Though it operates as between the transferor and transferee to transfer the debt, a suit to recover the debt must be in the name of the transferor, and consequently he is not prevented by the transfer from suing to enforce the security (x).

Reversion.—Reversion is the undisposed of interest in land which reverts after the exhaustion of the particular estate which may have been created. Like remainders and executory interests, reversions are mixed incorporeal hereditaments. An assignment of the reversion, whatever may be its value, requires registration. As between landlord and tenant reversion is the only interest in the property which remains with the landlord, after he has leased his immoveable property to his tenant and made over possession to him. A house which was in possession of defendants as tenants, was sold to them by the owner in 1909 for Rs. 50 by an unregistered deed of sale and again sold in 1910 by the owner to the plaintiff by a registered sale deed; the plaintiff's claim was allowed (y). A contrary view expressed by the Calcutta High Court (z) is somewhat difficult to follow.

Registration.—As regards registration, the section draws a sharp distinction between tangible property and a reversion or other intangible thing. In the latter case the transaction must be evidenced by a registered instrument irrespective of the price; whilst in the case of tangible immoveable property a distinction is made, whereby property of the value of Rs. 100 and upwards needs registration. Either a registered instrument or delivery of possession is necessary for a valid transfer and sale of property under the value of Rs. 100 (a). If delivery is not possible, it must be by a registered deed (b). As to the effect of non-registration of documents, reference may be made to section 49 of the Indian Registration Act, 1908. Mere registration does not convey title to a purchaser (c). If the intention of the parties was that no title should pass to the purchaser until payment of purchase-money in full (d), the condition must be strictly fulfilled (e). If a purchaser is directed to pay certain debts binding on the property, such payment is not a condition precedent to vesting of title (f). Registration is not a formality which creates any right. It is *prima facie* proof of intention to transfer the title. It is no proof of operative transfer (g).

- (v) *The Official Receiver, Trichinopoly v. Lakshman Aiyar* (1919) 41 M. L. J. 453; *Elumalai Chetty v. Balakrishna* (1921) 44 Mad. 965; *Perumal Ammal v. Perumal Naicker* (1921) 44 Mad. 196, dissented from.
 (w) *Sakhiuddin v. Sonaulah* (1917) 22 C. W. N. 641; *Banarsi Das v. Ram Chandra*, A. I. R. (1933) Lah. 210.
 (x) *Fanny Skinner v. Bank of Upper India, Ltd.* (1935) 57 All. 314, 62 I. A. 115; *Imperial Bank of India v. Bengal National Bank* (1930) 59 Cal. 377, 58 I. A. 323.
 (y) *Bhasker Gopal v. Padman Hira Chowdhari* (1916) 40 Bom. 313.
 (z) *Sibendrapada Bannerjee v. The Secretary of State for India in Council* (1907) 34 Cal. 207.
 (a) *Biswanath v. Chandra Narayan* (1921) 48 Cal. 509, 48 I. A. 127; *Ma Kyan v. Maung*

- Min Din*, A. I. R. (1929) Rang. 259
Sheo Narain Singh v. Darbari Mahton (1897) 2 C. W. N. 207.
 (b) *Kaliram v. Dulabram*, A. I. R. (1933) Cal. 544; *Nathu v. Gulabchand*, A. I. R. (1934) Nag. 13.
 (c) *Gostho Behary Ghosh v. Rohini Gowalini*, A. I. R. (1928) Oudh 439; *Kuppuswami v. Chinnaswami*, A. I. R. (1928) Mad. 546.
 (d) *Ram Singh v. Gunga Ram* A. I. R. (1922) Lah. 356.
 (e) *Sheo Narain Singh v. Darbari Mahton* (1897) 2 C. W. N. 207; *Mauladan v. Rughunandan Pershad Singh* (1900) 27 Cal. 7.
 (f) *Gangi Ammal v. Gounda Padayachi* (1924) 46 M. L. J. 464.
 (g) *Sheo Narain Singh v. Darbari Mahton* (1897) 2 C. W. N. 207.

The registration of a sale deed effects a transfer of the property to the purchaser (h), but no property passes to the purchaser who has paid the purchase-money and obtained possession, if the deed be not registered, when the value of the immoveable property is above Rs. 100 (i). A vendor who has not executed a registered deed of transfer is not estopped from pleading that the purchaser had no title by his admission of an agreement for sale in a suit for possession (j). The effect of section 4 of the Transfer of Property Act is not to make section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of section 54, paragraph 2 of the Transfer of Property Act and not by the provisions of section 17 of the Registration Act itself (k). In dealing with the case of a fictitious inclusion of property for the purpose of registration, the Judicial Committee observed that they were not prepared to accept the suggestion that for the purpose of section 54 some sort of constructive possession resulting from the delivery of the instrument and transfer might be sufficient and for that purpose there must have been a real delivery of the property (l). A fictitious entry in a schedule intentionally made by the parties for the purpose of obtaining registration in the district where no part of the property actually charged and intended to be charged in fact existed, is a fraud on registration law and no registration obtained by means thereof is valid. And the deed not having been registered in accordance with the Registration Act, the mortgagee has no title to maintain the suit. The Judicial Committee further held that the principle of concurrent findings of fact does not apply to the case of no evidence, for a decision, that there is no evidence to support a finding is a question of law (m). The above principle is equally applicable to sales. On a transfer of moveable and immoveable property for a single consideration, where the registration of the latter is compulsory, non-registration would be ineffectual to affect a transfer of the moveables (n).

Transfer of ownership of tangible immoveable property of value less than Rs. 100.—Where the value of tangible immoveable property is Rs. 100 or more, there is only one way in which transfer of ownership can be effected and that is by a registered instrument. But where tangible immoveable property is of a value less than Rs. 100, two alternative ways are provided by paragraph 3 to section 54, one by registered instrument as in the case of property of the value of Rs. 100 or more, and the other by delivery of the property. What is delivery is explained hereafter. In the latter case a conflict arises where the parties choose to carry out their transaction not only by delivery but by delivery accompanied by written instrument. One view is that the written instrument should be registered, while the other view is that registration is unnecessary as the transfer of ownership is effected by delivery and the written instrument is merely evidence of the transaction. The latter view seems in consonance with the provisions of the section, for it cannot be that where delivery is enough, the existence of a written instrument should nullify the transfer of ownership. Hence transfers of such properties may be made (1) by a registered instrument or (2) by delivery of the property (o). There is nothing in section 54 which would render a sale effected by

(h) *Ponnaya Goundan v. Muthu Goundan* (1894) 17 Mad. 146.

(i) *Lalchand v. Lakshman* (1904) 28 Bom. 466.

(j) *Maung Po Yin v. Maung Tet Tee* (1925) 2 Rang. 459; *Dharam Chand v. Manji Sahu* (1913) 16 C. L. J. 436; *Mathura Mohan v. Ram Kumar* (1917) 43 Cal. 790.

(k) *Sohan Lal v. Mohan Lal* (1928) 50 All. 986.

(l) *Biswanath Prasad v. Chandra Narayan*

Chowdhury (1921) 48 Cal. 509, 48 I. A. 127

(m) *Harendra Lal Koy v. Haridasi Debi* (1914) 41 Cal. 972 P.C.

(n) *Bhabu Dutt v. Ramalalbyamal*, A. I. R. (1934) Rang. 303.

(o) *Makhan Lal Pal v. Bunkee Behari Ghose* (1892) 19 Cal. 623.

S. 54 the second alternative, void by reason of the execution of a non-registered deed of sale (*p*). Even though the unregistered instrument did not confer on the purchaser any title, he could fall back on his title by delivery (*q*). A transfer effected by an unregistered deed of sale followed by delivery, has priority over one effected by a subsequent registered deed (*r*). An unregistered deed with delivery of possession is not destructive of the transaction. It has been held by the Calcutta High Court that the document does not confer title and is merely evidentiary, but having regard to section 91 of the Evidence Act it may be the only admissible evidence of the nature and terms of the transaction, though that section would not include proof of the fact of delivery of possession (*s*). A similar view was adopted by the Allahabad (*t*), Lahore (*u*) and Patna (*v*) High Courts and also by Macleod, J., in a Bombay case (*w*). The opposite view was taken by the Madras High Court (*x*) and the Rangoon Chief Court (*y*). The authorities were reviewed at length by the former Court in *Kuppuswami v. Chinna-swami* (*z*) in which the Court came to the conclusion that a sale of property less than Rs. 100 in value, if in writing, has to be registered, observing that the expression "sale by delivery of property" should be construed as comprising a case where the parties agree that the transaction should be effected by delivery, and would not include a case where they agreed to reduce to the form of a document the terms of the sale. The moment the parties reduce the terms to writing, the transaction cannot correctly be described as a sale by delivery of the property. The conflict has now been set at rest by the proviso to section 49 of the Indian Registration Act (*a*). It should be observed that this method of transfer of ownership by delivery does not apply in the cases of reversion or other intangible thing obviously as they are not capable of delivery. In the Punjab, whether the property be tangible, immoveable property or an intangible thing or reversion, even an oral sale is valid as the Act is not applicable there (*b*).

Sale with condition for reconveyance.—A property is conveyed with a condition that on the sale consideration being repaid it shall be reconveyed. Payment of money into Court is as valid as payment or tender to the person entitled to receive it or to his account in a bank (*c*).

Rule of perpetuities.—A contract to convey or reconvey immoveable properties, whenever demanded for a certain amount, is only a personal contract and does not create any interest in immoveable property and is therefore enforceable and not void as contravening the rule against perpetuities (*d*). In such a case, the document

- (*p*) *Imamuddin v. Ramzan Chandri*, A. W. N. (1885) 201; *Daya Ram v. Sita Ram*, A. I. R. (1925) All. 206; *Kothari Narsimha Raju v. Bhupati Raju* (1915) 29 M. L. J. 721.
 (*q*) *Mt. Rupa Telin v. Bisamber Telin* (1892) 8 C. P. L. R. 1; *Harlasla v. Bapu* (1922) 18 Nag. 8.
 (*r*) *Ganga Narain Gope v. Kali Churn Goala* (1895) 22 Cal. 179; *Sharfudin v. Govind Bhikaji* (1903) 27 Bom. 452; *Krishnamma v. Suranna* (1893) 16 Mad. 148; see sec. 3, explanation II of the Transfer of Property Act.
 (*s*) *Sheikh Jaman v. Mohammad Nobinoaz* (1917) 21 C. W. N. 1149; *Ganga Narain v. Kali Charan* (1895) 22 Cal. 179.
 (*t*) *Daya Ram v. Sita Ram*, A. I. R. (1925) All. 206; *Jhampu v. Kulramani* (1917) 39 All. 696; *Habib-un-Rahman v. Rasul Bandi* (1921) 19 A. L. J. 376.
 (*u*) *Qador Baksh v. Mangha Mal*, A. I. R. (1923) Lah. 495.
 (*v*) *Keshwar v. Sheonandan*, A. I. R. (1929) Pat.

620.
 (*w*) *Diwal Parmanshah v. Dharma Rajaram* (1918) 41 Bom. 550.
 (*x*) *Muthukaruppan v. Muthu Samban* (1915) 38 Mad. 1158.
 (*y*) *Ma Kyan v. Maung Min Din*, A. I. R. (1929) Rang. 259.
 (*z*) A. I. R. (1928) Mad. 546.
 (*a*) Sec. 10, Transfer of Property (Amendment) Supplementary Act, XXI of 1929; see *Thayarammal v. Lakshmi Ammal* (1920) 43 Mad. 822.
 (*b*) *Udho Das v. Mehr Baksh*, A. I. R. (1933) Lah. 262.
 (*c*) *Mohammad Yawar Husain v. Hakim Wazir Hasan*, A. I. R. (1927) Oudh 159; *Shumeshwar Dat Singh v. Kamla Singh*, A. I. R. (1925) Oudh 533.
 (*d*) *Avula Charamudi v. Mariboyina Raghavulu* (1916) 39 Mad. 462; *South Western Railway v. Associated Cement Manufacturers* (1900), Ltd. (1910) 1 Ch. 112, followed.

giving to the vendor rights, contrary to those parted with, should be registered, if the sale deed is also registered as affecting property of a value not less than Rs. 100 (e). But a covenant, contained in a deed of sale of immoveable property, which purported to impose upon the purchaser and his representatives indefinitely, an obligation in the event of their wishing to sell property purchased, to communicate their intention to the vendor or his representatives and to confer on the latter a right to pre-empt is void as offending the law against perpetuities (f).

Avoidance of sale.—Where a transfer of property of a value over Rs. 100 has been effected by a registered instrument it can only be avoided by a registered instrument unless equitable relief for its cancellation is sought (g) and so also a document which gives to the vendor rights, contrary to those parted with in the sale deed (h). But section 54 does not permit an agreement to reconvey to be pleaded in bar to the purchaser's right to recover possession (i).

Offer to give first opportunity to purchaser.—This is not a contract to sell property and unless perfected by acceptance, is not binding. By itself there is nothing in this offer to compel the offeree to purchase (j).

Delivery.—According to paragraph 4 of the section, delivery takes place when the seller places the buyer or such person as the buyer directs, in possession of the property. Delivery may be actual or constructive, or both. If the property is vacant, the buyer can be placed in actual physical possession, but if it is occupied by tenants, possession would have to be constructive, as by asking the tenants to attorn to the buyer. Or the buyer may be already in possession in his capacity as a tenant or mortgagee. Delivery is deemed to be made, provided the vendor by appropriate acts or declarations, converts the position of the purchaser as tenant or mortgagee into purchaser (k), for possession under an encumbrance together with an agreement to sell, is equivalent to delivery of possession under section 48 of the Indian Registration Act (l). In actual practice possession is obtained by entering on a part in the name of the whole (m). A Full Bench of the Allahabad High Court in *Sohan Lal v. Mohan Lal* (n), following the decision of the Calcutta High Court in *Sibendrapada Bannerji v. The Secretary of State for India in Council* (o), has taken the view that if property is already in possession of the transferee, there could be no delivery without first asking the transferee to vacate the property and that delivery under this section meant actual delivery and not constructive delivery. The Full Bench was dealing with the transfer of the equity of redemption of the mortgagor. The Court held that the document did not effect a change in title, there being no delivery of the property. No title passed even if such interest be regarded as tangible, immoveable property and that if such interest were intangible property, it was compulsorily registrable under section 54 and that there was no distinction between a simple mortgage and a usufructuary mortgage. This view, however, does not seem, with due respect, to be a correct exposition of the law (p). Further, such a view would make property of a value less than Rs. 100 compulsorily

(e) *Gopi Ram v. Jeot Ram* (1903) 45 All. 478.

(f) *Bala v. Sadashiv* (1921) 23 Bom. L. R. 1066.

(g) *Ehtisham Ali v. Jamna Prasad* (1922) 24 Bom. L. R. 675.

(h) *Bala Kandappa v. Sadashiv Hari* (1921) 23 Bom. L. R. 1066.

(i) *Timangowda v. Benegowda* (1915) 39 Bom. 472.

(j) *Govindaswami Pillai v. Doraiswami Mudali*, A. I. R. (1926) Mad. 120.

(k) *Palani v. Selambara* (1886) 9 Mad. 267; *Kannan v. Krishnan* (1890) 13 Mad. 324;

Thakurdas v. Sobhachand (1916) 12 Nag. 3; *Muthukaruppan v. Muthu* (1915) 38 Mad. 1158.

(l) *Kannan v. Krishnan*, (1890) 13 Mad. 324; *Palani v. Selambara* (1886) 9 Mad. 267.

(m) *Hanmanta v. Mir Ajmodin* (1904) 6 Bom. L. R. 1104.

(n) (1928) 50 All. 986.

(o) (1907) 34 Cal. 207.

(p) *Ram Nath Singh v. Gajadhar Lal*, A. I. R. (1926) All. 300; *Muthukaruppan v. Muthu Sambhan* (1915) 38 Mad. 1158.

S. 54

registrable. Yet another Court has held that for the purposes of section 54, there must be a real delivery of property. Where deed is not registered, any sort of constructive possession is not sufficient (*q*). There does not seem to be any reason why a request by the vendor to the purchaser to remain in possession in the capacity of a purchaser, should not be sufficient to pass title without recourse to the expedient of the purchaser quitting the property one moment and entering upon it at another. It is submitted that an arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession treated as one by the purchaser with absolute title is sufficient to satisfy the requirements of section 54 of the Transfer of Property Act. So far as delivery of possession is concerned there seems to be no difference between the provisions of section 48 of the Registration Act and those of section 54 of the Transfer of Property Act. A correct view has been taken by the Court of Madras (*r*), the earlier cases of the Courts at Nagpur (*s*) and later by the Courts at Calcutta (*t*).

Effect of contract for sale.—Under English Law, on a contract for sale of land the vendor parts with his rights and dominion over it. It is in equity no longer his. He is considered constructively a trustee for the purchaser and the latter as a trustee of the purchase-money for the vendor (*u*). This rule is followed in the Punjab (*v*) where the Act is not in force. The land contracted to be sold is vendible and chargeable as his and capable of being encumbered and devised as his (*w*). The vendor, however, during his possession becomes a trustee without any qualification as soon as the title is accepted and the purchase-money paid (*x*). Under the Transfer of Property Act a contract for sale creates by itself no interest in such property (*y*). No change of ownership takes place, and the purchaser acquires no interest (*z*) in the property or any charge on the property (*a*) unless deposit is made. Even part-payment of the price or earnest makes no difference (*b*). The utmost right which is conferred upon the purchaser, is to enable him to call upon the vendor for possession and conveyance on payment of the purchase-money (*c*). The purchaser, however, can transfer or assign his benefits under the contract to a third party, so as to confer upon him the rights possessed by him and impose upon him the same obligation to which he, the purchaser, is subject. The purchaser's remedy is personal against the vendor or his assignee with notice of the agreement, either to enforce the contract by a suit for specific performance (*d*) or to claim damages. Where the vendor has sold the property to a *bona fide* purchaser for value without notice of the agreement, the purchaser's remedy is in damages. A

- (*q*) *Mt. Sarja v. Mt. Tulsi*, A. I. R. (1928) Nag. 93.
 (*r*) *Sheik Dawood v. Moideen Bacha Saheb* (1925) 48 M. L. J. 264; *Muthu Karuppan v. Muthu Samban* (1915) 38 Mad. 1158.
 (*s*) *Linanath v. Manbodhi* (1916) 12 Nag. 139; *Thakurdas v. Sobhagchand* (1916) 12 Nag. 3.
 (*t*) *Sonai Chulia v. Sonaram Chulia* (1916) 20 C. W. N. 195; *Kulachandra v. Jogendra-chandra* (1933) 60 Cal. 384; *Gunga Narain v. Kali Churn* (1894) 22 Cal. 179; *Mitarjit Mahton v. Leakut Hosain* (1914) 18 C. W. N. 858; *Hushmat v. Jamir* (1918) 23 C. W. N. 513.
 (*u*) *Wall v. Bright* (1821) 1 Jac. & W. 494, 37 E. R. 456.
 (*v*) *Tomlinson v. Harding*, A. I. R. (1930) Lah. 131.
 (*w*) *Paine v. Meller* (1801) 6 Ves. 349, 31 E. R. 1088.
 (*x*) *Ridout v. Fowler* (1904) 2 Ch. 93.
 (*y*) *Ishwardas v. Dosibai* (1883) 7 Bom. 316; *Hormasji v. Keshav* (1894) 81 Bom. 13;

- Shridhar v. Chintaman* (1894) 18 Bom. 396; *Patel Ranchod Morar v. Bhikabhai* (1897) 21 Bom. 704; *Hurnandun v. Jawad Ali* (1900) 27 Cal. 468.
 (*z*) *Gopi Ram v. Jeot Ram* (1923) 45 All. 478; *Ram Sarup v. Hardeo*, A. I. R. (1924) All. 396; *Basdeo Rai v. Jhagru Rai* (1924) 46 All. 333; *Jaddar Nath Poddar v. Rup Lal Poddar* (1906) 33 Cal. 967; *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542 P.C.; *Rajeshwar Prasad v. Anil Kerman Roy* (1928) 55 Cal. 35; *Ramasami v. Chinnan Asar* (1901) 24 Mad. 449.
 (*a*) *Krishnaji v. Sangappa* (1925) 27 Bom. L. R. 42; *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542, 44 I. A. 15; *Kanam v. Krishnam* (1890) 13 Mad. 324.
 (*b*) *Mg Po v. Mg Tel*, A. I. R. (1925) Rang. 68.
 (*c*) *Hormasji v. Keshav* (1894) 18 Bom. 13.
 (*d*) *Mahdeo Chintaman v. Kirtikar* (1899) 23 Bom. 181; *Ramasami v. Chinnan Asar* (1901) 24 Mad. 449; *Gangaram v. Laxman* (1916) 40 Bom. 498.

suit for specific performance is not the purchaser's only remedy. If there are no other facts operating to his prejudice, he may successfully plead his contract for sale and the possession acquired under it (*e*). The agreement for sale transfers no estate, so that even the right of a co-sharer cannot be transferred or assigned by such an agreement (*f*). It need not be registered even though the earnest or the whole of the purchase-money be paid, for it does not operate to create or declare an interest but comes under clause (h) of the Registration Act, XVI of 1908, as a document merely creating a right to obtain another document which would, when executed, create or declare an interest in immoveable property (*g*). The purchaser is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property and such obligation may be enforced against a transferee with notice thereof or a gratuitous transferee (*h*). A registered contract for sale operates as a sale, on fulfilment of conditions mentioned therein (*i*). On an agreement to sell property devised, the devisee can be called upon to pass a conveyance and receive the purchase-money (*j*). Having no direct right to the land, the purchaser cannot apply to set aside a sale under O. 21, r. 89 of the Code of Civil Procedure (*k*). Until sale, it is attachable at the instance of the vendor's creditors (*l*) though the Court purchaser could only take the judgment debtor's right, title and interest existing at the date of sale, namely, subject to the equity in favour of the purchaser to compel specific performance (*m*). A distinction was, however, made when the vendor had delivered possession and received the purchase-money, though no registered deed was executed (*n*); also when property was in possession of a Mahomedan widow under a decree for dower (*o*) and an award transferred the husband's property to the wife without a conveyance (*p*). A distinction has been observed between a contract of sale and a contract to sell, the former being an executed contract and the latter only executory. Sale creates a *jus in rem*, as it passes ownership immediately it is executed, and a contract to sell is a *jus ad rem*, for it only creates an obligation attached to the ownership of property and does not amount to an interest therein (*q*).

Contract for sale viewed in the light of section 13 of the Specific Relief Act, I of 1877.—Section 54 provides that a contract for sale by itself does not create any interest in immoveable property. By section 13 of the Specific Relief Act, I of 1877, it is provided that a contract is not wholly impossible of performance if a portion of its subject-matter existing at its date has ceased to exist at the time of the performance. Illustration (a) to the section renders it clear, that when a contract for sale is made, the purchaser becomes, as in English Law, the owner of the property. Inconsistent as the illustration to section 13 of the Specific Relief Act is with the provisions of this Act, it can have no application in cases to which the Transfer of Property Act applies. By virtue of section 55 (5) (c) of the latter Act, the loss

(*e*) *Bapu Appaji v. Kassinath Saodba* (1917) 41 Bom. 438.

(*f*) *Rajeswar Prasad v. Anil Kumar Roy* (1928) 55 Cal. 35.

(*g*) *Kannan v. Krishnan* (1890) 13 Mad. 324; *Adakkalam v. Theethan* (1889) 12 Mad. 506; *Chunilal v. Bomonji Mancherji* (1883) 5 Bom. 143; *Pertab Chander Ghose v. Mohendranath Purkait* (1890) 17 Cal. 291; explanation to section 17, Registration Act, 1908.

(*h*) Sec. 40, Transfer of Property Act, IV of 1882.

(*i*) *Kondu bin Kanhoji v. Vishnu Moreswar Bhat* (1913) 37 Bom. 53.

(*j*) *Ganga Sakharam* (1920) 22 Bom. L. R. 1396.

(*k*) *Mahdeo Chintaman v. Kirtikar* (1899) 23 Bom. 181.

(*l*) *Hormasji v. Keshav* (1894) 18 Bom. 14.

(*m*) *Peer Mahomed v. Mahomed Ebrahim* (1905) 29 Bom. 234; *Sobhagchand v. Bhaichand* (1882) 6 Bom. 193.

(*n*) *Karalia v. Mansukhram* (1900) 24 Bom. 400; explained in *Lalchand v. Lakshman* (1904) 28 Bom. 466.

(*o*) *Ram Baksh v. Meghlani Khanam* (1904) 26 All. 266.

(*p*) *Muhammad Talib v. Inayati Jan* (1911) 33 All. 683.

(*q*) *Shib Lal v. Bhagwan Das* (1889) 11 All. 245.

- S. 54 or destruction referred to in the above illustration, would be borne by the vendor, the ownership of the property not having passed to the buyer.

Agreement for sale contemplating execution of a formal agreement.—It appears to be well settled that if the document by which the parties have made the contract, contemplates execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain (*r*) or whether it is a mere expression of the desire of the parties as to the manner in which the transaction will go through (*s*). In the former case there is no enforceable contract; in the latter it is a binding contract (*t*). An agreement, which provides that the vendor is willing to sell a leasehold house subject to the preparation by his solicitor and completion of the formal contract, is not final (*u*). Holding in *Rossdale v. Denny* (*v*) that an offer "subject to formal contract to embody such reasonable provisions as solicitor may approve, was conditional and not a binding contract," Russell, J., in summing up the authorities stated as follows:—"If upon the true construction of the documents, the reference to a formal contract amounts to an expression of a desire on the part of one or other of the parties, or both, that their already complete contract should be reduced into a mere formal shape, then the fact that no such contract has been executed is no defence to the action, but the original and complete contract survives and may be enforced. If, on the other hand, the true construction of the documents is this, that either the offer or the acceptance was conditional only, then the non-execution of a formal contract affords a defence to the action, upon the ground that the parties really did not intend to be bound until a formal document had in fact been executed." Documents may upon their true construction, amount to a binding contract enforceable by specific performance, although they provide for the preparation of a contract by a *vakil*, and that provision with other terms of the agreement is described as a condition. The mere fact that persons wish to have a formal agreement drawn up, does not establish the proposition that they cannot be bound by a previous agreement. The reservation in respect of a formal document to be prepared by a *vakil*, only means that it should be put in proper shape and in legal phraseology with any subsidiary term that the *vakil* may think necessary for insertion in a formal document (*w*). A contract of sale, according to section 37 of the Indian Contract Act, IX of 1872, is enforceable against the representatives of the contracting parties (*x*).

Party having notice of a prior contract for sale cannot by a subsequent purchase override it.—A contract for sale of immoveable property creates neither a charge

(*r*) *Hawkesworth v. Chaffey* (1886) 55 L. J. Ch. 335 (subject to formal contract being signed as approved); *Page v. Norfolk* (1894) 70 L. T. 781 (offer made subject to approving a detailed contract to be entered into); *Sante Fe Land Co., Ltd. v. Forestal Land, Timber & Railway Co., Ltd.* (1910) 26 T. L. R. 534 (offer "subject to formal contract to be approved"); *Lloyd v. Nowell* (1895) 2 Ch. 744 (subject to preparation by vendor's solicitor and completion of formal contract); *Harichand Mandaram v. Govind Laxman* (1923) 50 I. A. 25; *Filby v. Hornsall* (1896) 2 Ch. 737 (offer if accepted purchaser would "sign contract on auction particulars" and acceptance communicated "subject to contract as agreed"); *Clerk v. Robinson* (1903) 51 W. R. 443 (vendor accepted purchaser's offer "subject to the conditions of sale and an agreement").

(*s*) *Bolton Partners v. Lambert* (1889) 41 Ch. D. 295 (acceptor will instruct his lawyers to prepare the necessary document); *North v. Percival* (1898) 2 Ch. 128 ("heads of agreement" made "subject to approval of conditions and form of agreement by purchaser's solicitor"); *Allen (A. H.) & Co., Ltd. v. Whiteman* (1920) 89 L. J. Ch. 534 ("we are prepared to accept offer, kindly forward contract in due course").

(*t*) *von Hatzfeldt Wildenburg v. Alexander* (1912) 1 Ch. 284; *Rossdale v. Denny* (1921) 1 Ch. 57; *Love Stewart, Ltd. v. Instone & Co., Ltd.* (1917) 33 T. L. R. 475; *Bromet v. Neville* (1909) 53 Sol. Jo. 321.

(*u*) *Lloyd v. Nowell* (1895) 2 Ch. 744.

(*v*) (1921) 1 Ch. 57.

(*w*) *Harichand Mancharam v. Govind Laxman* (1923) 47 Bom. 335, 50 I. A. 25.

(*x*) *Avula Charamudi v. Marriboyina Raghavulu* (1926) 39 Mad. 462.

nor an interest in immoveable property, but it gives the obligee the benefit of an obligation to execute a conveyance under section 40, clause 2, which may be enforced against a transferee with notice of that obligation. Such transferee is in the position of a trustee for the obligee, and cannot profit by his conveyance, except to stand in the shoes of the vendor and receive the balance of the purchase-money due, on payment of which, he has to convey to the defendant and is subject to the liability of having a decree against him passed for specific performance of the contract. The authorities establish that a person who has notice of an agreement for sale of immoveable property cannot, with notice of such contract, by entering into a contract for sale with the vendor, defeat the rights of the prior purchaser even by obtaining a registered conveyance and possession of the property (y). The principle is based on the doctrine of notice. Section 40 of the Transfer of Property Act enacts that where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property not amounting to an interest therein or an easement therein, such obligation may be enforced against a transferee with notice thereof, but not against a transferee for consideration and without notice of the obligation. Analogous provisions are made in section 27 (b) of the Specific Relief Act (z) and section 91 of the Indian Trust Act (a). The latter statute regards such obligation as in the nature of a trust, while the former empowers a Court to decree specific performance of the contract against any person claiming under a party thereto, by a title arising subsequently to the contract, except a transferee (1) for value, (2) in good faith, and (3) without notice of the original contract (b), the burden of proving which, lies on such transferee. For when a party claims exemption from a general provision of law, the onus lies on him to prove that he comes within the exception (c). Very little evidence and in certain circumstances, a mere denial on oath regarding want of knowledge of the plaintiff's contract, would discharge this onus and shift it on the plaintiff (d). In this sub-section the word "transferee" is not used in the wide sense as meaning a person to whom a conveyance has been made. Registration of a conveyance is contemplated by the Legislature (e) and the words "any other person claiming under him by a title arising subsequently to the contract" includes the heirs and legal representatives of a deceased party to a contract (f). In order to establish that he is a *bona fide* purchaser for value, a subsequent purchaser must prove, when the plaintiff claiming under a prior contract is in possession, that he inquired of the nature of his possession from the plaintiff (g). When a decree is passed in a civil suit against a defendant and his property sold in execution, the purchaser acquires a good title, though the decree be afterwards set aside. But in case of a sale by a Revenue Court for arrears of assessment, if it should turn out that the land was not liable to assessment, the sale would be set aside. In the latter case the plea of purchase without notice will not be available (h). Nor can the

(y) *Waman v. Dhondiba* (1880) 4 Bom. 128; *Chundu Nath Roy v. Bhoyrub Chunder* (1883) 10 Cal. 250; *Chunder v. Krishna* (1883) 10 Cal. 710; *Katar v. Ismail* (1883) 9 Mad. 119; *Kannan v. Krishna* (1890) 13 Mad. 324; *Diwan Singh v. Jutho Singh* (1897) 19 All. 196; *Himallal v. Vasudeo* (1912) 33 Bom. 446; *Nanbat Rai v. Dhaunkal Singh* (1916) 38 All. 184; *Gangaram v. Laxman* (1916) 40 Bom. 498; *Gaurishankar v. Ibrahim Ali*, A. I. R. (1929) Nag. 298.

(z) 1 of 1877.

(a) 11 of 1882.

(b) *Himallal v. Vasudeo* (1912) 33 Bom. 446; *Hem Chandra v. Amiyabala* (1925) 52 Cal.

121; *Harunandan v. Jawad Ali* (1900) 27 Cal. 468; *Namasivayam v. Nellayappa* (1895) 18 Mad. 43; *Nanbat Rai v. Dhaunkal Singh* (1916) 38 All. 184.

(c) *Hem Chandra v. Amiyabala* (1925) 52 Cal. 121.

(d) *Ramleni Singh v. Gumani Raut*, A. I. R. (1929) Pat. 300; *Hemchandra v. Amiyabala* (1925) 52 Cal. 121.

(e) *Loknath v. Shah Wahib*, A. I. R. (1930) Pat. 181.

(f) *U. Dun Htoo v. Maung Aow*, A. I. R. (1929) Rang. 274.

(g) *Ramleni Singh v. Gumani Raut*, A. I. R. (1929) Pat. 300.

(h) *Mahadev v. Sadashiv* (1921) 45 Bom. 45.

S. 54

subsequent registered purchaser plead as a bar to a suit against him, a prior decree obtained in a suit for specific performance against his vendor by the original purchaser (i). The proper form of decree in such cases is to direct the subsequent purchaser to execute a conveyance to the plaintiff (j). Registration of the original contract, according to the Bombay (k) and Allahabad (l) High Courts is notice, whilst the Calcutta (m), Madras (n), Central Provinces (o) and Burma Courts have held that registration of itself is not notice. The Judicial Committee adopted the view of the Courts of Calcutta and Madras that it depended upon the circumstances of each case whether registration was or was not notice in itself (p). The subject of notice is further elucidated by two illustrations to section 27 of the Specific Relief Act. The one runs thus:—"A contracts to sell land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000 to C who has notice of the original contract." The other is as follows: B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no inquiry of B relating to his interest in the land, B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C." This authoritatively declares the law in accordance with the leading case of *Daniels v. Davison* (q). The notice referred to in the above referred cases, does not in each instance appear to have consisted solely in registration but in possession as well, as to which, the general consensus of opinion of all the High Courts, following English decisions, appears to be that possession, if not notice, is at least very cogent evidence of notice which a purchaser cannot with safety disregard, as the terms on which that person is in possession, are circumstances giving him an equity repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession and that section 50 of the Registration Act (XVI of 1908) does not do away with the effect of notice in favour of the registration to which *cæteris paribus* it gives preference (r). It appears to be the result of the Bombay decisions that no purchaser can protect himself merely by registering his document of title against the title of a person in possession of the subject-matter and if he ignores that possession and fails to make inquiry into its nature and origin he will be affected by all the equities which the person in possession is proved to have (s). When a person has possession of another man's property, the legal character in which he holds it, is to be determined by his animus (t). A purchaser put into possession under an oral sale is entitled to call for a registered deed and a subsequent registered sale deed confers no title on the subsequent purchaser having notice of

(i) *Gaffur v. Bhicaji* (1902) 26 Bom. 159.(j) *Gaurishanker v. Ibrahim Ali*, A. I. R. (1929) Nag. 298.(k) *Lakshmandas v. Dasrat* (1882) 6 Bom. 168; *Dundaya v. Chenbasapa* (1885) 9 Bom. 427; *Chintaman v. Darappa* (1890) 14 Bom. 506; *Narayan v. Bapu* (1893) 17 Bom. 741; *Balamukandas v. Moli Narayan* (1894) 18 Bom. 444; *Chunilal v. Ramchandra* (1898) 22 Bom. 213; *Dina v. Nathu* (1903) 26 Bom. 538, but see *Gordhandas v. Mohanlal* (1921) 45 Bom. 170.(l) *Churaman v. Balli* (1887) 9 All. 591; *Mata Din v. Kazim* (1891) 13 All. 432; *Janki Prasad v. Kishen Dat* (1894) 16 All. 478; *Nand Kishore v. Anwar Husain* (1908) 30 All. 82.(m) *Bunwari v. Ramjee* (1902) 7 C. W. N. 11; *Joshua v. Alliance Bank of Simla* (1895) 22 Cal. 185; *Inderdawan v. Gobind Lal* (1896) 23 Cal. 790; *Preonath v. Asutosh* (1900) 27 Cal. 358.(n) *Shan Maun Mull v. Madras Building Com-**pany* (1892) 15 Mad. 268; *Madras Building Company v. Rowlandson* (1889) 13 Mad. 383.(o) *Sukhnandan v. Sadaram* (1899) 13 C. P. L. R. 43.(p) *Tilakdhari Lal v. Khedan Lal* (1921) 48 Cal. 1, 47 I. A. 239; *Nasir Khan v. Tara Chand*, A. I. R. (1927) All. 357.

(q) (1809) 16 Ves. 249, 33 E. R. 978.

(r) *Ram Autar v. Dhanauri* (1886) 8 All. 540; *Dundaya v. Chenbasapa* (1887) 9 Bom. 427; *Nani Bibee v. Hafizullah* (1883) 10 Cal. 1073; *Krishnamma v. Suranna* (1893) 16 Mad. 148; *Sharfuddin v. Govind* (1903) 27 Bom. 452; *Baburam v. Madhab Chandra* (1913) 40 Cal. 565; *Faki Ibrahim v. Faki Gulam* (1921) 45 Bom. 910.(s) *Faki Ibrahim v. Faki Gulam* (1921) 45 Bom. 910; *Sharfuddin v. Govind* (1903) 27 Bom. 452.(t) *Gaurishanker v. Ibrahim Ali*, A. I. R. (1929) Nag. 298.

the first sale (u). Explanation I added to the definition of notice, deals with transactions of which registration is compulsory while by explanation II possession is notice of title.

Ss. 54-55

Whether an agreement for sale followed by possession but not by registered conveyance is a valid defence to a suit for ejectment.—The question was answered in the affirmative by a Full Bench of the Bombay High Court, where the vendor sought to recover possession and there were no facts operating to his prejudice. It was a valid defence to the suit, that the vendor had agreed to sell the property to the purchaser, the agreement being at the date of the suit still capable of specific performance, although there was no registered conveyance to the defendant, who had taken possession and was willing to perform his part of the contract (v). The same question arose before a Full Bench of the Madras High Court which held that part-performance by way of delivery of possession and an enforceable right on the purchaser's part to specific performance, are each good defences to an action for ejectment based on the want of a conveyance (w). The same Bench was satisfied that the earlier cases (x) of that Court had been wrongly decided. The Madras Full Bench decision proceeded on the principle of part-performance, whilst the Bombay Full Bench decision was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his purchaser in a suit for possession. The same argument was applied where the purchaser in possession had allowed time for filing a suit for specific performance to expire (y). Earlier cases, however, had taken the view that on account of non-payment of the whole or part of the price, it was not open to a vendor having given possession, to rescind the contract and recover possession, though he may have a lien upon the property for the unpaid balance of the purchase-money (z). The Privy Council answered the question in the negative in a case (a) where the point arose, before the partial importation into India of the doctrine of part-performance as enunciated in section 53A.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

Rights and liabilities
of buyer and seller.

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and

(u) *Desibhai v. Ishwar* (1920) 44 Bom. 586; *Laxman v. Ravji* (1923) 25 Bom. L. R. 1027.

(v) *Babu Appaji v. Kashinath Sadoba* (1917) 41 Bom. 438; *Laxmanrao v. Bhagwansingh* (1921) 45 Bom. 434.

(w) *Vizagapatam Sugar Development Co., Ltd. v. Muthuramareddi* (1923) 46 Mad. 919; *Venkayamma v. Appa Rao* (1916) 39 Mad. 509; *Mahomed Musa v. Aghore Kumar Ganguli* (1915) 42 Cal. 801.

(x) *Ramanathan v. Ranganathan* (1917) 40 Mad. 1134; *Kurri Veerareddi v. Kurri Bapireddy* (1906) 29 Mad. 336.

(y) *Venkatesh Damodar v. Mallappa Bhimappa* (1922) 46 Bom. 722.

(z) *Moidin v. Avaran* (1888) 11 Mad. 263; *Kesri v. Ganga Prasad* (1882) 4 All. 168; *Shib Lal v. Bhagwan Das* (1889) 11 All. 244.

(a) *Pir Bakhsh v. Mahomed Taher* (1934) 58 Bom. 650, 61 I. A. 388.

S. 55

which the buyer could not with ordinary care discover ;

- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;
- (e) between the date of the contract for sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents ;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the

transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. S. 55

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power;

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, *any transferee without consideration or any transferee with notice of the non-payment*, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part *from the date on which possession has been delivered*.

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has

S. 55

reason to believe that the seller is not aware, and which materially increases the value of such interest ;

- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs : provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;
 - (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;
 - (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.
- (6) The buyer is entitled—
- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;
 - (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, , to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

S. 55

Implied covenants between vendor and purchaser.—The section lays down the mutual rights and obligations of the contracting parties, viz., the vendor and the purchaser respectively of immoveable property, unless the statutory obligation is negatived in the particular circumstances of the case, by reason of the terms of the contract for sale. Both parties are governed by the rules laid down in the section. A vendor who desires to limit the rights of a purchaser must do so by explicit and plain conditions. The rules laid down in the section are what are said to be implied covenants between the parties. An express covenant excludes an implied covenant but an express covenant to the contrary, relied on as a bar to the plaintiff's claim to be indemnified under section 55 of the Transfer of Property Act, must be in plain and unambiguous language (b).

In the absence of a contract to the contrary.—The words "in the absence of a contract to the contrary" which appear in the first part of the section and control all the rules, mean that the general rules, by which the rights and liabilities of the vendors and purchasers are regulated by this section, are not applicable when those rights and liabilities are governed by the express provisions of a contract between the parties (c).

Buyer.—As to the word "purchaser," "though the words 'purchase' and 'purchaser' may technically imply an acquisition of property otherwise than by descent, in relation to a sale of land, they are commonly used as appropriate to the stage prior to actual completion by conveyance or transfer" (d).

Seller.—The word "seller" in section 55, clause (1) as applied to the provisions of sub-clauses (a) to (d) of that section, can mean only a person who has contracted to sell but has not yet sold. In sub-clauses (e) and (g) it seems, however, to mean the person who has not only contracted to sell but has also actually sold. In sub-clause (f), it seems to mean the same thing, where possession ought naturally to follow only on the completion of the sale, that is, in cases where a registered conveyance is necessary to convey title but it might include also a person who has only contracted to sell when the delivery of possession itself has to be made to complete the sale (as in the case of a sale of property worth less than Rs. 100 and not effected by a registered conveyance). In clause (2) the word "seller" seems to mean the same thing as in sub-clauses (e) and (g) of clause (1), that is, a person who has actually parted with his title (e).

English Law.—It has been observed by the Judicial Committee that the rules of English Courts of Equity have no application to the sale of real estate in Lower Burma (f).

Clause (1), Sub-clause (a): Disclosure by Vendor.

Amendment.—Sub-clause (a) of clause (1) was amended by Act 20 of 1929, by the addition of the words "or in the seller's title thereto" in order to give effect to

(b) *Digambar Das v. Nishibala Debi* (1911) 15 C. W. N. 655; *Devi Ghela v. Jivaraj Mukundas* (1866) 2 Bom. H. C. 406.

(c) *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542, 44 I. A. 15.

(d) Per Jenkins, C. J., in the *Bombay Tramway*

Co. v. The Bombay Municipal Corporation (1902) 4 Bom. L. R. 384.

(e) *Adikesavan Naidu v. Gurunatha Chetti* (1914) 40 Mad. 338.

(f) *Maung Shwe Goh v. Maung Inn* (1917) 44 Cal. 542, 44 I. A. 15.

S. 55 the decision that the expression "material defect" includes a defect in title to an estate (g).

Ordinary care.—The words "ordinary care" in clause (a) of section 55 of the Transfer of Property Act mean that "a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business and a purchaser, who wilfully departs from it in order to avoid acquiring a knowledge of the vendor's title, is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge, if he had transacted his business in the ordinary way" (h).

Material.—The word is nowhere defined in the Act. In order to entitle the purchaser to relief on the ground of defect in title or property such defect must be substantial and not trifling. The defect which can be cured or remedied or is of such a nature as not to interfere with the enjoyment of the property or retention of it against any adverse claimant, is not a defect which can be said to be material. A defect is material when the Court, on account of its existence, would not enforce specific performance at the instance of the vendor. In the words of Lord Justice Knight Bruce in *Leyland v. Illingworth* (i), a representation is materially incorrect when "it is importantly otherwise than true," though there may be no imputation of fraudulent or dishonest intention to anyone. Facts which are necessary for a purchaser to know in order to judge of the nature and value of the property are material (j). A defect which may be material to one set of circumstances may not be so to another. For instance, the existence of an underground current of running water could not be material when the property was purchased for residential purposes (k), but would be so when it was purchased for building purposes (l). A defect to be material must be of such a nature that it might reasonably be supposed that if the buyer had been aware of it, he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy (m). In order to be material, the defect must be such as would influence the purchaser in making up his mind to purchase the property or fix the price or agree to other conditions or restrictions in respect thereof. Material defect includes defect in title and when the defect is not apparent in the title-deed and the purchaser was not bound to make inquiries which would have led to the discovery of the defect, the vendor's omission entitles the purchaser to avoid the contract (n).

Disclosure of material defect in the property.—The difficulty here, as in a great majority of the cases which come before the Court, is not a difficulty as to what the law is but as to the application of the law. There is no doubt what the principle is, as to questions of this kind. It is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities and incidents of the property which he is going to sell; and when he describes the property for the information of the purchaser, it is his duty to describe everything which it is material to know, in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true; and leaving it to the purchaser to inquire whether there is an error or omission in the description or not (o).

(g) *Haji Essa v. Dayabhai* (1896) 20 Bom. 522.
 (h) *Lallubhai v. Chimantal* (1935) 59 Bom. 83;
 Manji Karimbhai v. Hoorbai (1910) 35 Bom.
 342; *Bailey v. Barnes* (1894) 1 Ch. 25.
 (i) (1860) 2 De G. F. & J. 248, 45 E. R. 617.
 (j) *Brandling v. Plummer* (1854) 2 Drew. 429,
 61 E. R. 785.
 (k) *Shepherd v. Croft* (1911) 1 Ch. 521.

(l) *In re Puckett & Smith's Contract* (1902) 2 Ch.
 258.
 (m) *Lallubhai v. Chimantal* (1935) 59 Bom. 83.
 (n) *Mahomed Siddiq v. Li Kan Shoo*, A. I. R.
 (1925) Rang. 372; *Hajee Essa v. Dayabhai*
 (1886) 20 Bom. 522.
 (o) *Brandling v. Plummer* (1854) 2 Drew. 429,
 61 E. R. 785.

Paragraph 1 (a) of section 55 imposes a statutory obligation on the vendor to disclose to the purchaser material defects (*p*) not only relating to the state and condition of the property, but also as regards his own title subject to the qualification that the duty to disclose extends only to defects of which the seller is and the buyer is not aware (*q*) and which the latter on a careful observation could not discover (*r*). A defect may be either patent or latent. In order to be patent, it must be either visible to the eye or arise by necessary implication through something visible to the eye (*s*). There is no duty to warn the purchaser of doubtful claims. There is no duty on the part of the seller to disclose defects in title or existence of an encumbrance of which the buyer is aware (*t*). There is no duty on the seller's part to make disclosures about matters of which the buyer is perfectly well aware or which relate to the tenure of the land. The evidence to prove knowledge on the part of the buyer cannot be said to vary or contradict the terms of the contract (*u*). Nor is there any duty to disclose matters which relate to the quality of the land. The rule of *caveat emptor* applies. It is the duty of the purchaser to exercise due care and ascertain for himself what he is purchasing. For instance, there is no duty to disclose that a house is in a ruinous condition (*v*) or that there is a highway across the land (*w*). Yet matters which are not visible on careful inspection and which are likely to influence the purchaser's judgment must be disclosed (*x*). Non-disclosure on the sale of land of a fact material to the title of the property, stands on a different footing from non-disclosure of a fact relating to its quality. If the vendor gives particulars of the rents (*y*), or the rents and business (*z*) and the vendee says he will trust him and inquires no further, an action will lie; but if the purchaser makes inquiries no action will lie though the particulars be false because he did not rely upon those particulars. Where property was described as "of the estimated annual value of £400" and was worth only £200 a year, it was held that the statement being admittedly not dishonest, the condition entitling the purchaser to compensation for any error or mis-statement in the particulars, did not apply (*a*). It was pointed out that the purchaser's real complaint was not that the property was not of the "estimated" annual value of £400, but that £400 a year was too high a value. When a purchaser comes to Court for relief he must account for failure to attend to matters of such a kind which are open to observation (*b*). He is bound to exercise a reasonable degree of caution. Therefore if there be anything in the nature or circumstances of the representations made by the vendor calculated to excite suspicion or to require explanation or investigation, he is put upon his guard and must bear the consequences of his own neglect in not making further investigation. So if a purchaser not satisfied by the representations made by the vendor, takes upon himself to investigate the truth of them and has a full and fair opportunity of testing their accuracy he cannot afterwards say that the investigation made by him was loosely or carelessly made or his solicitor acted in a cursory manner (*c*). If the misrepresentation

- (*p*) *Nottingham Patent Brick & Tile Company v. Butler* (1886) 16 Q. B. D. 778; *Carlsh v. Salt* (1906) 1 Ch. 335; *In re Jackson & Haden's Contract* (1906) 1 Ch. 412; *Halkett v. Dudley* (1907) 1 Ch. 590.
 (*q*) *Ramasubba v. Muthiah*, A. I. R. (1925) Mad. 968.
 (*r*) *Harilal v. Mulchand* (1928) 52 Bom. 883.
 (*s*) *Yandle & Sons v. Sutton*, *Young v. Same* (1922) 2 Ch. 199.
 (*t*) *Ramasubbu Iyer v. Muthiah Kone*, A. I. R. (1925) Mad. 968.
 (*u*) *Ramasubbu v. Muthiah*, A. I. R. (1925) Mad. 968.
 (*v*) *Keates v. Earl Cadojan* (1851) 10 C. B. 591; *Cook v. Waugh* (1860) 2 L. T. 784.

- (*w*) *Oldfield (or Bowles) v. Round* (1800) 5 Ves. 508, 31 E. R. 707.
 (*x*) *Lucas v. James* (1849) 7 Hare 410, 68 E. R. 170; *Re. Puckett & Smith's Contract* (1902) 2 Ch. 258.
 (*y*) *Lysney v. Selby* (1705) 2 Ld. Raym. 1118, 92 E. R. 240.
 (*z*) *Dobell v. Stevens* (1825) 3 B. & C. 623, 107 E. R. 864; *Pilmore v. Hood* (1838) 5 Bllg. N. C. 97, 132 E. R. 1042.
 (*a*) *Re. Hurlbalt & Chaytor's Contract* (1888) 57 L. J. Ch. 421.
 (*b*) *Loundes v. Lake* (1789) 2 Cox. Eq. Cas. 363, 30 E. R. 167.
 (*c*) *Clarke v. Mackintosh*, *Mackintosh v. Clarke* (1862) 4 Giff. 134, 66 E. R. 651.

S. 55 is in respect of some fact which is patent, or the truth of which is ascertained by the slightest inquiry, and the purchaser does not choose to inquire, he will be compelled to perform the agreement. Even in these cases, the argument sounds bad in the mouth of the vendor, "I made a representation which was false, and you chose to believe me instead of doubting me and relying upon your own inquiries" (d). Specific performance was decreed, where the sale plan, accurately describing the existing state of the property, would not carry the case higher than a view of the property by the purchaser (e).

Similarly, objection by an auction purchaser, who through carelessness did not choose to inquire about a way round and across a meadow, was not upheld (f). It was not a latent defect. Nor is it a valid objection where land was recommended as well drained, because the purchaser had failed to inquire by whom it was drained, as the draining had to be paid for (g). So a purchaser unacquainted with the locality, purchased a house described as situate in 39, Regency Square, while in fact it was on a street leading from that square to another, specific performance was decreed as the house was well known as 39, Regency Square (h). If a vendor is guilty of concealment, no specific performance would be decreed. Concealment to be fraudulent and material must be a concealment of something that the party concealing was bound to disclose (i). Where there has been concealment of a material fact, though it may not amount to affirmative fraud, and though there has been no eviction, a Court of Equity will grant relief (j). It has never been held that a man is obliged to take a thing with compensation when the thing is substantially and materially different from that, which he was induced by the representations made to him to believe that he bought (k). Specific performance was not decreed when the defence was that the vendor gave no notice of the necessary repair of a wall to protect the estate from the river Thames, which would be an outgoing of £50 per annum (l).

Unless the contrary is stated, contract of sale of land will be deemed to imply that the property is to be sold with vacant possession, so that existing leases or tenancies must be mentioned in the particulars of sale, or in the case of private contract, be referred to in the agreement (m). A purchaser entered into an agreement for the purchase of a property, which he desired to occupy by a particular day, about which the vendor was apprised. The vendor, however, concealed from the purchaser the existence of a lease, which precluded the purchaser from occupying the premises as contemplated by him. In a suit by the purchaser to rescind the contract, it was held that the vendor had been guilty of fraud within the meaning of section 17 of the Indian Contract Act, by actively concealing a fact which was material for the purchaser to know and the purchaser was induced thereby to purchase. The fact that the purchaser by the exercise of ordinary diligence might have ascertained the truth, affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to section 19 of the Contract Act (n). A vendor cannot escape liability on the ground that the contract was negotiated through an agent. If an agent, commissioned by a vendor to describe his property and to state the facts and circumstances affecting its value, so as to bind the vendor, makes false statements

(d) Per Lord Chelmsford in *Colby v. Gadsden* (1887) 17 L. T. 97.

(e) *Fewster v. Turner* (1842) 11 L. J. Ch. 161.

(f) *Oldfield (or Bowles) v. Round* (1800) 5 Ves. Jun. 508, 31 E. R. 707.

(g) *Ward v. Moss* (1867) 16 L. T. 91.

(h) *White v. Bradshaw* (1851) 18 L. T., O.S. 183.

(i) *Irvine v. Kirk Patrick* (1850) 17 L.T. O. S. 32.

(j) *Mostyn v. The West Mostyn Coal & Iron*

Company, Ltd. (1876) 1 C. P. D. 145.

(k) *Re. Arnold, Arnold v. Arnold* (1880) 14 Ch. D. 270; *Jacobs v. Revell* (1900) 2 Ch. 858.

(l) *Shirley v. Stratton* (1785) 1 Bro. C. C. 440, 28 E. R. 1226.

(m) *Encyclopædia of Forms*, 1st Ed., Vol. 12, p. 32.

(n) *Morgan v. The Government of Hyderabad* (1888) 11 Mad. 419.

as to description or value, though not instructed so to do, which the purchaser is led to believe and upon which the purchaser relies, the vendor cannot recover in an action for specific performance. The false statement made by the agent being within his authority, was sufficient to vitiate the contract (*o*). A vendor knowing of a defect in his title is not entitled either by himself or by his agent to put forward conditions of sale, which are to force upon a purchaser a title which he knew was bad but which he did not disclose (*p*). The same doctrine applies to India.

A purchaser having been evicted, from a portion of the house under a decree, which had not been disclosed by the vendor, he was held entitled to damages for fraudulent concealment (*q*). But the law as regards latent defects is different. If the vendor at the time of the contract does not know the existing defect in the estate, the Court will enforce the contract. It would be otherwise if the defect be known to the vendor but which a provident purchaser could not discover (*r*). There is, however, no duty to disclose an intimation by a tenant that he would leave at the end of the year, the tenant not having given formal notice (*s*). Nor need the vendor disclose a deed acknowledging that the vendor is not entitled to access of light over the land of a third person (*t*). There is no such thing known to the law as an inchoate easement and a contract for sale of land with windows overlooking the land of a third party, implies no representation or warranty that the windows are entitled to the access of light over the land or that even the prescriptive period is running. The existence of an agreement, which prevents the statutory period of prescription beginning to run, does not create an encumbrance on the property and the non-disclosure of such an agreement does not invalidate the contract. A clause in such an agreement that the owner of the buildings will block up the windows, is an affirmative covenant only and cannot be enforced against subsequent purchasers under the doctrine of *Tulk v. Moxhay* (*u*). A further clause in such an agreement that the adjoining owner may enter and build up the windows in default of the owner of the buildings doing so, is a mere revocable licence and does not give the adjoining owner any interest in the land, and if it did give such an interest, it would be void as a perpetuity. None of the points mentioned above makes the title too doubtful to be forced upon a purchaser (*v*).

A landlord's notices to repair containing material facts must be disclosed. On July 31, 1924, defendant purchased from plaintiff two leasehold houses and paid a deposit. Completion was fixed for August 21, 1924. Under the lease the vendors were bound to do the inside and outside repairs. The conditions of sale provided that the purchaser should execute all necessary repairs. In due course requisitions on title were delivered, which included one, asking whether notices from landlords had been served on the property. The answer was that the vendors were not aware of any. This answer, though made in good faith, was not true. In fact the vendors had received landlord's notices on July 7, 1924, calling upon them, within three months of July 4, 1924, to make good the dilapidations found to have accrued on the premises "as per the schedule hereto annexed." The mistake was soon discovered and the vendors on August 20, 1924, sent copies of the notices to the purchaser, who then declined to complete, unless the vendors complied with the notices

(*o*) *Mullens v. Miller* (1882) 22 Ch. D. 194.

(*p*) *Heywood v. Mallalieu* (1883) 25 Ch. D. 357.

(*q*) *Gajapathi v. Alagia* (1886) 9 Mad. 89.

(*r*) *Lucas v. James* (1849) 7 Hare 410, 68 E. R. 170.

(*s*) *Davenport v. Charsley* (1886) 54 L. T. 372.

(*t*) *Greenhalgh v. Brindley* (1901) 2 Ch. 324;

Bonner v. Great Western Railway Co. (1883) 24 Ch. D. 1; *Smith v. Colbourne* (1914) 2 Ch. 533.

(*u*) (1848) 2 Ph. 774.

(*v*) *Smith v. Colbourne* (1914) 2 Ch. D. 533; *Greenhalgh v. Brindley* (1901) 2 Ch. 324.

S. 55 at their own expense. Condition 6 of the conditions of sale provided that the production of the last receipt for rent should be conclusive evidence that all the covenants had been complied with. Condition 8 provided that if any notices were outstanding, they should be complied with at the expense of the purchaser. Plaintiffs brought an action for specific performance of the contract by defendant. Defendant counter-claimed for the rescission of the contract and the return of his deposit. Held that the notices contained material facts, which it was the duty of the vendors to disclose and that the non-disclosure deprived them of the right to the special relief of specific performance; that neither condition 6 nor condition 8 relieved the vendors from the obligation of disclosing the notices, because the former required the purchaser to assume to be true, that which the vendors knew at the time of the sale to be untrue, and the latter only stated as a contingency, that which the vendors knew to be a fact. Held also that the purchaser having made out no case for the rescission of the contract, it was good at law, and since the purchaser refused to complete according to its terms, he was not entitled to the return of his deposit (*w*).

Non-disclosure of material defect in title.—A vendor's duty on sale of immovable property is to disclose any material defect in title which is exclusively within his own knowledge and which the purchaser could not be expected to discover for himself with care, ordinarily used in such transaction. If he knowingly suppresses a defect in title, the Court will not allow him to force the title upon a purchaser although in the conditions of sale he has employed general words, large enough to include the defect (*x*).

Material defects in seller's title.—A condition of sale that "if any error or mis-statement shall appear to have been made in the particulars of sale or these conditions" they shall not annul the sale but compensation will be allowed as may be fixed by a Judge in chambers, does not apply to a defect in title (*y*). Errors in particulars will not cover a large deficiency, e.g., 573 s. yards for 753 s. yards (*z*). Conditions of this kind are intended to cover small unintentional errors or inaccuracies (*a*) unless the party got all he saw (*b*). The authorities as to compensation conditions are reviewed in *Jacobs v. Revell* (*c*). An "error in the description of the property" means misdescription of the corporeal property, not a mistake in the description of the vendor's title (*d*). There is a presumption against the person suppressing a defective title, where a deed or other evidence is suppressed (*e*). It was observed by Fry, L. J., that there is a great practical convenience in requiring the vendor who knows his own title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title-deeds before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not in accordance with the usual course of business in sales by private contract (*f*). And this rule in *Reeve v. Berridge* (*g*) is applicable whether the sale be by private treaty or by public auction (*h*). The authorities establish that full information should be given to

(*w*) *Beyfus v. Lodge* (1925) 1 Ch. 350.

(*x*) *Carlisk v. Salt* (1906) 1 Ch. 335; *Stevens v. Adamson* (1818) 2 Stark 422; *Edwards v. Wickwar* (1865) L. R. 1 Eq. 68.

(*y*) *Debenham v. Sawbridge* (1901) 2 Ch. 98.

(*z*) *Whittemore v. Whittemore* (1869) 8 Eq. Cas. 603.

(*a*) *Postman v. Mill* (1826) 2 Russ. 570, 38 E. R. 449; *Dimmock v. Hallet* (1866) 2 Ch. App. 21.

(*b*) *In re Fawcett & Holmes* (1889) 42 Ch. D. 150.

(*c*) (1900) 2 Ch. 858.

(*d*) *Re Beyfus & Master's Contract*, 1888) 39 Ch.

D. 110.

(*e*) *Lewis v. Lewis* (1680) Rep. Temp. Finch. 471, 23 E. R. 254.

(*f*) *Reeve v. Berridge* (1888) 20 Q. B. D. 523; *Re White & Smith's Contract* (1896) 1 Ch. 637; *Molyneux v. Hawtrey* (1903) 2 K. B. 487; *Dougherty v. Oats* (1900) 45 So. Jo. 119; *Re Childe & Hodgson's Contract* (1905) 54 W. R. 234; *Hone v. Gahstatter* (1909) 53 So. Jo. 286.

(*g*) (1888) 20 Q. B. D. 523.

(*h*) *Re White & Smith's Contract* (1896) 1 Ch. 637

the purchaser. A vendor who desires to limit the rights of a purchaser must do so by explicit and plain conditions : he must tell the truth and all the truth, relevant to the matter in hand. A condition of sale provided that the commencement of title should be an indenture which was a conveyance, not for value, of real and leasehold property on trust for donor for life and then for sale, with power to the donor to revoke the trusts. It was held that the condition was misleading by reason of its not stating the nature of the deed (i). Concealment of defect in title by vendor's solicitor, even though the vendor since the date of the report against the title, put himself in a condition to make a good title, will relieve the purchaser (j). Hence concealment of a decree under which the purchaser was ejected from a portion of the house, was held fraudulent (k). And so with suppression of knowledge. A vendor who owned certain land upon cantonment tenure, knowledge of which was not brought to the notice of the purchaser, entered into a contract to sell the properties held by him, received Rs. 5,000 as earnest money and agreed to get the property transferred to the purchaser's name in the Brigade Major's office in Poona. Notice of the proposed sale having been published, the Cantonment Committee wrote to the purchaser that Government possessed certain rights over the property, upon which the purchaser refused to complete. It was held that the knowledge, that the property was held on cantonment tenure not having been brought to the notice of the purchaser, the Court could not impute such knowledge to him, that the terms of the contract itself were calculated to induce the purchaser to believe, that the vendor was selling not a mere revocable licence to occupy the land, but the land itself and that the purchaser was entitled to the return of his earnest money. It is open to a purchaser claiming specific performance to amend the plaint so as to include a claim for refund of earnest money, and the plaintiff failing to obtain a decree for specific performance should not be driven to bring a separate suit for its recovery, if he is entitled to relief in that form. The circumstance that the purchaser is not entitled to specific performance, is by no means conclusive against his right to the return of his deposit (l). Where the property was in possession of the vendor's mother-in-law who claimed a share, which fact was not disclosed to the purchaser, it was held that the omission to disclose the fact was a material defect in the title (m). A property described in a contract for sale as freehold means unencumbered freehold (n). Non-disclosure, however innocent, will release the purchaser, as where a vendor described property subject to restrictive covenants as freehold (o); or failed to disclose a material and latent defect that the premises were liable to be taken under compulsory acquisition (p); or concealing service of a party wall notice, throwing liability to contribute to costs of party wall works, inasmuch as it would affect the purchase price and constitute a latent defect in the title (q); or that a person in possession claimed a share in the property (r). Where a vendor of immovable property had purchased it from a Hindu widow in possession under a document, purporting to be her husband's will, neither signed nor attested, and on the construction of which, it was doubtful whether she took a widow's estate or an absolute interest, the title was held defective (s). Relief was granted to a purchaser when a

(i) *Marsh v. Granville Earl* (1882) 52 L. J. Ch. 189.

(j) *Dalby v. Pullen* (1830) 1 Russ. & M. 296, 39 E. R. 114.

(k) *Gajapathi v. Alagia* (1886) 9 Mad. 89.

(l) *Ibrahimbhai v. Fletcher* (1897) 21 Bom. 827.

(m) *Mahomed Siddique v. Li Kan Shoo*, A. I. R. (1925) Rang. 372.

(n) *Hone v. Gakstatter* (1909) 53 So. Jo. 286.

(o) *Hone v. Gakstatter* (1909) 53 So. Jo. 286; *Lallubhai v. Chimanlal* (1935) 59 Bom. 83;

Dosibai v. Dhanbai (1924) 49 Bom. 325.

(p) *Ballard v. Way* (1836) 1 M. & W. 520, 150 E. R. 540; *Lallubhai v. Chimanlal* (1935) 59 Bom. 83.

(q) *Carlisk v. Salt* (1906) 1 Ch. 335; *Stevens v. Adamson* (1818) 2 Stark 422 followed; *Nottingham Patent Brick & Tile Co. v. Butler* (1886) 16 Q. B. D. 778.

(r) *Gonduramasubbu Iyer v. Muthiah Kine*, A. I. R. (1925) Mad. 968.

(s) *Lallubhai v. Chimanlal* (1935) 59 Bom. 83.

S. 55 right of way was not disclosed. Certain trustees put up for sale by auction, two adjoining freehold properties known as lots Nos. 2 and 3. To lot No. 3, the only access was by a carriage sweep opening into the carriage drive of lot No. 2. By error no mention was made of the right of way in the particulars of sale of both lots but on the sale plan, which formed no part of the contract, it was apparent that the only access to lot No. 3 was over the carriage drive. The conditions of sale provided that the sale was subject to all the rights of way and other easements, whether mentioned or not in the particulars, and if any be found not disclosed, such non-disclosure should be deemed to be an omission or error within the meaning of clause 15, whereby it was provided that the sale should not be annulled nor any abatement or compensation allowed, if any error, mis-statement or omission be discovered in the particulars or sale plan. It was held that the vendors were not entitled to specific performance, that there was no patent defect in the title and that the conditions as to errors only applied to errors which were not known to the vendor, that the purchaser was not bound to make a requisition as to the right of way, when the abstract shewed a title to an unencumbered freehold and that the purchaser was entitled to rescind and to a return of the deposit (*t*). A purchaser was discharged on the ground of undisclosed restrictive stipulation. A vendor had previously orally covenanted with the owner of the adjoining houses not to do anything to prejudice the right of light to the windows of each other's premises and the purchaser had agreed to buy two recently built freehold houses "subject to right of light with owner of the adjoining property being guaranteed." Such a restrictive stipulation was held a defect in title (*u*). Existence of a restrictive covenant against building within 7½ feet of the boundary, is a material defect entitling purchaser to rescind (*v*).

On an agreement for sale of an existing lease no purchaser is affected with constructive notice of the covenants in a lease nor is he bound to complete the contract if the lease is subject to onerous covenants of an unusual nature, unless he had a fair opportunity of inspecting the lease before entering into the contract. The rule is the same whether the agreement is to purchase an existing lease or to take an under-lease (*w*). It is the duty of the vendor to disclose the existence of the covenant to an ignorant purchaser or he must shew that he gave him an opportunity of acquainting himself with the terms of the lease (*x*). Failure to disclose on a sale of leasehold premises, restrictive covenants in a contract which stated that the lease contained common usual covenants, entitled the purchaser to rescind the contract on his discovering that the lease required all under-leases to be registered, accompanied with a certain fee and contained a power of re-entry in case of breach or non-performance of any of the covenants (*y*). And where a lease was subject to a covenant, which after restricting certain trades, provided that there should not be carried on the premises "any trade or business or occupation whatsoever whereby any injurious, offensive or disagreeable noise or nuisance shall or may be occasioned, caused or made" it was held that the carrying on of a boys' school would come within prohibition of the covenant and the plaintiff who discovered the covenant after the contract was made, was entitled to rescind (*z*). So also where the lease contained an unusual covenant such as "not to assign or part with the possession of the premises without the consent of the lessor, such consent not to be unreasonably

(*t*) *Simpson v. Gilley* (1922) 92 L. J. Ch. 194.
 (*u*) *Pensel & Wilson v. Tucker* (1907) 2 Ch. 191;
 Rudd v. Lascelles (1900) 1 Ch. 815; *Re*
 Davis & Cavey (1888) 40 Ch. D. 601.
 (*v*) *Dossibai v. Dhunbai* (1925) 49 Bom. 325.
 (*w*) *Reeve v. Berridge* (1888) 20 Q. B. D. 523;

Hyde v. Warden (1876) 3 Ex. D. 72.
 (*x*) *Molyneux v. Hawtrey* (1903) 2 K. B. 487.
 (*y*) *Brookes v. Drysdale* (1877) 3 C. P. D. 52.
 (*z*) *Waulon v. Coppard* (1899) 1 Ch. 92; *Davis*
 v. Cavey (1888) 40 Ch. D. 601.

withheld" (a). It is established that a vendor of leasehold property must disclose the existence of onerous and unusual covenants in the lease or at least afford the purchaser an opportunity of inspecting the leases. Even if "the vendor's title is accepted by the purchaser" the latter will be entitled to rescind, if the vendor has failed to disclose the existence of onerous and unusual covenants before the contract was entered into and of which the purchaser had no notice (b). The condition as to acceptance of the title, did not affect the vendor's general duty of disclosure. On a sale of a reversion, if the vendor had misled the purchaser by a statement that it was subject to a lease containing usual covenants for repairs, etc., the vendor knowing at the same time that there was no person against whom the covenants could be enforced, the Court may refuse specific performance. But where property is sold subject to a lease so described, and tenants are in possession of the property, and pay their rent according to the terms of the lease, and the vendor is not aware, at the time of the contract, of any difficulty in enforcing the covenants, the Court will not refuse to decree specific performance, on the ground that the vendor cannot shew upon whom the liability of the covenants in the lease has devolved. It is not the duty of the vendor to find out and acquaint the purchaser with the name of the party who may be liable on such covenants (c). On a sale by trustees as vendors, they are not bound to disclose the existence of debts which render the sale necessary (d).

Misdescription and misrepresentation.—A misdescription to be a ground for annulment of the sale, must go to the essence of the contract, otherwise the purchaser's remedy is in compensation. A certain cook-room was shewn in the plan as a building intended to be included in the purchase, but which was in fact not included. The purchaser claimed annulment on the ground of error or mis-statement in the particulars. This was refused to him on the ground that, although a house without a cook-room is not much use for the purpose of habitation, yet the nature of the property shewed that the cook-room could be built on the premises, so that the error in the particulars was capable of compensation and that the conditions of sale which provided for any error or mis-statement, if capable of compensation, should not annul the sale nor entitle the purchaser to be discharged, applied (e). Reference may be made to *Fawcett v. Holmes* (f), where the Court laid down that in each case "the question depends on the view of the Court as to the importance of the misdescription." If a misdescription, although unintentional and not proceeding from fraud, is in a material and substantial point, of such a nature that it may be reasonably supposed, that but for such misdescription, the purchaser would never have entered into a contract for sale, the purchaser is entitled to rescind the contract and recover back his deposit (g). But if the misdescription or defect is not so material as to bring the case within the principle of *Flight v. Booth* (h), the purchaser is not entitled to have the contract rescinded even if the defect be known to and not disclosed by the vendor (i). So a purchaser was discharged where the conditions of sale incorrectly stated the effect of the trusts of a reversionary interest (j); also where the land offered for sale at an auction, was described as ripe for immediate development, when in fact it could not be used without excavation and filling (k);

(a) *Bishop v. Taylor & Company* (1891) 60 L. J. Q. B. 556.
 (b) *In re Haedicke and Lipski's Contract* (1901) 2 Ch. 666.
 (c) *Flint v. Woodin* (1852) 9 Hare. 618, 68 E. R. 660.
 (d) *Flux v. Best* (1874) 31 L. T. 645.
 (e) *Administrator General of Bengal v. Aghore Nath Mookerjee* (1902) 29 Cal. 420.

(f) (1889) 42 Ch. D. 150.
 (g) *Flight v. Booth* (1834) 1 Bing. N. C. 370, 131 E. R. 1160; *Jones v. Edney* (1812) 3 Camp. 285.
 (h) (1834) 1 Bing. N. C. 370.
 (i) *Shepherd v. Croft* (1911) 1 Ch. 521.
 (j) *Hadley v. Robins* (1866) 14 L. T. 100.
 (k) *Baker v. Moss* (1902) 66 J. P. 360.

S. 55 and where the particulars of sale of a hotel described that the hotel was occupied by a most desirable tenant, while in fact he could scarcely pay the rent and was in arrears for a quarter's rent, while the previous quarter had been paid by instalments and six weeks after the sale he filed his petition, the purchaser was relieved (*l*); so also when the occupation rent was erroneously stated (*m*). It would be a ground for annulment if a vendor offers to convey property substantially different from what he offered to sell (*n*) or where any substantial part of the property turns out to have no existence or cannot be found or the vendor has *mala fide* given a very exaggerated description of the property (*o*). And where in the particulars of sale by auction of freehold land, the property was described "as land tax redeemed," but the evidence of redemption was not such as to entitle the vendor to completion of the contract (*p*), the purchaser was held entitled to the return of his deposit, interest and costs of investigation of title. Misdescription may also be due to failure to disclose existence of easements (*q*) or that the property was subject to restrictive covenants (*r*). Where the area is considerably under-stated or over-stated, it would, as affecting the price of the property, be a ground for avoiding the sale altogether (*s*).

The existence of a scheme of road alignment affecting a property is a material and substantial disadvantage to the property. The non-disclosure amounts to an error or misdescription, but for which, the purchaser would never have made the contract. The purchaser is entitled to the return of earnest money with interest, the case not being one for compensation (*t*). The existence of the alignment scheme constitutes a defect in title which cannot be cured by compensation (*u*). The mere fact that the neighbouring properties have been set back is not constructive notice of the alignment scheme (*v*). On a sale in different lots, each lot is a separate contract, so that, if there is a misrepresentation as to one, giving the purchaser a right to rescind, he cannot repudiate the other, unless the two lots are so connected together or so inter-dependent, that the transaction is in effect one contract (*w*). Mere contiguity of the lots or the fact that a particular purchaser resolves to purchase two lots because he thinks he can conveniently occupy them together, is not sufficient to make them inter-dependent. Where the conditions provide for errors, mis-statements or omissions and that the same shall not annul the sale nor shall abatement or compensation be allowed or paid by the vendor to the purchaser, such conditions are intended to guard against unintentional errors and do not apply to actual fraud or misrepresentation (*x*). Here the particulars described the estate to contain 227 acres of a freehold tenure except 50 acres which were of copyhold. The tenure being doubtful, a clause was inserted in the contract that in case the copyhold exceeded 50 acres, no compensation was to be made to the purchaser. The vendor was not required to distinguish which portion was freehold and which copyhold, nor was any compensation to be allowed. The purchaser sent

(*l*) *Smith v. Land and House Property Corporation* (1884) 28 Ch. D. 7; *Bisset v. Wilkinson* (1927) A. C. 177.

(*m*) *Dimmock v. Hallett* (1866) 2 Ch. 21.

(*n*) *Jacobs v. Revell* (1900) 2 Ch. 858.

(*o*) *Robinson v. Musgrove* (1838) 8 C. & P. 469.

(*p*) *Poppleton v. Buchanan, Buchanan v. Poppleton* (1858) 4 Jur. N. S. 414, 140 E. R. 986.

(*q*) *Shackleton v. Sutcliffe* (1847) 1 De G. & Sen 609, 63 E. R. 1217; *Dykes v. Blake* (1838) 4 Bing. N. C. 463, 132 E. R. 866.

(*r*) *Re. Ebsworth & Tidy's Contract* (1889) 42 Ch. D. 23; *Lallubhai v. Chimanlal* (1935) 59 Bom. 83.

(*s*) *Price v. North* (1837) 2 Y. & C. 620, 160 E. R. 544; *Durham v. Legard* (1865) 34 Beav. 611, 55 E. R. 771; *Leslie v. Thompson*

(1851) 9 Hare. 268, 68 E. R. 503.

(*t*) *Ramlal Sen v. Suradhanisundaree* (1936) 63 Cal. 124, *Flight v. Booth* (1834) 1 Bing. (N. C.) 370; *In re Contract between Fawcett and Holmes* (1889) 42 Ch. D. 150.

(*u*) *Ramlal Sen v. Suradhanisundaree* (1936) 63 Cal. 124; *Lallubhai v. Chimanlal* (1934) 59 Bom. 83.

(*v*) *Ramlal Sen v. Suradhanisundaree* (1936) 63 Cal. 124.

(*w*) Sec. 16, Specific Relief Act, 1877; *Holliday v. Lockwood* (1917) 2 Ch. 47; *Graham v. Krishna Chandra Dey* (1925) 52 Cal. 335, 52 I. A. 90; *Casamajor v. Strobe* (1834) 2 My. & K. 706, 47 E. R. 181.

(*x*) *Turgand v. Rhodes* (1868) 37 L. J. Ch. 830; *Dimmock v. Hallett* (1866) 2 Ch. App. 21.

a requisition by which he claimed to have the copyhold and freehold distinguished with a view to compensation. The purchaser afterwards discovered that of the 227 acres 178 acres contained copyhold and 49 freehold and that all the minerals except stone were reserved to the Crown. Held, there was a misdescription of the property and the purchaser had properly objected, and specific performance was refused. The jurisdiction to decree specific performance will not be exercised in favour of a vendor, who has failed to satisfy the Court that he has done all he can to avoid misdescription. If a vendor suggests, that if an opportunity be given to him the representation may be cured, the purchaser does not lose his right to rely upon the misrepresentation and to determine the contract, if the vendor, at the end of the time, fails to make good his suggestion (*y*). An innocent misrepresentation might justify a purchaser in rescinding the contract, yet if he went on with it he could not recover damages, unless such innocent representation amounted to a warranty forming a contractual part of the bargain (*z*). A sub-purchaser can take advantage of misrepresentation made by a vendor to a purchaser. Where it was represented that the area of the land was 1,530 acres but the estate consisted of less than 1,100 acres, the sub-purchaser was held entitled to rescind, although one of the articles of the contract provided that the estate as to extent of acreage, should be taken to be conclusively shewn by certain deeds. The Court held that such a condition was merely a conveyancing condition as to identity and coupled with the representation as to acreage, it did not estop the sub-purchaser from rescinding on the ground of deficiency in acreage (*a*). And where a vendor offered to sell a lease for a certain term when the lessor had the right of option to determine the lease within the time (*b*) the purchaser was held entitled to return of his deposit with interest. A vendor's assurance that land was burdened with a yearly tenancy when the tenancy was permanent is a misrepresentation (*c*); so also where a vendor selling a tied public house described it as a free public house in the conditions of sale of the lease of a public house (*d*). Similarly, a purchaser believing that he was purchasing a long term which turned out to be shorter, is entitled to repudiate (*e*), but not if the difference between the remaining term and the term stated is insignificant (*f*).

Where on a sale of leasehold premises described as being held for a term of 23 years and including a yard which was necessary for its enjoyment, it turned out that the yard was not held under the lease, but under a tenancy from year to year at a further rent of £10, and although after the day fixed for completion, the vendors procured a lease, for the same term, of the yard at an additional rent of £8, and offered it to the purchaser, it was held that the defect was not a matter of compensation but one of title and as no title was shewn, the purchaser was entitled to avoid the sale (*g*). Where an under-lease was described as a lease, the Court considered that although there was a misdescription of the property, there was no such substantial misrepresentation as would entitle the purchaser to repudiate the contract (*h*). Where again an indefinite representation was made by a vendor, such as property described as

(*y*) *Tibbatts v. Boulter* (1895) 73 L. T. 534.
 (*z*) *Lawrence v. Hull* (1924) 41 T. L. R. 75.
 (*a*) *Aberaman Ironworks v. Wickens* (1868) 4 Ch. App. 101.
 (*b*) *Weston v. Savage* (1879) 10 Ch. D. 736.
 (*c*) *Visvanath v. Bala Kak* (1916) 18 Bom. L. R. 292.
 (*d*) *Jones v. Edney* (1812) 3 Camp. 285, 170 E. R. 1384.
 (*e*) *Hearn v. Tomlin* (1793) Peak. 253 N. P.;

Nash v. Wooderson (1884) 52 L. T. 49.
 (*f*) *Belworth v. Hassell* (1815) 4 Camp. 140 N. P.
 (*g*) *Dobell v. Hutchinson* (1835) 3 Ad. & El. 355, 111 E. R. 448; but see *Debenham v. Sawbridge* (1901) 2 Ch. 98.
 (*h*) *Bartlett v. Salmon* (1855) 6 De. G. M. & G. 33, 43 E. R. 1142; *Contra in Madeley v. Booth* (1848) 2 De. G. & Sen. 718; *Broom v. Phillips* (1896) 74 L. T. 459.

S. 55

nearly freehold turning out to be a leasehold for a long term or freehold turning out to be copyhold the purchaser was held entitled to repudiate the contract (*i*). Where misrepresentations as to nature and character affecting the value of the property, are made and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, the foundation is laid for setting aside the contract (*j*). A slight and immaterial description is of no consequence (*k*). It is a fatal description entitling the purchaser to rescind, to describe an under-lease as a lease (*l*); that the property was let to a desirable tenant when the tenant could hardly pay the rent (*m*); when the land offered for sale was described as "ripe for immediate development" when in fact it was filled with rubbish without excavating which, it could not be used for building purposes (*n*); that a property situate in a town was "well-supplied with water" when the water was only supplied from a water-works company on payment of water rates, there being no spring or running stream upon the property and the purchaser purchased on the faith of the description in the particulars without knowing the real state of the property (*o*). And so also failure to disclose the existence of an underground culvert (*p*) or a public sewer and foot-path likely to interfere with the development of the land (*q*) or neighbour's right to overhang on part of property (*r*) sold. Similarly, where the particulars of sale did not mention any peculiarity as to access to the house and the objection was taken as soon as it was known, the purchaser was held entitled to rescind the contract on the principle, that what was presented as the subject-matter of the contract was something different from what must be understood from the description. Here the purchaser of the house, in order to reach it, had to pass through part of another house by way of easement (*s*). The onus is on the vendor to shew that the purchaser did not rely on the representations made by him and that he was not actually misled. There is no general rule that actual fraud is necessary to induce a Court to rescind a sale. The Court acts on the same principle in rescinding contracts for sale, as in setting aside other contracts and dealings which it considers unconscientious (*t*). A purchaser agreed to buy an estate upon a statement in the particulars of sale that it lay upon a valuable vein of coal, which vein afterwards proved to have been mostly worked out. Subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of considerable quantity of coal and afterwards discovered the fact of the exhaustion of the coal. Held, reversing the decision of the Master of the Rolls, that the plaintiff having failed to shew that his misrepresentation did not influence the defendant to enter into the agreement, the rule of *caveat emptor* did not apply and that the plaintiff must be left to his remedy at law, if any. Held further that the transaction between the purchaser and the third party did not invalidate the purchaser's defence of misrepresentation to a bill by the vendor for specific performance, though it might have been an answer to a claim by the purchaser for abatement of the purchase-money (*u*). The existence of a right of way over land which a vendor purports to convey, is a breach of the covenant for good

(*i*) *Fenton v. Browne* (1807) 14 Ves. 144, 33 E. R. 476; *Draw v. Corp.* (1804) 9 Ves. 368, 32 E. R. 644; *Turner v. West Bromwich Union Guardians* (1860) 3 L. T. 662.
 (*j*) *Attwood v. Small* (1838) 6 Cl. & Fin. 232, 7 E. R. 684.
 (*k*) *Jennings v. Brunt* (1869) 19 L. T. 705 N. P.
 (*l*) *Broom v. Phillips* (1896) 74 L. T. 459; *In re Beyfus and Master's Contract* (1888) 39 Ch. D. 110.
 (*m*) *Smith v. Land and House Property Corporation* (1884) 28 Ch. D. 7.
 (*n*) *Baker v. Moss* (1902) 66 J. P. 360.

(*o*) *Leyland v. Illingworth* (1860) 2 De. G. F. & J. 248, 45 E. R. 627.
 (*p*) *In re Puckett and Smith's Contract* (1902) 2 Ch. 258.
 (*q*) *Mc Grory v. Alderdale Estate Co.* (1918) A. C. 503.
 (*r*) *Laybourn v. Gridley* (1892) 2 Ch. 53.
 (*s*) *Stanton v. Tattersall* (1853) 1 Sm. & Giff. 529, 65 E. R. 231.
 (*t*) *Torrance v. Bolton* (1872) 8 Ch. App. 118; *Witt v. O'Flanagan* (1936) 154 L. T. 634.
 (*u*) *Colby v. Gadsden* (1867) 17 L. T. 97.

right to convey implied by the use of the words "as beneficial owner." The proper measure of damages in such a case, is the difference between the purchase price and the value of the land as the vendor had power to convey (v). There may, however, be latent defects which though not such as to give the party the right of rescission, may affect the value of the property, giving rise to a claim for compensation on the part of the purchaser. Thus where the vendor knowing of the existence of an underground watercourse, did not disclose it to the purchaser and the purchaser's agent, on inspecting the property prior to the contract, did not see the piping, although it was exposed to view in a hole in the lawn of the house, it was held that the watercourse was not a sewer or drain vested in the local authority nor an easement affecting the property, nor a defect in title but that it was a latent defect in the property although not of such materiality as would prevent the purchaser from getting substantially what she had contracted for, if the contract was specifically enforced against her (w). The principle is that even where there is a latent defect but it is not so material as to bring the case within *Flight v. Booth* (x), the purchaser is not entitled to have the contract rescinded, even if the defect is known to and not disclosed by the vendor. But where a purchaser bought the land for building purposes which was known to the vendor, who failed to disclose an underground culvert which was a substantial drawback for use of land for building purposes, it was held that the purchaser would not get that for which he had contracted (y). In the former case (z), what the defendant was purchasing and the vendors were offering, was a residential property, with certain specified building advantages, so that notwithstanding the existence of the underground watercourse the defendant would be substantially getting what the plaintiff contracted to give her, viz., a desirable residential property with certain building advantages. In the latter case (a) the purchaser bought the land for building purposes and this was known to the vendors, who represented that it was suitable for building and that there was no restriction as to the class of houses to be erected. Before he entered into the contract the purchaser inspected the property and some time after the contract discovered that there was an underground culvert for water running across the land. There was nothing in the plan shewn to him to indicate the existence of the culvert and the vendors who were trustees of a former owner, were not aware of it. Further, the land was sold subject to the condition, "the property being open for inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and conditions thereof. If any error shall be found in the particulars, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." Where land is contracted to be sold subject to a condition empowering the vendor to rescind the contract in the event of the purchaser making any requisition which the vendor is advised not to comply with, and stipulating that the return of the deposit shall be accepted by the purchaser in discharge of all claims for costs or otherwise, and the Court accedes to an application by the purchaser to be discharged from his contract on the ground of misrepresentation, the vendor cannot avail himself of his power to rescind under the contract; and where the sale is under the direction of the Court, the costs recoverable by the purchaser include, besides the costs of investigating the title and of the application, the costs occasioned by his bidding for and becoming the purchaser of the property (b). Mere puffing up by an

(v) *Turner v. Moon* (1901) 2 Ch. 825; *Great Western Railway v. Fisher* (1905) 1 Ch. 316; *Eastwood v. Ashton* (1913) 2 Ch. 39.
 (w) *Shepherd v. Croft* (1911) 1 Ch. 521; *In re Brewer and Hankin's Contract* (1899) 80 L. T. 127.
 (x) (1834) 1 Blng. N. C. 370, 131 E. R. 1160.

(y) *Re Puckett and Smith's Contract* (1902) 2 Ch. 258.
 (z) *Shepherd v. Croft* (1911) 1 Ch. 521.
 (a) *In re Puckett & Smith's Contract* (1902) 2 Ch. 258.
 (b) *Holliswell v. Seacombe* (1906) 1 Ch. D. 426.

S. 55

auctioneer is to be looked at as a mere flourishing description, and misrepresentation in such cases does not entitle a purchaser to be discharged. Nor is a mere general statement or expression of opinion which the vendor honestly held, a ground for rescission, if it turned out to be false (c); such as the representation that "land is fertile and improvable" whereas part of it was abandoned as useless, cannot, except in extreme cases as, for instance, where a considerable part is covered with water or otherwise irremediable, be considered such a misrepresentation as to entitle a purchaser to be discharged (d); that a house was "substantial and convenient" containing two sitting and five bed-rooms, when the bed-rooms were too small to be used for that purpose (e); that land was "uncommonly rich water-meadow" whereas in fact it was imperfectly watered (f). These are mere expressions of opinion and do not amount to such misrepresentation or misdescription as to vitiate or avoid the sale. So also with indefinite representations of a vendor as that a leasehold was nearly equal to a freehold, being renewable upon a small fine. Such representations ought to put the purchaser on inquiry (g). It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion; the statement of such an opinion in a sense, is a statement of facts about the condition of the man's own mind, which is irrelevant, for it is of no consequence what the opinion is. But if these facts are not equally known to both sides, then the statement of opinion of one who knows the facts, will involve very often the statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

Purchaser's remedy for misrepresentation.—The remedy of a purchaser whose consent to an agreement has been obtained by misrepresentation is (h) either

- (1) to have the contract declared voidable, for which purpose he has one of the following remedies, namely, compensation, damages, rescission or return of deposit; or
- (2) insist that the contract shall be performed and that he shall be put in the position in which he would have been, if the representation made had been true, the remedy being specific performance.

But the contract is not voidable :

- (1) If the party whose consent was so caused, had the means of discovering the truth with ordinary diligence.
- (2) If the misrepresentation had not caused the consent of the party to whom such misrepresentation was made.

The vendor is not entitled to specific performance, on waiving the part affected by the misrepresentation. The effect of misrepresentation is to destroy the agreement entirely, and to operate as a personal bar against the party who has practised it (i).

How notice of defect affects a purchaser.—Sub-section (1) (a) protects a buyer against defects in the state of the property or the seller's title if he has no notice, actual or constructive, of the defect. If a contract for the sale of land is silent as

(c) *Bisset v. Wilkinson* (1927) A. C. 177.
 (d) *Dimmock v. Hallett* (1856) 2 Ch. App. 21.
 (e) *Johnson v. Smart* (1860) 2 L. T. 783.
 (f) *Scott v. Hanson* (1829) 1 Russ. & M. 128,
 39 E. R. 49.

(g) *Fenton v. Browne* (1807) 14 Ves. Jun. 144,
 33 E. R. 476.
 (h) Sec. 19, Indian Contract Act (Act IX of 1872).
 (i) *Clermont (Viscount) v. Tasburgh* (1819)
 1 Jac. & W. 112, 37 E. R. 318.

to the title which is to be shewn by the vendor, the legal implication that the purchaser is entitled to a good title (*j*) may be rebutted by evidence that before the execution of the contract, the purchaser had notice of the defect in the vendor's title. But if the contract expressly provides that a good title shall be shewn, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title (*k*). If the contract contains no stipulation as to possession being taken by the purchaser before completion and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking of possession amounts to a waiver of the purchaser's right to require the removal of those defects or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver. A purchaser by making structural alterations to a considerable extent after notice of restrictive covenants, was held to have waived his rights to object to the title on the ground of the restrictions (*l*). On a purchase of leasehold, it is the duty of the purchaser to inform himself of the covenants of the lease and if he enters and takes possession before doing so, he is bound by those covenants (*m*). A purchaser of leasehold, who is aware at the time of entering into the contract that the vendor's interest is merely that of an under-lessee, is bound by the contract notwithstanding the misdescription (*n*). But a purchaser of an under-lease has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they are (*o*). So also a purchaser of land from one who has purchased it for value without notice, either actual or constructive, of a restrictive covenant, is not bound by the covenant although he himself had notice of it (*p*). And where the same person is agent both for the vendor and purchaser or is himself vendor and agent for the purchaser, whatever notice he may have, will bind the purchaser (*q*). It is the duty of the vendor to make his conditions clear and if the vendor's representations preclude the purchaser from making inquiries which he would otherwise have made, the purchaser cannot be fixed with constructive notice of such facts (*r*).

Where the facts are such as to put the purchaser on inquiry, he is deemed to have had constructive notice of those facts and he is bound by them (*s*). A recital of a deed is constructive notice of its contents (*t*), though the deed be inaccurately recited (*u*), and the most express representation on the part of the vendor or lessor that the deed contains no restrictive covenants or anything to affect the title, will not discharge a purchaser from the consequences of not looking at the deed (*v*). Nor is a purchaser relieved where the original deed is lost or destroyed and what purported to be a true copy of the instrument lost or destroyed, was subsequently found to be defective in its contents (*w*) and he will not be heard to say that he

- (*j*) *Shrinivasdas v. Meherbai* (1917) 41 Bom. 300; 44 I. A. 36; *Haji Mahomed Mitha v. Musaji Essaji* (1891) 15 Bom. 657; see Specific Relief Act, I of 1877, sec. 25 (b).
- (*k*) *Re. Gloag & Miller's Contract* (1883) 23 Ch. D. 320; *Re. Wallis & Barnard's Contract* (1899) 2 Ch. 515; *Barnet v. Wheeler* (1841) 7 M. & W. 364, 151 E. R. 806; *Re. Highett & Bird's Contract* (1903) 1 Ch. 287.
- (*l*) *Re. Gloag & Miller's Contract* (1883) 23 Ch. D. 320.
- (*m*) *Cosser v. Collinge* (1832) 3 My. & K. 283, 40 E. R. 108; *Pope v. Garland* (1841) 4 Y. & C. Ex. 394, 160 E. R. 1059; *Grosvenor v. Green* (1858) 28 L. J. Ch. 173.
- (*n*) *Flood v. Pritchard* (1879) 40 L. T. 873; *Henderson v. Hudson* (1867) 15 W. R. 860; *Re. Edwards to Sykes* (1890) 62 L. T. 445.
- (*o*) *Hyde v. Warden* (1877) 3 Ex. D. 72.

- (*p*) *Wilkes v. Spooner* (1911) 2 K. B. 473.
- (*q*) *Dryden v. Frost* (1837) 3 My. & Cr. 670, 40 E. R. 1084.
- (*r*) *Drysdale v. Mace* (1854) 5 De G. M. & G. 103, 43 E. R. 809.
- (*s*) *Hervey v. Smith* (1856) 22 Beav. 299m 52 E. R. 1123.
- (*t*) *Prosser v. Watts* (1821) 6 Mad. 59, 56 E. R. 1012.
- (*u*) *Hope v. Liddell, Liddell v. Norton* (1855) 21 Beav. 183, 52 E. R. 829; *Nawab Sidhee Nuzur Ally Khan v. Raja Ojooobhyaram Khan* (1865) 10 M. I. A. 540.
- (*v*) *Palman v. Harland* (1881) 17 Ch. D. 353; *Mogridge v. Clapp* (1892) 3 Ch. 382; *Spencer v. Bailey* (1893) 69 L. T. 179.
- (*w*) *Hooper v. Bromet* (1903) 89 L. T. 37; see The Law of Property Act, 1925, Ch. 20, sec. 44 (5).

§. 55 partially inspected a lease and had no notice of the covenants (x). Occupation of land by a tenant affects the purchaser with constructive notice of the tenant's rights but not of the lessor's title or rights. Actual knowledge by the purchaser that the rents are paid by the tenant to some other person whose receipt is inconsistent with the vendor's title, is constructive notice of that person's rights but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all (y). Where freehold land is sold subject to restrictions contained in or referred to by a specified deed which in turn discloses certain restrictions to which the land is subject as contained in a second deed, a purchaser, who before executing the contract has not inspected either the first or the second deed, will not be granted relief for want of notice, at the time when he entered into the contract, of the restrictions contained in the second deed (z). The absence of a receipt for the consideration in a deed, though it is notice of its non-payment, is not constructive notice of other irregularities in the transaction (a).

Defects discovered after conveyance.—Where the purchaser discovers material defects after the conveyance, he must make out a case of fraud in order to set aside a sale (b). A purchaser sued the vendor on account of deficiency in the actual area of the land from that stated in the sale deed. It was held that the purchaser must make out a fraudulent misrepresentation which he accepted as true, and which induced him to enter into a contract, and which caused him damage (c).

Rescission after conveyance.—In order to warrant rescission, the misrepresentation must amount to actual positive fraud to the same extent as in an action for deceit (d) or the purchaser must prove unfair dealing (e). To set aside a purchase perfected by conveyance and payment of purchase-money, proof of concealment of defect in title by vendor's agent is not sufficient. There must be proof of direct personal knowledge of concealment by the principal (f). A having two parcels and B one parcel of land supposed to contain petroleum, it was agreed by them and C that C should pay them £10,000 if he succeeded in forming a company and inducing such company to pay £13,750 as price of the land, out of which C was to keep £3,750. B, assuming the character of owner, gave to C a conditional promise to sell all land for £13,750, provided the offer was accepted within a certain time. A wrote a letter meant to be shewn to, and which was shewn to, persons intending to form the company, which proved to have influenced them. A and B actively co-operated with C throughout the whole transaction. The company in ignorance of the combination, accepted the proposal, but having discovered the fraud, sued for rescission of the contract. Held, that the contract must be wholly rescinded, price repaid and land reconveyed. Fraud having been established against a party, it is for him if he alleges laches in the other party, to shew when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right (g). A vendor sold and conveyed copyhold as freehold and received the purchase-money. Afterwards the purchaser discovered that the property was really copyhold. The

(x) *Smith v. Capron* (1849) 7 Hare. 185, 68 E. R. 75.

(y) *Hunt v. Luck* (1902) 1 Ch. 428; *Barnhart v. Greenshields* (1853) 9 Moo. P. C. 18 followed. Dictum of Jessel, M. R., to the contrary in *Mumford v. Stohwasser* (1874) L. R. 18 Eq. 556, 562 disapproved.

(z) *Childe and Hodgson's Contract* (1905) 50 So. Jo. 59.

(a) *Greenslade v. Dare* (1855) 20 Beav. 284, 52 E. R. 612.

(b) *Eastern Mortgage & Agency Co., Ltd. v. Muhammed Fazlul Karim, A. I. R.* (1926) Cal. 385.

(c) *Abdulla Khan v. Abdul Rehman Beg* (1896) 18 All. 322.

(d) *Attwood v. Small* (1838) 6 Cl. & Fin. 232, 7 E. R. 684; *Brownlie v. Campbell* (1885) A. C. 925; *Wilde v. Gibson* (1848) 1 H. L. Cas. 605, 9 E. R. 897; *The Public Trustees v. Duchy of Lancaster* (1927) K. B. 516.

(e) *May v. Platt* (1900) 1 Ch. 616.

(f) *Wilde v. Gibson* (1848) 1 H. L. Cas. 605, 9 E. R. 897.

(g) *Lindsay Petroleum Co. v. Hurd* (1874) 5 P. C. 221; *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 A. C. 1218.

vendor alleged that he made the representation, believing it to be true. Held, assuming that he had made the representation *bona fide*, the vendor had committed a legal fraud; the sale must be set aside and the purchase-money repaid with interest at 4 per cent. after deducting rents and profits during occupation and the vendor must pay all the expenses which the purchaser had incurred in consequence of the purchase (h).

Where both parties are under a mistake as to a matter of fact.—Section 55 (1) (a) has no application where the contract is fundamentally affected, by both parties to an agreement being under a mistake as to matters of fact, essential to the agreement, for in that case the agreement itself is void (i). Where the defect is unknown both to the vendor and the purchaser, it is not necessary to decide or consider whether the facts over which the parties have been mistaken, constitute non-disclosure of a material defect in the property. The plaintiff, an auction purchaser of property sold at the instance of the Official Receiver, discovered after the sale was held and before the completion, that about half the property was notified by a public body for acquisition and on that ground refused to complete the purchase and demanded the return of the deposit. It was held that the plaintiff was entitled to a declaration that the agreement for sale was void and to a return of the deposit (j). In this case the predecessor in office of the vendor, had notice of the intended acquisition and it was argued that the knowledge referred to in section 55 (1) (a) of the Transfer of Property Act was knowledge in fact and not constructive knowledge. The point is further illustrated by illustration (c) to section 20 of the Indian Contract Act. A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement but both parties were ignorant of the fact. The agreement is void. But the case is different where through fraud or common mistake or by accident, property is not included in the conveyance or what is not sold is added. In such cases the remedy would be rectification under section 31 of the Specific Relief Act.

Effect of omission to disclose.—Clause 55 (1) (a) has to be read with the last paragraph of section 55 which regards an omission to make such disclosure as fraudulent. It is not open to a purchaser to plead that the vendor failed to discharge his obligation under the section, if he with ordinary care could have discovered the defect in title or if, owing to want of care and wilful abstention from inquiry which he ought to have made, he does not come to know of the defect in title. He is not entitled in such a case to charge the vendor with fraud within the meaning of the last paragraph of section 55 of the Transfer of Property Act. The same result follows if, leaving aside the special provisions of section 55 of the Transfer of Property Act, we consider the section relating to fraud and misrepresentation in the Indian Contract Act. Section 19 contains an exception that if consent be caused by misrepresentation or by silence, which is fraudulent within the meaning of section 17, the contract nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence (k). Any omission to disclose a material defect, whether through carelessness or design, is fraudulent. Affirmative fraud is not necessary to entitle a purchaser to relief (l), nor is it competent

(h) *Hart v. Swaine* (1877) 7 Ch. D. 42; *Toliffe v. Baker* (1883) 11 Q. B. D. 255; *Nash v. Wooderson* (1884) 52 L. T. 49.

(i) Sec. 20, Indian Contract Act, IX of 1872; *Harilal v. Mulchand* (1928) 52 Bom. 883.

(j) *Nursing Dass Kothari v. Chuttoo Lall Misser*

(1923) 50 Cal. 615; *Huddersfield Banking Co. v. Lister* (1895) 2 Ch. 273.

(k) *Harilal v. Mulchand* (1928) 52 Bom. 883.

(l) *Mostyn v. West Mostyn Coal & Iron Company, Ltd.* (1878) 1 C. P. D. 145.

S. 55 to a vendor or his agent with knowledge, failing to disclose a material defect, to put forward conditions of sale which are to force a bad title upon his purchaser (*m*). The same doctrine applies to India when a contract of sale of immovable property implies some warranty as to title by the seller (*n*). Silence amounts to fraud, for which a Court will grant relief only when it is the non-disclosure of those facts and circumstances which one party is legally bound to communicate to the other. The silence must be the true cause of the change of position of the other party. If a purchaser has allowed the vendors to remain in possession, intending to mislead the plaintiff, who having been misled, has sued them, the decree in the suit would bind the purchaser on the ground of fraud (*o*). A vendor must produce all documents and must inform the purchaser of all material facts, not apparent on the documents. Whether it would be fraud to offer as good, a title which the vendor knows to be defective in point of law, it is not necessary to determine; but if he knows all and conceals a fact material to the validity of the title, there is no principle on which relief can be refused to a purchaser (*p*). Again, under the Specific Relief Act sections 17 and 18, the contract for sale is declared not enforceable in favour of a vendor, who knowing himself to have no title to the property has contracted to sell the same and in clause (d) of section 18 it is laid down "when the vendor sues for specific performance of the contract and the suit is dismissed on the ground of imperfect title, the defendant has a right to a return of his deposit with interest and costs."

Right to sue on covenant free from encumbrances.—In an action on a covenant against encumbrance, the plaintiff must allege the facts constituting the disturbance and that the disturbance was lawful, with sufficient particularity, to shew the breach of covenant (*q*).

In order to justify legal proceedings on this covenant against encumbrances, it is requisite that an actual interruption, claim or demand be made on the purchaser: some hindrance or prevention of enjoyment proved; for the chance alone of his being disturbed and his liability to satisfy claimants or, in other words, the mere existence of outstanding encumbrances, unless they prevent entry and enjoyment as in the case of a prior unexpired lease, will not constitute an immediate breach (*r*). When the covenant against encumbrance is not an independent covenant but is part of the covenant for quiet enjoyment, the covenantor does not mean to guarantee that the estate was free from encumbrances. The mere existence of an encumbrance does not give a right to sue under this covenant.

Clause (1), Sub-clause (b) : Disclosure by Seller.

Root of title.—In India there is no rule, as in England, that a purchaser cannot call for title beyond a particular number of years (*s*). This is not practicable in view of the time limit on actions on mortgages and the provisions in the Statute of Limitations, which in certain events and under certain circumstances give a fresh starting point of limitation. In the absence of any circumstances casting a doubt on title, a 12-year possessory title in the vendor may be regarded as safe.

(*m*) *Heywood v. Mallalien* (1883) 25 Ch. D. 357.

(*n*) *Mahomed Siddiq v. Li Kan Shoo*, A. I. R. (1925) Rang. 372; *Hajee Essa v. Dayabhai* (1886) 20 Bom. 522; *Jyotiprasad v. H. V. Low & Co.* (1930) 57 Cal. 1189.

(*o*) *Joy Chandra Bannerji v. Sreenath Chatterji* (1905) 32 Cal. 357; *Fox v. Mackreth* (1791) 2 R. R. 55 followed.

(*p*) *Edwards v. McLeay* (1818) 2 Bevan. 287, 36 E. R. 625; *Mostyn v. West Mostyn Coal & Iron Co.* (1876) 1 C. P. D. 145; *Notting-*

ham Patent Brick & Tile Co. v. Butler (1886) 16 Q. B. D. 778.

(*q*) *Foster v. Pierson* (1792) 4 T. R. 617; *Nottidge v. Derring* (1909) 2 Ch. 647; *In re Martin, Ex-parte Dixon v. Tucker* (1912) 106 L. T. 381.

(*r*) *Eastern Mortgage & Agency Co., Ltd. v. Muhammad Faslal*, A. I. R. (1926) Cal. 385.

(*s*) Sec. 44, Law of Property Act, 1925, substitutes 30 years for 40 years.

A vendor cannot, however, force a title on a purchaser with an indemnity. The ground of the English rule, that a purchaser cannot call for a title for more than 60 years, is not that 60 years made a good title, but that it raised an inference on which the Court would act that there was nothing to disturb the title. This did not preclude a purchaser from calling for a long title if the vendor had one, but only that a purchaser could not demand a longer title if the vendor had no better (*t*). On a reference to *Devsi Ghela v. Jivaraj Mukundas* (*u*) it appears that in two previous cases, the Bombay High Court held that a purchaser could not require more than 20 years' title. The decision in that case was founded on the agreement between the parties that no other title should be required than that appearing in the documents mentioned therein. Where it is provided by conditions of sale of land that the vendor shall not be bound to shew any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and, if it be proved to exist, may rescind the contract and recover back earnest money, interest and expenses (*v*). The purchaser must bear the costs of obtaining certified copies of all orders and consent decrees asked for in his requisitions (*w*). So also certified copies of wills, Probates and Letters of Administration, the vendor is neither bound to deliver nor pay for. The above documents are not title-deeds. Even a mortgage is not a muniment of title.

Title-deeds.—It is not solely incumbent upon the vendor to move by tendering the abstract. It is also incumbent upon the purchaser to ask for it (*x*). Certified copies of documents and decrees or orders of the Court, probates and Letters of Administration are not title-deeds. It is the duty of the seller to render to the buyer all facilities for investigation of title. He must, therefore, produce all deeds relating to the property which are in his possession or in the possession of one from whom he is in a position to procure. The seller is bound to produce documents of title only when the purchaser asks for them (*y*). Under the Act the seller is obliged to give inspection to the buyer on demand of all documents of title relating to the property, not only such as may be in his possession but also those which are in his power to produce, such as may be with his agent, solicitor or mortgagee. Usually the matter of giving and taking inspection of title-deeds is provided for by the contract for sale itself. In general practice, the seller's solicitor hands the title-deeds over to the buyer's solicitor, on the latter undertaking to return the same on demand without claiming any lien for his costs or otherwise. In the absence of any stipulation, it is the duty of the buyer to go to the seller's place or such reasonable place as he may appoint, including his solicitor's office, to inspect the title-deeds. The costs of such inspection must be borne by the purchaser. In England, however, the rule is to deliver to the buyer an abstract of title. It would obviously be unwise for the seller to deliver his title-deeds to the buyer or his solicitor unconditionally, for in case of dispute between them, their recovery might entail not only cost and trouble but perhaps litigation. The seller must clear the title at his own expense (*z*). It is his duty to be ready with his title before he carries the property to market.

Abstract of title.—On completing the agreement for sale, the seller delivers to the buyer an abstract of title. In India on sales by auction, a condition for delivery of the abstract is inserted. Usually time for delivery of the abstract is not of the

(*t*) *Pan v. Lovegrove* (1857) 4 Drew. 170, 62 E. R. 66 (*n*).

(*u*) (1866) 2 Bom. H. C. 406.

(*v*) *Mancharji Pestanji v. Narayan Lakshumanji* (1863) 1 Bom. H. C. 77.

(*w*) *Shamsudin Tajbhai v. Dahyabhai Maganlal* (1924) 48 Bom. 368.

(*x*) *Guest v. Homfray* (1801) 5 Ves. 818, 31 E. R. 875.

(*y*) *Maung Po Te v. Maung Shwe Ko* (1916) 10 Bur. L. T. 35.

(*z*) *Wilson v. Allen* (1820) 1 Jac. & W. 611, 37 E. R. 501.

S. 55 essence of the contract, though it may be made such by express stipulation between the parties, by reason of the nature of the property or by surrounding circumstances shewing an intention on the part of the parties to complete the contract within a limited time. In considering the question whether, in the absence of any of these circumstances, time is to be considered as the essence of the contract in delivering the abstract, the Court looks at the substance and not the mere form of the contract (a). The vendor must bear the expense of abstracting a deed forming part of the title required by law, although such deed be not in his possession (b). In India the practice of delivering an abstract of title does not obtain (c).

As to what is a proper abstract is a question of degree and where a purchaser objects that the abstract is insufficient, it lies upon him to show how it is imperfect (d). By the expression "perfect abstract" is meant the most perfect abstract in the vendor's possession, actual or constructive, at the time of delivery. For a vendor, who has a good title, would not be permitted fraudulently to deliver an imperfect abstract to which objections would necessarily be taken, and upon these objections being taken, avail himself of his own fraud to avoid his contract (e). A perfect abstract of title should contain, with sufficient fullness, the effect of every instrument which constitutes the title of the vendor and it should contain further a statement of all the facts necessary to deduce a title in the vendor (f). An abstract though deficient in length of title, is sufficient if it contains a full and fair statement of all muniments which the vendor has in his possession, power or knowledge and contains a fair statement of the deduction of his title (g). Every document that forms a link in the vendor's title, ought to be abstracted in chief and also the deed which is recited in the subsequent deed (h). Where the title-deeds are to be produced by a certain day, if they are not then ready, the purchaser cannot object to the delay, if he receives them afterwards without objection (i). A vendor is bound, on delivering an abstract, to make out such a title as he undertook to shew or as a purchaser was bound to accept (j). The practice of setting in an abstract, deeds to be executed which were not so, is both inconvenient and improper (k). The title is first shewn when the abstract states all the matters which, if proved, make a good title. A title is made when the matters are proved. A purchaser is entitled to call for inspection of any deed not abstracted, which relates to the property and is in possession of the vendor. As to missing documents, a good title was made when proof was produced of search for them and their loss (l). A vendor is not justified in suppressing an equitable encumbrance, although satisfied, but it may not be necessary that that should appear upon the abstract (m).

Computation of limitation.—One of the conditions in a sale by auction is that the purchaser shall, within a specified number of days after the actual delivery of the abstract, deliver, at a given address of the office of the vendor's attorney, a statement in writing of his objections and requisitions (if any) to or on the title, as deduced by such abstract to and in respect of the description of the property and upon the expiration of such last mentioned time (and in this respect time is to be

(a) *Roberts v. Berry* (1853) 3 De. G. M. G. 284, 43 E. R. 112.
 (b) *Re. Johnson and Tustin* (1885) 30 Ch. D. 42.
 (c) *Jyotiprasad v. H. V. Low & Co.* (1930) 57 Cal. 1189.
 (d) *Ward v. Grimes* (1863) 8 L. T. 782.
 (e) *Morley v. Cook* (1842) 2 Hare. 106, 67 E. R. 44.
 (f) *Nilmani Addy v. Dinendranath Das* (1930) 57 Cal. 1115.
 (g) *Bloodburn v. Smith* (1842) 2 Ex. 783 154 E. R. 707.

(h) *Re. Stamford, Spalding & Boston Banking Co. & Knights Contract* (1900) 1 Ch. 287.
 (i) *Smith v. Burnam* (1795) 2 Aust. 527, 145 E. R. 956.
 (j) *Poppleton v. Buchanan* (1858) 31 L. T. O. S. 83, 140 E. R. 986.
 (k) *Bedford v. Hopes* (1843) 2 L. T. O. S. 192.
 (l) *Parr v. Lovegrove* (1857) 4 Drew. 170, 62 E. R. 66.
 (m) *Drummond v. Tracy* (1860) John 608, 70 E. R. 562.

deemed of the essence of the contract) the title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions, if any. Under such a stipulation the time within which a purchaser would be barred, dates from the delivery of a perfect abstract and not an abstract which shews a perfect title (which is entirely a different thing) but an abstract which sufficiently shews all documents and gives all the facts upon which such title, as the vendor is professing, is based (n).

Recitals no evidence.—Recitals in a deed are, strictly speaking, evidence only against the parties to the deed and those claiming through or under them. A mortgage was effected on the property in favour of two joint mortgagees, by an agreement of charge duly registered and the deposit of title-deeds with the mortgagees. To deduce a good title, it was necessary to prove that the mortgage had been discharged. As proof of discharge, the vendor produced a certified copy of a release executed by only one of the joint mortgagees, which recited the death of the other mortgagee and that the co-mortgagee was his sole heir. It was held that the recitals in the release were not evidence against the joint mortgagee and the title contracted for had not been deduced (o). In Bombay, solicitors have adopted the practice of accepting recitals in deeds over 20 years old in the same way as is done in England, under the Vendor and Purchaser Act, 1874 (p).

Covenant to produce.—A purchaser is not bound to complete his purchase without the title-deeds unless he has a legal covenant to produce them. A covenant to produce title-deeds runs with the land for the benefit of the purchasers but not for the benefit of the vendors (q).

Loss of sale deed before registration.—If a deed of sale for value more than Rs. 100, is lost before registration, the purchaser can bring a suit against the vendor to compel execution and registration of a fresh deed. If the vendor has resold and delivered possession after the execution of the lost deed to another who has notice of the sale to the plaintiff, the latter is entitled as against the subsequent purchaser to a decree for possession of the property (r).

Conveyance destroyed by fire before registration.—Where a conveyance compulsorily registrable under section 17 of the Registration Act, XVI of 1908, is destroyed by fire before registration, the purchaser can sue the vendor for a fresh deed to the same effect. In such a case secondary evidence of the contents is admissible (s).

Unstamped title-deeds.—Where a title-deed is unstamped or insufficiently stamped which being a link in the chain, is necessary for the protection of the title, the purchaser is entitled to insist upon the document being stamped at the vendor's expense. Where a mortgage deed was insufficiently stamped the purchaser could compel the vendor to stamp it before completion with a full *ad valorem* duty at the vendor's expense notwithstanding the mortgagee had consented to join in the conveyance (t). The Court is not entitled to speculate whether the purchaser may or may not have occasion to use the deed. A purchaser is entitled to have every deed forming a step in his title in such a shape that he can, if he needs it, give it in evidence. But a purchaser has no such right when the deed is unnecessary for the

(n) *Nilmani Addy v. Dinendranath Das* (1930) 57 Cal. 1115; *Hobson v. Bell* (1839) 2 Beav. 17, 48 E. R. 1084; *Blacklow v. Laws* (1842) 2 Hare. 40, 67 E. R. 17; *Want v. Stallibrass* (1873) L. R. 8 Ex. 175; *Pryce Jones v. Williams* (1902) 2 Ch. 517.
(o) *Srinivasadas Barri v. Meherbai* (1917) 41 Bom. 300, 44 I. A. 36.

(p) *Shamsudin Tajbhai v. Dahyabhai Maganlal* (1924) 48 Bom. 368.
(q) *Barclay v. Raine* (1823) 1 Sim. & St. 449, 57 E. R. 179.
(r) *Nallappa v. Ramalingachi* (1897) 20 Mad. 250.
(s) *Nynakka v. Vavana* (1869) 5 Mad. H. C. 123.
(t) *Whiting to Loomes* (1881) 17 Ch. D. 10.

S. 55

protection of his title and the defect can be cured by the concurrence of the parties to the unstamped deed (u). Under section 35 of the Stamp Act of 1899 no instrument chargeable with duty shall be admitted in evidence for any purpose unless such instrument is duly stamped (v). Consequently such a document is regarded as non-existent.

Delivery of abstract.—It was observed in *Oakden v. Pike* (w) that an abstract was delivered whenever a number of sheets of paper, call it what you will, is delivered to the purchaser, which contains with sufficient clearness and sufficient fullness the effect of every instrument, which constitutes part of the title of the vendor, and that is the delivery of the abstract even though it takes place before actual comparison of the abstract with the deeds themselves, which they purport to abstract. The vendor by sending that, announces to the purchaser that those are the documents which he is ready to shew him at any time whenever he wishes to see them, either at his place of residence or any place of business that may be arranged.

Deducing a title.—It was observed in *Oakden v. Pike* (x) that “it is inappropriate to use the word deduce as expressing either delivery of the abstract or the shewing of the deeds. The deducing the title—the proper use of that expression is this :—“I deduce my title from my great-grandfather ; I do not deduce my title by sending the title nor do I deduce my title by shewing you the deeds. By sending you the abstract and shewing you the deeds, I shew you how I deduce my title. According to the strict meaning of the words, ‘deducing the title’ is stating from whom or from what source the party draws forth his title.”

Commissioners’ report.—Exceptions are allowed on the Registrar’s holding that the sale conferred a good title (y).

Clause (1), Sub-clause (c) : Answers to Buyer’s Requisitions.

The seller’s title.—There is no express provision in the Act as to the nature of the title which a seller must offer to the buyer. The duty cast upon the seller is to disclose to the buyer any material defect in his title, of which the buyer is not aware and which he could not with ordinary care discover. It cannot be said that when the title-deeds are handed over to the buyer or a complete abstract given to him, any defect which could be discovered from the title-deeds or from the abstract, is a defect that would come within the purview of sub-section 55 (1) (a). The title which a vendor must shew must be a title in himself or in those whom he has a legal or equitable right to require to join in the conveyance ; he has no right to say that some other person is willing to enter into a contract, and so force the title of that other person on the purchaser (z). It is his duty to make out a title to the whole and not a part only of the property (a). If a purchaser is entitled at all to insist, that the vendors having only a partial interest, makes the contract void, he must insist upon the objection at once and cannot avail himself of it after having treated the contract as good and required the concurrence of the persons who can complete the title (b). In the absence of a contract, providing that the plaintiff should shew only such title as he could give or some other special contract as to title, the general

(u) *Ex-parte Birkbeck Freehold Land Society* (1883) 24 Ch. D. 119.
 (v) *Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat* (1911) 35 Bom. 29.
 (w) (1865) 34 L. J. Ch. 620.
 (x) (1865) 34 L. J. Ch. 620.
 (y) *Ram Lal Sen v. Sim. Suradhani* (1935) 39

C. W. N. 897.
 (z) *De Souza v. Daphtary* (1923) 25 Bom. L. R. 610.
 (a) *Roffey v. Shallcross* (1819) 4 Mad. 227, 56 E. R. 690.
 (b) *Murrell v. Goodyear* (1860) 1 D. F. & J. 432.

law laid down in section 25 of the Specific Relief Act, I of 1877, must prevail (c). Generally, the title which the seller is expected to make is stipulated between the parties. In an open contract, however, when nothing is said on either side, it is the duty of the seller to make out a title which the Court could force upon an unwilling purchaser, for which purpose it must be a marketable title free from reasonable doubts.

In *Pyrke v. Waddingham* (d) the question was whether the vendor had shewn such a title as the Court would compel the purchaser to accept. The Vice-Chancellor, although his opinion was in favour of the title, thought that that opinion was not based upon any general rule of law or upon reasonings so conclusive as to satisfy the Court that other competent persons might not entertain a different opinion or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation. He refused to decree specific performance and proceeded to lay down certain principles, as follows :—

- (1) A doubtful title which a purchaser will not be compelled to accept, is not only a title upon which the Court entertains doubts, but includes also a title, which although the Court has a favourable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons ; for the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded. No standard can be laid down as to the nature and amount of doubt which would justify a purchaser from completing the sale. The difficulty of this subject is further enhanced by the conflict of judicial decisions and opinions.
- (2) If the doubts as to a title arise upon a question connected with the general law, the Court is to judge whether the general law on the point is or is not settled ; and if it be not, or if the doubts as to the title be affected by extrinsic circumstances, which neither the purchaser nor the Court can satisfactorily investigate, specific performance will be refused.
- (3) The rule rests upon the principle that every purchaser is entitled to require a marketable title.
- (4) It is the duty of the Court, on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation.
- (5) A marketable title is a title, which at all times, and under all circumstances, may be forced upon an unwilling purchaser.

The decision was disapproved, and not followed where the facts were similar (e). Still the principle has been approved of (f).

“A marketable title” is the same as a “title free from reasonable doubts.” Often “marketable title” is used with or without the addition of the words “free from reasonable doubt.” It means a title which the Court will at all times and in all circumstances force on an unwilling purchaser (g). It is a title to which an honest purchaser could not reasonably raise any objection and which in turn would enable him to thrust the property on any buyer, however unwilling, from him. In the absence of a contract to the contrary fiduciary owners should make out a marketable title free from reasonable doubt. So also in case of an open contract, the vendor

(c) *Haji Mahomed Mitha v. Musaji Esaji* (1891) 15 Bom. 657.

(d) (1852) 10 Hare 1, 68 E. R. 813.

(e) *Mullings v. Trinder* (1870) L. R. 10 Eq. 449.

(f) *Palmer v. Locke* (1831) 18 Ch. D. 388.

(g) *Bochen v. Wood* (1820) 1 Jac. & W. 419 ;
Lallubhai v. Chimanlal (1935) 59 Bom. 83.

S. 55

must make out a marketable title (*h*). Where doubt is thrown upon a title owing to strangers making claims, their truth or falsehood may only be ascertained by litigation between those strangers and the vendor, and that doubt cannot be resolved in a suit for specific performance. In determining whether the title is doubtful, the state of facts existing at the time the suit was brought, must be considered. When the question between vendor and purchaser is whether the title is good, bad or doubtful, it is for the Court to decide to which category the title is to be assigned; and when there is reasonable probability that forcing it on the purchaser will involve him in litigation, the Court ought not, in the exercise of its discretion, to force it on an unwilling purchaser. No title offered by the head of a joint Hindu family or a family in which, whether in fact joint or not, claims are put forward by members to the property as ancestral, could be good enough to be forced on an unwilling purchaser, unless all the coparceners concurred (*i*). The possibility of a reasonable dispute as to the construction of a will (*j*) or a right of renewal under a lease (*k*) are also instances. A good or sufficient title is such a title as a Court of Chancery would adopt as a sufficient ground for compelling specific performance, and by a stipulation for good title must be understood, not such a title as would support a verdict for the purchaser in an action of ejectment against a mere stranger, but such a one as would enable the purchaser to hold the property against any person who might probably challenge his right to it (*l*). A condition in an agreement for sale of freehold provided for a marketable title, but on investigation it was discovered that the houses were a part of a property, sold by a building society subject to contingent restrictive covenants which were admitted to make the title not marketable. It was held that the purchaser was right in declining to proceed with the sale and was entitled to recover back his deposit (*m*). Here the vendor adduced evidence that the purchaser knew of the restrictions at the time of the contract, but the evidence was held inadmissible to modify the terms of the express contract. But where a vendor sells such title as he has or has to convey under an agreement of compromise of doubtful rights, he is not bound to deduce any title to the property (*n*). A condition of sale that the purchaser shall take such title as the vendor can give, implies possession of some title in the vendor, however defective it might be (*o*). A purchaser is not bound under an express agreement to give a good title, to pay the purchase-money until such a title is made out by the vendor and he is ready to convey (*p*). If a contract for sale is silent as to the title, the legal implication that the purchaser is entitled to a good title, may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title. But, if the contract expressly provides that a good title shall be shewn, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract, he had notice of defects in the vendor's title. If the purchaser before completion, takes possession with knowledge that there are defects in the title, which the vendor cannot remove, the taking of possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does

(*h*) *Pyrke v. Waddingham* (1852) 10 Hare. 1, 68 E. R. 813.

(*i*) *Ahmedbhoy Habibhoy v. Sir Dinshaw N. Petit* (1909) 11 Bom. L. R. 545.

(*j*) *Lallubhai v. Chimantai* (1935) 59 Bom. 83.

(*k*) *Meghji v. Tyeballi* (1924) 26 Bom. L. R. 1019.

(*l*) *Jeakes v. White* (1851) 6 Ex. 873, 155 E. R. 800.

(*m*) *Cato v. Thompson* (1882) 9 Q. B. D. 616.

(*n*) *Godson v. Turner* (1851) 15 Beav. 46, 51 E. R. 453.

(*o*) *Motivahoo v. Vinayak* (1898) 12 Bom. 1; *Hume v. Pocock* (1866) 1 Ch. App. 379.

(*p*) *Manby v. Cremonini* (1851) 21 L. J. Ex. 288, 155 E. R. 772.

not amount to such a waiver (*q*). Indirect evidence is admissible on investigation of title, in case of death, by production of probate or Letters of Administration, and in the case of mortgage by deposit of title-deeds or equitable charge, by the fact that the documents creating the charge are in possession of the debtor (*r*). A declaration inserted in the testing clause of a deed which purports to affect or qualify any other provisions in the body of the deed, has no legal effect (*s*). The record of rights is no evidence on the question of title (*t*). A *kobala* containing a clause to the effect that if it be subsequently found that the vendors had no title to the properties sold, then certain other properties of theirs shall be counted as sold, creates or declares a right in the latter properties, though in future, vested or contingent, in favour of the vendees and coming, as such, under section 17 (1) (b) of the Registration Act, it is registrable at a registration office within the jurisdiction of which, some of the latter properties are situated (*u*).

Contracts for sale of property are upon condition frequently expressed but always implied, that the vendor has a good title; if he has not, the purchaser is entitled to no satisfaction; the return of the deposit with interest and costs is all that the purchaser can expect (*v*). The right to a good title does not grow out of the agreement between the parties but is given by law; but a purchaser may waive his right by going on with the agreement, after he has full notice that he is not to expect a good title. This is, in such case, a matter of notice and not contract (*w*). If a vendor of leasehold interest means to sell it without producing his lessor's title, he ought to declare it (*x*). Independently of the question of merger, a party selling is taken, *prima facie*, to do so free from encumbrances (*y*). A purchaser is not bound to accept an indemnity for a contingent encumbrance, however small the amount or remote the contingency, but is entitled to have it discharged (*z*). A vendor must use all reasonable diligence to make a good title and he will not be relieved of this duty by a Court, without the consent of the purchaser, even though he should offer to discharge the purchaser from the contract (*a*). It is his duty to make a title to the whole property and not to a part only (*b*). When the sale is of two distinct lots which adjoin and which would be more conveniently occupied together, a purchaser is not obliged to purchase, unless a good title to both is made out (*c*). Here the inducement was to possess one as an appendage to the other and so the purchaser should not be compelled to purchase one alone. Otherwise a purchaser of two lots is not justified in refusing to perform his contract for the purchase of one lot because a good title to the other lot is not made out (*d*). When property is encumbered, the question of encumbrance is a question of conveyance but not of title (*e*). It is no objection to a title upon a sale by auction that a memorandum appears amongst the title-deeds, shewing that a former owner of the property (under

- (*q*) *In re Gloag and Miller's Contract* (1883) 23 Ch. D. 320.
 (*r*) *Nicoll v. Chambers* (1852) 11 C. B. 996, 138 E. R. 770; *Farmer v. Turner* (1899) 15 T. L. R. 922.
 (*s*) *Blair v. Assets Co., Ltd.* (1896) A. C. 409; *Smith v. Chambers* (1847) 3 A. C. 795.
 (*t*) *Kumar Raj Krishna v. Barabani Coal Concern, Ltd.* (1934) 60 C. L. J. 477.
 (*u*) *Sm. Nurannessa Khatoon v. Shaikh Osman Gani* (1934) 39 C. W. N. 120.
 (*v*) *Flureau v. Thornhill* (1776) Wm. Bl. 1078, 96 E. R. 635; *Bain v. Fothergill* (1874) 7 H. L. 158; *Gaslight Coke Co. v. Towse* (1887) 35 Ch. D. 543; *Baynes v. Lloyd* (1895) 2 Q. B. 616; *Morgan v. Russell* (1909) 1 K. B. 357; *Keen v. Mear* (1920) 2 Ch. 574; *Hall v. Betty* (1842) 11 L. J. C. P. 256, 134 E. R. 168.

- (*w*) *Ogilvie v. Foljambe* (1817) 3 Mer. 53, 36 E. R. 21.
 (*x*) *Ogilvie v. Foljambe* (1817) 3 Mer. 53, 36 E. R. 21.
 (*y*) *Bulkeley v. Hope* (1856) 1 Jur. N. S. 864, 69 E. R. 549; *Sharman v. Sharman* (1892) 67 L. T. 833.
 (*z*) *In re Weston & Thomas's Contract* (1902) 1 Ch. 244.
 (*a*) *Hawkins v. Shewen* (1823) 1 L. J. O. S. Ch. 148.
 (*b*) *Roffey v. Shallcross* (1819) 4 Mad. 227, 56 E. R. 690.
 (*c*) *Gibson v. Spurrier* (1795) Peake, Add. Cas. 49, 170 E. R. 190.
 (*d*) *Lewin v. Guest* (1826) 1 Russ. 325, 38 E. R. 126.
 (*e*) *Sober v. Kemp* (1847) 6 Hare. 155, 67 E. R. 1120.

S. 55 whom the vendor derives title) had raised money thereunder by way of equitable mortgage, and that there is no evidence that such charge had been released, other than that afforded by the vendor's possession of the deeds and memorandum (f). Where the title is derived through a mortgagee who conveyed the property to the vendor, the mortgagee's title not being absolute against the creditors of the mortgagor, and there being no proof of the debts being satisfied and the mortgagor dying intestate and without heirs, and any of the creditors might obtain administration to the estate and redeem the mortgage, it cannot be said that a good title was shewn (g). If a deed of gift to a person, under whom the vendor claims by purchase for value, forms a link in the title, a purchaser is not entitled to repudiate the contract (h). But he may do so if the voluntary conveyance was the commencement of the title and the title was not of sufficient length of time. Such an omission on the part of the vendor, viz., to state that the title commenced with a voluntary conveyance, renders the condition of sale a misleading one (i). The existence of a restrictive covenant makes the property of less value and is a fatal objection to title if it has not been disclosed (j) unless the restrictive covenants could be disregarded as being necessarily inoperative. So where it was practically impossible that gas works should be erected, a covenant not to erect them might be disregarded (k).

Purchaser's right to investigate lessor's title.—On a sale of leasehold property, a purchaser is bound to assume the lease duly granted (l) and has no right to ask the vendor to make out a title to the reversion, whether such reversion be freehold or leasehold. This is the law in England both under section 2 of the Vendor and Purchaser's Act, 1874, 37 and 38 Vict., c. 78, and the Conveyancing and Law of Property Act, 1881, 44 and 45 Vict., c. 41, sec. 3 (1).

Leasehold conveyed as freehold.—The Act makes no distinction between freehold and leasehold for the purpose of the law embodied in section 8 of the Act (m). Where, however, by mistake of the draftsman a leasehold has been conveyed as freehold, it is advisable to rectify the instrument by executing an assignment of the term. The covenants in an assignment of leasehold differ from those on a grant of freehold but the lessee would nevertheless be liable for such of the covenants as run with the land, assuming him to have notice of the leasehold character of the property. A lease obtained from Government is exempt under section 3 of the Indian Stamp Act, 1899, from stamp duty not only in the first instance but in the case of subsequent transfers as well.

Marketable title to the satisfaction of the purchaser's solicitors.—As to what a vendor should prove, when the purchaser refuses to perform his contract, containing a stipulation that the vendor shall make out a marketable title to the satisfaction of the purchaser's solicitors, was considered by the Bombay High Court when it was held, that a vendor has to establish, when he desires to enforce such a contract either (a) that the solicitors did approve of the title, or (b) that there was such a title tendered as made it unreasonable not to approve of it (n).

Possessory title.—Where a vendor contracts to give a title commencing with a certain instrument and it afterwards appears that he cannot give such a title but can give a good possessory title from a later date, the possessory title which accrued

(f) *Nicoll v. Chambers* (1852) 11 C. B. 996, 138 E. R. 770; *Farmer v. Turner* (1899) 15 T. L. R. 522.
 (g) *Beale v. Symonds* (1853) 16 Beav. 406, 51 E. R. 835.
 (h) *Noyes v. Paterson* (1894) 3 Ch. 267.
 (i) *Re. Marsh & Granville (Earl)* (1883) 24 Ch. D. 11.
 (j) *Re. Ebsworth and Tidy's Contract* (1889) 42

Ch. D. 23.
 (k) *In re Higgins & Hitchman's Contract* (1882) 21 Ch. D. 95.
 (l) *Re. Highett & Burn* (1903) 1 Ch. 287; *Gosling v. Wolf* (1893) 1 Q. B. 39.
 (m) *Macleod v. Kissan* (1906) 30 Bom. 250.
 (n) *Treacher & Co., Ltd. v. Mahomedally* (1911) 35 Bom. 110.

after the date of the contract under the Statute of Limitation, was forced upon the purchaser (o). A title founded upon possession of but a few years, is the weakest possible legal title. In *re. Baker & Selmon's Contract* (p), the title was forced on the purchaser though it was very different from that for which he bargained. The principle in such cases is that the vendor has fulfilled his contract of sale. The conditions of sale bind the parties and if the vendor has undertaken to give a title of a particular type and the good title which he offers is not of that type, the purchaser cannot be compelled to accept it, because it is not that which contractually the vendor has undertaken to give. An experienced conveyancer may say it is in reality as valuable and as sound a title, but the purchaser has a right to say, "I do not take anybody's advice. I contracted for one type of title and no Court can make me take one which does not comply with the description in the contract" (q). Offering a possessory title is no fulfilment of contract for an absolute title (r).

Leasehold title.—On a sale of leasehold there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and because the residue of the term is short, the value of the property small, and the absence of any premium for the lease, there is no inference that the purchaser intended to waive his right to call for the production of the lessor's title (s). And when an agreement for lease contains an option to purchase the premises by the lessee, his rights are those of an ordinary purchaser to have a good title made out and the onus is on the vendor to shew that the purchaser had waived his right to have a good title made out (t). On a sale of a lease the vendor must also shew that he has a valid title to the lease or to the term granted by the lease. Likewise, in case of an agreement to lease, the vendor is bound to shew that there is a subsisting valid agreement to lease (u). Where a lease contained a provision reserving to the lessee "option of purchasing all the estate, interest and title which is at the date of these presents vested in the landlords in and to the freehold premises hereby demised and the fixtures and fittings at a price not exceeding £3,000," it was held that the tenant's rights were only to acquire for £3,000 the actual interest in the premises and therefore the landlords were under no obligation to pay off the mortgage and convey the unencumbered fee simple in consideration of the purchase price of £3,000 (v). The purchaser of a leasehold may object to the vendor's title if he has incurred a forfeiture, although it does not appear that the lessor has taken advantage of the forfeiture (w). On a purchase of an under-lease, it is not a valid objection to the title that the under-lease may become forfeited by the non-performance of the covenants in the original lease (x). The purchaser must have known, before the contract, that the under-lease was liable to be forfeited by a breach of the covenants contained in the original lease. It is because of this very evil that a contract to assign a lease is not satisfied by granting or assigning an under-lease. A purchaser entered into an open contract to purchase a "leasehold" house and paid a deposit. It appeared from the abstract of title that the property was held upon an under-lease. The

(o) *In re. Atkinson and Horsell's Contract* (1912) 2 Ch. 1; *Games v. Bonnor* (1884) L. J. Ch. 517 followed.

(p) (1907) 1 Ch. 238.

(q) Per Fletcher Moulton, L. J. in *re. Atkinson's and Horsell's Contract* (1912) 2 Ch. 1, 13.

(r) *Re. Brine and Davies's Contract* (1935) 152 L. T. 552.

(s) *Souler v. Drake* (1834) 5 B. & Ad. 992, 110 E. R. 1058; *Hall v. Betty* (1842) 11 L. J. C. P. 256.

(t) *Welchman v. Spinks* (1861) 5 L. T. 385.

(u) *Brewer v. Broadwood* (1882) 22 Ch. D. 105.

(v) *Fowler v. Willis* (1922) 2 Ch. 514; *United London and Scottish Insurance Co. v. Omnium Insurance Corporation* (1915) 84 L. J. Ch. 777.

(w) *Wilson v. Wilson* (1854) 14 C. B. 616, 139 E. R. 253.

(x) *Hayford v. Criddle* (1855) 22 Beav. 477, 52 E. R. 1192.

S. 55

purchaser objected to the title on the ground that the property being so held, she would be liable to eviction by the original lessor for breaches of covenant in respect of property not comprised in the under-lease. Held, applying the doctrine of *Darlington v. Hamilton* (y), followed in *Creswell v. Davidson* (z), that a good title had not been shewn and that the purchaser was entitled to a return of the deposit (a). Assignor of a lease who by non-compliance with a dilapidation notice served by the landlord has incurred forfeiture, cannot make a good title under an open contract although the assignee has tendered and the landlord has accepted rent subsequently to the date of the contract but before completion had been effected (b). Where property is described as held under a lease which actually proves to be an under-lease, the purchaser cannot be compelled to accept the title (c). Such a description is fatal to the title (d). A contract to lease is not satisfied by granting an under-lease but if the purchaser had knowledge, he would be prevented from setting up misdescription as an objection to title (e). Where an agreement was made to sell "all his interest in the lease" it was held that the purchaser could not refuse to complete on the ground that the title proved to be an under-lease for a term less by three days than the term granted by the original lease (f). If a property is subject to easements, a purchaser is not compelled to take the title (g). It is a formidable objection to the vendor's title, on a sale of leaseholds, that the vendor has underlet the premises with the covenants contained in the original lease omitted, for example, covenants to build or to paint at certain periods, for by doing so, the vendor puts it out of his power during the under-lease to enforce performance of covenants, for breach of which the original lessor can re-enter (h).

Seller with an imperfect title.—Section 18 of the Specific Relief Act, I of 1877, enacts that where a person contracts to sell certain property, having only an imperfect title thereto, the purchaser (except as otherwise provided by Chapter II of the said Act) has the following rights:—

- (a) If the vendor has subsequently to the sale acquired any interest in the property, the purchaser may compel him to make good the contract out of such interest;
- (b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's request, the purchaser may compel him to procure such concurrence;
- (c) where the vendor professes to sell unencumbered property but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;
- (d) where the vendor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to the return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor in the property agreed to be sold.

(y) 23 L. J. Ch. 1000, 69 E. R. 233.

(z) (1887) 56 L. T. 811.

(a) *Re. Lloyds Bank, Ltd. and Lillingston's Contract* (1912) 1 Ch. 601.

(b) *Re. Martin, ex-parte Dixon (Trustee) v. Tucker* (1912) 106 L. T. 381.

(c) *Beyfus & Master's Contract* (1888) 39 Ch. D. 110; *Mudley v. Booth* (1848) 2 Deg. & Sm. 718, 64 E. R. 321.

(d) *Henderson v. Hutson* (1867) 15 W. R. 861;

Hayford v. Criddle (1855) 22 Beav. 477, 52 E. R. 1192.

(e) *Henderson v. Hutson* (1867) 15 W. R. 861; *Hayford v. Criddle* (1855) 22 Beav. 477, 52 E. R. 1192.

(f) *Waring v. Scotland* (1888) 57 L. J. Ch. 1016.

(g) *Shackleton v. Sutcliffe* (1847) 1 Do. G. & Sm. 609, 63 E. R. 1217.

(h) *Darlington v. Hamilton* (1854) 23 L. J. Ch. 1000, 69 E. R. 233.

Seller with no title.—A contract for the sale of immoveable property cannot be specifically enforced in favour of a vendor (i),

S. 55

- (a) who, knowing himself not to have any title to the property, has contracted to sell the same (j),
- (b) who, though he entered into the contract believing that he had a good title to the property cannot, at the time fixed by the parties or by the Court for the completion of the sale, give the purchaser a title free from reasonable doubt (k),
- (c) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract (l).

Whether or not specific performance ought to be granted.—The species of doubt which prevents a Court from enforcing specific performance must come within one of the three divisions. First, when there has been a decision adverse to the title or to the principle on which the title depends, which the Court is of opinion is wrong (of course, if the Court is of opinion that the decision is right, it is simply a bad title) in which case, the Court will not rely upon its own opinion against the decision already pronounced and will not enforce the title. Another case is where there is a decision in favour of the title but the Court is of opinion that the decision was not right. The third division is where there is a known difficulty in the title. To this may be added a fourth case, where validity of the title depends upon facts or a fact, the exact accuracy of which there are no means of judging (m). The authorities establish the following propositions :

- (a) The Court will not compel a person to take a doubtful title but if in its opinion, upon a due consideration of the law, the title is good, the Court is bound so to hold (n).
- (b) A title depending upon the establishment of complicated facts of an ambiguous nature and which is exposed to being challenged with reasonable chance of success, cannot be forced on a purchaser (o).
- (c) A purchaser is not compelled to accept a title formerly subject to encumbrances, the discharge of which is shown only by presumption (p).
- (d) Where title to an estate has been pronounced bad by any Judge of the Court, the Court of Appeal will not, except upon the clearest ground and under very special circumstances, force it upon the purchaser (q).
- (e) Where a vendor contracts to give a title commencing with a certain instrument and it afterwards appears he cannot give such a title, but can give a good possessory title from a later date, the possessory title will be forced upon the purchaser (r).

(i) Sec. 25, Specific Relief Act (I of 1887).
 (j) See illustration (a) to sec. 25, Specific Relief Act.
 (k) See illustrations (b) and (c) to sec. 25, Specific Relief Act.
 (l) See illustration (d) to sec. 25, Specific Relief Act.
 (m) *Mullings v. Trinder* (1870) 10 Eq. 449; *Smith v. Deane* (1820) 5 Mad. 371, 56 E. R. 937.
 (n) *Wrigley v. Sykes* (1856) 21 Beav. 337, 52 E. R.

89.
 (o) *Re. Douglas and Powell's Contract* (1902) 2 Ch. 296.
 (p) *Barnwell and Harris* (1809) 1 Taunt. 430, 127 E. R. 901.
 (q) *Cook v. Dawson* (1861) 30 L. J. Ch. 359, 45 E. R. 826.
 (r) *Re. Atkinson and Horsell's Contract* (1912) 2 Ch. 1; *Games v. Bonnar* (1884) 54 L. J. Ch. 517.

S. 55

- (f) Where property was described as business premises but a covenant imposed serious restrictions, excluding the very user of the premises for the purpose of business, the Court refused to force the title on the purchaser (s).
- (g) Upon a sale of a public house to a brewery company, on the lessor's refusal to the assignment on the ground that the house should remain a free house, the title could not be forced on the unwilling purchaser (t).

Searching interrogatory.—A purchaser made the following requisitions, "Is there, to the knowledge of the vendors or their solicitors, any settlement, deed, fact, omission or any encumbrance affecting the property not disclosed by the abstract?" The reply was, "We invariably decline to answer questions of this description." The requisition being pressed, the reply was returned, "The vendors will reply if required, but they have no knowledge of the contents of the abstract." A summons was taken out by the purchaser for an order on the vendor and their solicitors to answer this inquiry. Adhering to his decision in *Re. Solomon & Davey* (u), Hall, V. C., ordered that the vendors' solicitors must make a full and complete answer to the requisition. On appeal the order was reversed and it was held that neither the vendors nor their solicitors were bound to answer any part of the requisition (v). Such a question is no requisition. A vendor is not bound to answer such a general inquiry (w). It is a searching interrogatory put to the vendors and their solicitors. Some solicitors answer the requisition in this manner, "not that we are aware of but the purchaser's solicitors should make the usual searches." In India this practice is generally prevalent. Sometimes answers are given. Some conveyancers refuse to answer, their reason being that answering such a requisition might subject them to personal liability to the purchaser. The practice is of modern growth and there seems to be a tendency to discourage it. Sometimes the reply is evaded by an answer, "no requisition can be administered to the vendor's solicitors." In this connection it must be pointed out that clause 55 (1) (c) makes it incumbent upon the vendor to answer to the best of his information only relevant questions put to him in respect of the property or the title thereto. In India there is no judicial authority in favour of such a requisition.

Deeds collateral to the title.—A purchaser is not entitled to call for deeds collateral to the title (x).

Agreement not to require an abstract.—A purchaser who agrees not to require an abstract of title has nevertheless a right to inspect the deeds which constitute the vendor's title (y).

Objection to be made within a given time.—In a condition of sale where objections are to be sent to the vendor's title within a given time, time is of the essence of the contract; and where delivery of abstract is to be made within a specified time and the vendor fails to do so, the purchaser has a right to repudiate the purchase. On the other hand, if the vendor has complied with the conditions of delivering the abstract within a specified time and if the purchaser does not deliver his objections or if he does deliver his objections, and if there be any objection not contained in what are so sent in, but afterwards thought of, such objections are considered as waived and the title to that extent accepted (z). If the purchaser retains the abstract for

(s) *Re. Davis & Cavey* (1888) 40 Ch. D. 601.

(t) *In re Marshall and Salt's Contract* (1900) 2 Ch. 202.

(u) See footnote, 10 Ch. D., at page 366.

(v) *Re. Ford & Hill* (1879) 10 Ch. D. 365.

(w) *Taylor v. London and County Banking Company; London and County Banking Com-*

pany v. Nixon (1901) 2 Ch. 231.

(x) *Offen v. Harman* (1859) 29 L. J. Ch. 307, 45 E. R. 355.

(y) *Hardinge v.* (1826) 4 L. J. O. S. Ch. 213.

(z) *Oakden v. Pike* (1865) 34 L. J. Ch. 620.

five months, making no objections to the title but simply requires the vendor to verify the abstract with the title-deeds, he is deemed to have accepted the title (a). Time to deliver requisitions does not run until a perfect abstract is delivered (b). If the abstract be incomplete, it is not a delivery of the abstract (c). Purchaser is not entitled to use information derived from the abstract for his own advantage adversely to the vendor (d).

Time for answering requisitions.—When a requisition is made by a purchaser, reasonable time must be allowed to the vendor to answer it. In this case the requisition involved the necessity of filing a suit and obtaining a decree and the vendor consented to comply with it (e).

The vendor's usual rescission clause.—Frequently conditions of sale contain stipulations with regard to title, that in case a purchaser shall within a certain time, make any objection to or requisition on the title which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any attempt to remove or comply with such objection or requisition by notice in writing to be given to the purchaser or his solicitor, to annul the contract and return to the purchaser his deposit without interest, costs or other compensation. To say that a vendor upon a condition of this description could annul a contract *brevi manu*, without attempting to answer any of the requisitions which are made on the part of the purchaser, would be opposed both to principle and authority; for that would, in truth, be giving to the vendor the power of saying that that which was intended as a sale, and was a sale, shall, in truth, be no sale at all. The vendor's right of rescission must be co-extensive with the purchaser's right to object to the title under the same condition. Such a condition in a sale ought to be discouraged and ought not to receive a construction oppressive on the purchaser. A condition of this nature reserves to the vendor the right to rescind the contract for sale, upon his discovering that a purchaser insists or persists in a requisition which he is unable or unwilling to remove or comply with (f). Where there is a right to give notice to rescind, there must be an objection to title, unwillingness on the part of the vendor to remove that objection, communication of that unwillingness, and insistence on the part of the purchaser notwithstanding the communication (g). The vendor is not bound to exercise the right immediately, time not being of the essence, but may do so within a reasonable time (h); nor need such notice give the purchaser a period of time within which to waive his requisitions (i). The rescission must be by notice in writing to the purchaser after the requisition is made, or having given an answer, the purchaser considers it to be unsatisfactory and says, "I press this requisition." The right on the part of the vendor to rescind arises at once and there is no further *locus pœnitentiæ* allowed to the purchaser. In other words, where once the insistence is shewn by the purchaser, the vendor is not bound to intimate to him that if he goes on persisting or insisting, the power will be exercised adversely to him (j). Therefore, the right to rescind arises immediately the objection or requisition is persisted in. To hold otherwise would be to add a new term

(a) *Pegg v. Wisden* (1852) 16 Beav. 239, 51 E. R. 770.

(b) *Hobson v. Bell* (1839) 2 Beav. 17, 48 E. R. 1084.

(c) *Oakden v. Pike* (1865) 34 L. J. Ch. 620.

(d) *Murrell v. Goodyear* (1859) 2 Giff. 51, 66 E. R. 22.

(e) *Micholls v. Corbett* (1865) 34 Beav. 376, 55 E. R. 680.

(f) *In re Terry & White's Contract* 1886) 32 Ch.

D. 14.

(g) *Duddell v. Simpson* (1866) 2 Ch. App. 102.

(h) *Shoreditch Vestry v. Hughes* (1864) 10 L. T. 723.

(i) *Duddell v. Simpson* (1866) 2 Ch. App. 102.

(j) *Mawson v. Fletcher* (1870) 6 Ch. App. 91;
Duddell v. Simpson (1866) 2 Ch. App. 102;
Re Dames & Wood (1885) 29 Ch. D. 626;
Vowles v. British, &c., Building Society
 (1900) 44 So. Jo. 592

S. 55

to the contract. If there be litigation pending, the vendor may rescind before judgment (*k*), but not after judgment (*l*). Another point which is clearly established is that on a condition of this kind, the reason need not be stated by the vendor (*m*). Still there are limitations put upon his power.

A vendor has certain duties to perform which he cannot get rid of by such conditions of sale. He is bound to answer and give the purchaser an opportunity to waive or insist upon a requisition (*n*). For although the contract is in terms that the vendor may rescind if "unwilling" to comply with the requisition, this does not give him the right to rescind arbitrarily or capriciously (*o*), for example, if the vendor rescinds with a view to sell the property to a third person (*p*) or on the ground of expense in obtaining the Court's sanction (*q*). In *re. Dames and Wood* (*r*) the Court of Appeal had this kind of condition under consideration and there are dicta of the learned Judges there, which tend to shew that, in the opinion of the Court, the vendor cannot avail himself of such a condition arbitrarily or unless he shews some reasonable ground for his unwillingness to answer the requisitions. The right must be exercised in good faith (*s*). The right, however, is lost if the vendor answers the requisition (*t*), but this risk is guarded by insertion of the words, "notwithstanding any previous negotiation or attempt to remove or comply with" be at liberty on giving to the purchaser not less than a stipulated day's notice in writing to annul the sale. The operation of this condition is often suspended by a clause being added to the effect, that if the purchaser within a specified number of days after receiving the notice from the vendor to rescind, withdraws his objection or requisition, the notice to rescind shall also be withdrawn by the vendor. As to deposit, it is usual to provide that the purchaser shall be entitled to its return without interest, costs or compensation. If, however, there is no stipulation, the vendor must pay the costs of the purchaser of investigating the title and of any litigation undertaken by him, if his action was reasonable (*u*). The clause does not oust the jurisdiction of the Court to order purchaser's costs of the litigation pending at the date of rescission, notwithstanding a provision in the clause, that the vendor should on rescission return to the purchaser his deposit but without interest, costs or compensation (*v*). Under this condition, if the purchaser refuses to accept an indemnity offered by the vendor, the refusal in itself is not "a reasonable ground" for rescission and a notice of rescission signed "without prejudice" is void (*w*). Again, where the purchaser is discharged by the Court on the ground of misdescription, the vendor cannot avail himself of this condition (*x*). A vendor is not disentitled to exercise this power for having made a statement on the faith of a promise by a third party, that he will concur in the sale, without having previously made an agreement with that third party binding him to do so. Such a statement is not reckless (*y*). Where trustees were unable to make a title in that capacity but offered to convey as legal personal representatives, which course the purchaser

(*k*) *Isaacs v. Towell* (1898) 2 Ch. 285.
 (*l*) *Arbib and Class's Contract* (1891) 1 Ch. 601.
 (*m*) *Re. Glendon and Saunders to Haden* (1885) 53 L. T. 434.
 (*n*) *Greaves v. Wilson* (1858) 25 Beav. 290, 53 E. R. 647; *Turpin v. Chambers* (1861) 29 Beav. 104, 54 E. R. 566.
 (*o*) *In re Starr Bowkett Building Society and Sibun's Contract* (1889) 42 Ch. D. 375.
 (*p*) *Re. Jackson & Haden* (1906) 1 Ch. 412.
 (*q*) *Smith v. Wallace* (1895) 1 Ch. 385.
 (*r*) *Re. Des Reaux and Setchfields' Contract* (1926) Ch. 178.
 (*s*) (1885) 29 Ch. D. 626.

(*s*) *Smith v. Wallace* (1895) 1 Ch. 385.
 (*t*) *Morley v. Cook* (1842) 2 Harc. 106, 67 E. R. 44; *Tanner v. Smith* (1840) 10 Sim. 410, 59 E. R. 673.
 (*u*) *Duddell v. Simpson* (1866) 2 Ch. App. 102; *Re. Higgins & Hitchman* (1882) 22 Ch. D. 95; *Holliwell v. Seacombe* (1906) 1 Ch. 426.
 (*v*) *Re. Spindler and Mear's Contract* (1901) 1 Ch. 908.
 (*w*) *In re Weston and Thomas's Contract* (1907) 1 Ch. 244.
 (*x*) *Holliwell v. Seacombe* (1906) 1 Ch. 426.
 (*y*) *Merrett v. Schuster* (1920) 2 Ch. 240.

declined to accept, it was held that the vendors could exercise the right to rescind (z). Continuance of the treaty after the first objection of the purchaser is a waiver of the condition as to rescission (a).

Repudiation after acceptance of title.—Where a title has been accepted as marketable and where payment of a portion of the purchase-money has been made, a subsequent discovery before completion, that the title was not marketable, does not prevent the purchaser from repudiating the contract, where he has proceeded on an erroneous advice of his solicitors (b).

"Falsa demonstratio non nocet."—When there is an error in the description of the principal thing, though there was no error in the addition, nothing passes, but when the first description is true, a false addition does not vitiate the grant (c). If the grant, however, be of a particular thing, a mistaken or false addition will not restrict or modify it; but it is otherwise when the grant is in general terms (d). "*Falsa demonstratio non nocet*" is one of the established rules of construction. It means, that if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all: and so far as it is true, applies to one only (e). The doctrine is not to be confined to cases where the first part of the description is true and the latter untrue, it being immaterial on what part of the description the *falsa demonstratio* occurs (f), whether the true description precedes the false or *vice versa*. But if the words form an essential or material part of the description of the subject-matter of the agreement, they cannot be rejected as *falsa demonstratio* (g). When in a grant, the description of the parcels is made up of more than one part, and one part is true and the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a *falsa demonstratio*, and will not vitiate the grant (h). A person in possession of two contiguous estates, M. and P., sold the former to respondents in 1872 and a survey was made on behalf of both to ascertain the boundary between the two estates and thereafter the respondents occupied M. In 1881 P. was sold to the appellant. In 1896 the latter commenced proceedings to establish that the respondents were occupying a part of the P. estate. On measurements, the aggregate of the plots of land mentioned in the deeds as forming part of M. was found to be less than the land actually occupied by the respondents. It was held that the measurements in the deeds did not affect the title of the respondents to the land included in the conveyance to them as determined by contemporary survey (i). If the description of the property defines with sufficient certainty what is conveyed, inaccuracy of dimensions or of plans will not vitiate what is sufficiently defined. The dimensions are not an addition to what is sufficiently described but are part and parcel of the description itself. So that if property be sold as standing on a piece of land which it fully covers, a mistake in the area, whereby the property is mentioned as larger than it actually is, will not entitle the purchaser to any relief. Hence where a leading description is followed

(z) *Re. Milner and Organ's Contract* (1920) 89 L. J. Ch. 315.

(a) *Morley v. Cook* (1842) 2 Hare. 106, 67 E. R. 44.

(b) *Meghji v. Tyeballi* (1924) 26 Bom. L. R. 1019.

(c) *Dowrie's case, A. G. v. Dowrie* (1584) 3 Co. Rep. 9b, 76 E. R. 643; *Santaya v. Savitri* (1902) 4 Bom. L. R. 76; *Sakharam v. Gangadhar* (1903) 5 Bom. L. R. 995.

(d) *Roe & Conolly v. Vernon* (1804) 5 East 51, 102 E. R. 988.

(e) *Morrell v. Fisher* (1849) 4 Exch. 591, 154 E. R.

1350; *Cowen v. Truefitt, Ltd.* (1899) 2 Ch. 309.

(f) *Cowen v. Truefitt, Ltd.* (1899) 2 Ch. 309.

(g) *Magee v. Lavell* (1874) 30 L. T. 169.

(h) *Walcham v. A. G. of East Africa Protectorate* (1919) A. C. 533; *Eastwood v. Ashton* (1915) A. C. 900; *Mellor v. Walmsley* (1905) 2 Ch. 164.

(i) *Barnard v. De Charleroy* (1899) 81 L. T. 497; *Darapali v. Najib Ahmed* (1923) 50 Cal. 394.

S. 55 by a supplementary description which does not exhaust all the particulars, then the entirety, which has been expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars (*j*). Government agreed to convey to the plaintiff a plot of land of certain area. The plot was measured by survey officers and boundaries fixed by stone marks. In the conveyance the boundaries were loosely described and the plan annexed to it inaccurately shewed the area to be much higher than that agreed to be conveyed. It was held that the plan having been proved to be inaccurate, it must be treated as a mere *falsa demonstratio* (*k*). An inaccuracy in the boundary is not enough to exclude what is not so bounded, if it appears from the evidence to have been a part of the property dealt with and the previous description of the property is sufficient to include it (*l*). On a conveyance of land "bounded by the seashore" the word seashore in its strict legal sense means the land situate between medium, high and low water marks (*m*). Where land was described as of freehold tenure but a strip was found to be of copyhold tenure and this portion was between the freehold and one of the described boundaries, the strip would pass under the general words (*n*). The words of the conveyance, taken in connection with the map which is referred to and made part of it, are sufficient to describe the land in question and to express an intention to convey it. The omission to describe the land by the name of "muckland" and even the description of it as within another denomination, amounts at most to an erroneous additional description of that which is identified beyond doubt by reference to the map *constat de corpore* (*o*). There is no efficacy in them (*p*).

Waiver of purchaser's right to investigate the title.—The mere fact of taking possession does not amount to a waiver of the right to call for the vendor's title (*q*) though generally it amounts to a waiver of objection to title (*r*). *Prima facie* taking possession after delivery of abstract and not in pursuance of any term in the contract, amounts to a waiver of the objections appearing on the abstract (*s*). Possession was in this instance taken by the purchaser's tenant. In entering into possession, the purchaser proceeds upon the supposition that the contract will be executed and therefore he agrees from that day that he will treat it as if it was executed (*t*). If, however, the possession be taken pursuant to the contract for sale, it does not amount to waiver of the vendor's title (*u*). Where the abstract was not to be delivered until demanded by the purchaser, who took possession and for two years made no demand for the abstract, it was held that the purchaser was to be taken to have accepted the title and was not entitled to have it investigated (*v*). A long possession without objection to title and vexatious objections to complete the purchase, amount to acceptance of title (*w*). If, however, possession be taken with the permission of the vendor pending answer to certain requisitions, which were subsequently to be answered satisfactorily, and afterwards possession was

(*j*) *Tribhovandas v. Krishnaram* (1894) 18 Bom. 283; *West v. Lawday* (1865) 11 H. L. C. 384; *Travers v. Bhundell* (1877) 6 Ch. D. 436.
 (*k*) *Abdul Rahman v. The Secretary of State for India* (1929) 31 Bom. L. R. 1433; *Lyle v. Richards* (1866) 35 L. J. Q. B. 214.
 (*l*) *Francis v. Hayward* (1882) 22 Ch. D. 177.
 (*m*) *Mellor v. Walmesley* (1905) 2 Ch. 164.
 (*n*) *Early v. Rathbone* (1888) 57 L. J. Ch. 652.
 (*o*) *Rorke v. Errington* (1859) 7 H. L. C. 617, 11 E. R. 246.
 (*p*) *Hodges v. Jones* (1935) 1 Ch. 657.
 (*q*) *Simpson v. Sadd* (1854) 4 Do. G. M. & G. 665, 43 E. R. 668.
Flectwood v. Green (1809) 15 Ves. 594, 33 E. R.

879; *Margravine of Auspach v. Noel*, (1816) 1 Mad. 310, 56 E. R. 114; *Burnell v. Brown* (1820) 1 Jac. & Walk 168.
 (*s*) *Bown v. Stenson* (1857) 24 Beav. 631, 53 E. R. 501.
 (*t*) *Fludyer v. Cocker* (1805) 12 Ves. 25, 33 E. R. 10.
 (*u*) *Boxhall v. Jackson* (1825) 2 L. J. O. S. Ch. 100; *Stevens v. Guppy* (1828) 3 Rus. 171, 38 E. R. 540; *Re. Gloag and Miller's Contract* (1883) 23 Ch. D. 320.
 (*v*) *Sibbald v. Lowrie* (1853) 23 L. J. Ch. 593; *Deller v. Simonds* (1859) 34 L. T. O. S. 43; *Eversfield v. Troup* (1847) 9 L. T. O. S. 349.
 (*w*) *Hall v. Laver* (1838) 3 Y. & C. Ex. 191, 160 E. R. 669; *Wallis v. Woodyear* (1855) 2 Jur. N. S. 179.

given up by the purchaser, it was held that he was not precluded from rescinding by the act of possession (x). The Court never lets a purchaser into possession until he approves the title, but if he takes possession he accepts the title (y). Making structural alterations (z) or dealing with the property contracted to be purchased (a) or granting a lease after taking possession (b) amount to an acceptance of title. Notwithstanding possession taken, and acts of ownership incident to possession and preparation of conveyance, a purchaser was held entitled to investigation of title when after possession, investigation proceeded (c). Accepting a title under the influence of inaccurate representations of the vendor will not bind the purchaser (d), nor will a co-purchaser be bound by the acceptance of a joint purchaser of the title (e). If a purchaser expresses his willingness to accept title if a particular objection be removed and if that objection be not removed, he is entitled, on a reference, to have the title investigated in general terms and not confined to that particular objection (f).

Interest.—The act of taking possession is an implied agreement to pay interest. It cannot be that a purchaser could receive the rents and profits on taking possession and keep the vendor out of interest on the purchase-money (g). Interest at the rate of 4 per cent. was allowed (h).

Clause (1), Sub-clause (d) : A Proper Conveyance.

Amount due in respect of the price.—It is usually paid in the hands of the vendor unless there is an agent authorized to receive it. On a sale of land by trustees, the purchaser has a right to insist that the money should be paid to them personally or that they should authorize the purchaser to pay it into a bank to the joint account of the trustees. They are not justified in authorizing their solicitor to whom they have handed over the conveyance with the receipt duly endorsed, to receive the purchase-money (i).

As to payment to a solicitor who produces a deed with a receipt duly endorsed and signed, the Law in England under the Conveyancing and Law of Property Act, 1881 (j), was that such a deed was sufficient authority to the person liable to pay, for paying the same to the solicitor without the solicitor producing any separate authority in that behalf from the person executing the deed. In a recent case (k) it was observed that in the absence of anything suggested to the contrary, the person paying was bound to assume that the solicitor producing the deed, was acting as solicitor for the person having power to give a discharge. In that case the person having power to give a discharge, was estopped by his conduct from denying the solicitor's authority. There is no obligation to receive payment by cheque. And a purchaser is not bound to tender the purchase-money, unless the vendor be ready and willing to execute the conveyance.

(x) *Turquand v. Rhodes* (1868) 37 L. J. Ch. 830.
 (y) *Wilden v. Andrews* (1826) 4 L. J. O. S. Ch. 208.
 (z) *Gloag and Miller's Contract* (1883) 23 Ch. D. 320.
 (a) *Haydon v. Bell* (1838) 1 Beav. 337, 48 E. R. 970.
 (b) *Re. Barrington ex-parte Sidebotham* (1835) 4 Deac. & Ch. 693.
 (c) *Burroughs v. Oakley* (1819) 3 Swan. 159, 36 E. R. 815.
 (d) *Johnes v. Cloughton* (1824) 2 L. J. O. S. Ch. 113.

(e) *Makreth v. Dunn* (1841) 10 L. J. Ch. 367.
 (f) *Lesturgeon v. Martin* (1834) 3 M. & Y. K. 255, 40 E. R. 97.
 (g) *Fludyer v. Cocker* (1805) 12 Ves. 25, 33 E. R. 10.
 (h) *Hull v. Laver*, 3 Y. & C. Ex. 191, 160 E. R. 669.
 (i) *In re Bellamy and Metropolitan Board of Works* (1883) 24 Ch. D. 387; *Re. Flower and Metropolitan Board of Works* (1884) 27 Ch. D. 592.
 (j) Sec. 56.
 (k) *King v. Smith* (1900) 2 Ch. 425.

S. 55

Proper conveyance.—Under section 55 (1), sub-section (d), it is for the buyer to prepare and tender a conveyance to the vendor for execution (*l*) unless there is an agreement to the contrary (*m*). Conveyance is necessary both under the Transfer of Property Act as well as the Registration Act in case of tangible immoveable property of the value of Rs. 100 and upwards or in the case of a reversion or other intangible thing. It is incumbent on the buyer to prepare and tender a conveyance in proper form to the seller. Tangible property consists of substantial and permanent objects, as understood by the denomination land. Intangible thing consists of rights and profits arising from or annexed to land such as rents. It being the purchaser's duty to prepare a conveyance, it follows that he must bear the cost of preparation (*n*) and the vendor in an action for the purchase-money, need not allege tender or offer to convey, it being sufficient to allege readiness and willingness to convey (*o*). A stipulation, that the assurance and every instrument required for completing the vendor's title or for any other purpose, is to be prepared by and at the expense of the purchaser, is not wide enough to include the cost of perusing and executing the conveyance on behalf of the vendor's mortgagee concurring in the conveyance (*p*). No particular form is necessary but in practice it is usual with conveyancers to adopt a form which contains all the component parts hereinafter mentioned.

When it is simply a question of convenience to the purchaser not involving a matter of substance affecting the vendor, it is idle for the vendor to raise objections to the form of conveyance (*q*). The whole of the vendor's interest passes on a conveyance (*r*). In framing a conveyance the date is first mentioned, then the parties. As to how persons with different interests are to be distributed, anyone accustomed to legal documents must know, but in common practice the person from whom the property passes, is usually made party of the one part and the person to whom the thing is to pass, party of the other part. Where party of the first part has not the entire interest, other parties interested are joined and made parties under different parts in order to confirm or concur. In an ordinary conveyance, the parties generally are the vendor of the one part and the purchaser of the other part. Persons who have separate interest are made separate parties, those having a joint interest are made parties jointly. Thus where there is a conveyance by persons having a joint interest, they are made parties of the one part, but if there is a partition deed between them, then each is made a party separately. In instruments like exchanges and partitions, the disposition of the parties is immaterial. Along with the name, it is usual to give further details such as description and addition of the party, for example, race to which he belongs, his profession or rank and the country in which he resides. Next after the parties, follow the recitals which are no evidence against persons not parties to the deed (*s*). They are either narrative or introductory. They should not be used for setting out the title of the property, but only to mention facts which connect the last conveyance with the conveyance under preparation. Every fact should be recited in chronological order, but there is no rigid rule about dates. A recital is said to be introductory which leads to the operative part. For instance, in a sale deed the recital of the

(*l*) *Dinker Rao v. Ayab*, A. I. R. (1923) Nag. 37 ;
Ma Hui v. Maung Po Pu (1920) 31 C. L. J. 87.

(*m*) *Probodh Kumar v. Gillanders Arbuthnot & Co.*,
 A. I. R. (1934) Cal. 699.

(*n*) *Bolton (Duke) v. Williams* (1793) 2 Ves. 138,
 30 E. R. 561.

(*o*) *Poole v. Hill* (1840) 10 L. J. Ex. 81, 151 E. R. 651.

(*p*) *Re. Sander and Walford's Contract* (1900)
 83 L. T. 316.

(*q*) *Cooper v. Cartwright* (1860) John 679, 70 E. R. 592.

(*r*) *Bower v. Cooper* (1843) 2 Hare. 408, 67 E. R. 168.

(*s*) *Kumar Raj Krishna v. Barabani Coal Concern, Ltd.* (1934) 60 C. L. J. 477.

contract would be an introductory recital. Where the recital and the operative part differ, the words of the operative part must prevail (*t*). The limitation in the operative part of the deed cannot be controlled by the force of the recital (*u*), but where the operative part is sufficiently ambiguous, the Court looks to the recital (*v*). In *ex-parte Dawes*, *In re Moon* (*w*), Lord Esher, M. R., enumerated the three rules of construction as follows: "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." So also where a covenant is ambiguous, it will be controlled by the recital (*x*). The practice of Bombay solicitors is to accept recitals in deeds over 20 years old, as is done in England under the Vendor and Purchaser's Act, 1874 (*y*). On execution of a supplemental deed they are regarded as sub-recitals.

Next follows the witnessing part which states the agreement and consideration, which is composed of the earnest money paid at the time of the contract for sale and the balance in hand well and truly paid to the vendor by the purchaser on the execution of the conveyance. The statement of consideration is followed by the receipt clause and discharge to the purchaser in parenthesis. Where there are several witnessing clauses, it is usual to mention the consideration in the first. A separate receipt is, however, added at the end of the conveyance. Following the statement of consideration, come the operative words of the conveyance, such as, "grant, release or assign." The word "grant" being appropriate to freehold estates, "assign" to leasehold estate and interests in immoveable properties, "release" to remainders or reversions. In case of concurring parties, the word "confirm" is added. Next comes the description which usually contains the parcels and boundaries. They are either inserted in the body in the operative part or annexed at the end of the conveyance in a schedule by reference in the body. A purchaser is entitled to say by what description he would have the property vested in him, but the description must correspond with the property described in his contract (*z*). It is a convenient practice so to connect the modern description with the old one, that the identity of the property is not lost. In order to determine whether a land is a part of the land purchased, the boundaries given in the *kobala* must prevail over the area and where such boundaries are specified and definite, the land conveyed must be the land within those specified boundaries, but where the boundaries are vague and indefinite, the area should prevail (*a*).

Abuttals are not in general to be construed strictly, but if the description of abuttals be such that if correct, it might increase the value of the premises and induce the purchaser to take the land on that account, then the deed amounts to a grant, that the land abuts as it is described and not mere evidence that the land abuts according to the description (*b*). Plans must be looked at to explain parcels (*c*). Frequently, in the description, after the enumeration of the area, the words "more or less" are added. These words have never yet been absolutely fixed by decision, being considered sometimes to extend only to cover a small difference, one way or the other: sometimes as leaving the quantity altogether uncertain and throwing

(*t*) *Hammond v. Hammond* (1854) 19 Beav. 29, 52 E. R. 259.

(*u*) *Holliday v. Overton* (1852) 15 Beav. 480, 51 E. R. 623.

(*v*) *In re De Ros' Trust, Hardwicke v. Wilmot* (1885) 31 Ch. D. 81.

(*w*) (1886) 17 Q. B. D. 275.

(*x*) *Crouch v. Crouch* (1912) 1 K. B. 378.

(*y*) *Shumsudin Tajibhai v. Dahvabhai Maganlal*

(1924) 48 Bom. 368.

(*z*) *Re Sansom and Nabeth's Contract* (1910) 1 Ch. 741.

(*a*) *Bholanath v. Mrityunjoy* (1934) 59 C. L. J. 532.

(*b*) *Roberts v. Karr* (1809) 1 Taunt. 495, 127 E. R. 926.

(*c*) *Taylor v. Parry* (1840) 4 Jur. 967, 133 E. R. 474.

S. 55 upon the purchaser the necessity of satisfying himself with regard to it. The description is rendered still more loose by addition of the words "by estimation" (*d*). The plan is referred to at the end of the description as attached to the conveyance, whereon the property is delineated and surrounded by a coloured boundary line. A plan is more useful in cases where the property is divided into different parts and it is necessary to refer to those several parts as, for example, where the property consists partly of freehold and partly of leasehold land. A purchaser is entitled to have the land conveyed to him by a reference to the plan on his conveyance and to have a proper description of the property which ought to accord with the property as at the date of the conveyance to himself (*e*). The words of the grant must be looked at and not the plan in the margin (*f*). When an estate is sold as shewn upon a plan, the plan decides the extent thereof, although the particulars given and taken as being particulars of what is comprised in the plan, erroneously contained things not contained in the plan (*g*). In a case where there were four guides towards identification, the first three somewhat inaccurate, and a plan on which a small strip of land was coloured, which was not the property of the vendor, it was held that the plan, being a perfect definite delimitation of the land expressed to be conveyed in the deed, must prevail (*h*).

Immediately following the description are the general words used in a conveyance and "all the estate" clause. The general words begin with "together with all buildings, erections, ways, fences, watercourses, easements, advantages and appurtenances, etc." General words in a conveyance are to be construed in the same manner as other words according to their meaning and not as conveying easements only. The parcels in a conveyance were described by reference to coloured parts of a plan. A yard delineated but not coloured in the plan, was held to pass under the general words "yards" (*i*). General words in a grant must be restricted to what the grantor had power to grant at the date of the grant and will not extend to anything which he might subsequently acquire (*j*). Introduction of general words do not amount to warranty by the grantor that there is anything to answer them, but they are inserted to cover anything which may have been overlooked or not specifically mentioned (*k*). It is unusual to add them on assignments of leaseholds, for such assignments can only be of what is leased. On a conveyance of house sold by auction, in which there were fixtures and nothing was said about them at the auction, it was held that the fixtures passed (*l*). So also on a sale of land, farm-house and fixtures, threshing machines fixed by bolts and screws to pillars fastened to the ground, so that the machine could not be removed without disturbing the soil, also passed along with the land (*m*). Looms in a small mill not fixed but merely steadied by having their four iron hooks let into loom-foots dropped in the floor, would not pass (*n*). The "all the estate" clause runs as follows, "and all the estate, right, title, interest, claim and demand of the vendor into and upon the same hereditaments and premises." Under this clause a person conveys every interest which he can part with and which he does not except (*o*). It might be mentioned that neither general words nor the estate clause are necessary in a

(*d*) *Winch v. Winchester* (1812) 1 V. & B. 375.
35 E. R. 146.

(*e*) *In re. Sansom and Narbeth's Contract* (1910)
1 Ch. 741.

(*f*) *Sumner v. Schofield* (1880) 43 L. T. 763;
Rogers v. Jones (1935) 1 Ch. 657.

(*g*) *Gordon Comming v. Holdsworth* (1910) A. C.
537.

(*h*) *Eastwood v. Ashton* (1915) A. C. 900.

(*i*) *Willis v. Watney* (1881) 51 L. J. Ch. 181.

(*j*) *Booth v. Alcock* (1873) 8 Ch. App. 663.

(*k*) *Barring v. Abingdon* (1892) 2 Ch. 374.

(*l*) *Colegrave v. Dias Santos* (1823) 2 B. & C. 76,
107 E. R. 311.

(*m*) *Willshear v. Cottrell* (1853) 22 L. J. Q. B. 177,
118 E. R. 589.

(*n*) *Hutchinson v. Kay* (1857) 23 Beav. 413,
53 E. R. 163.

(*o*) *Johnson v. Webster* (1854) 24 L. J. Ch. 300,
43 E. R. 592, see sec. 8 of this Act.

conveyance. For easements and appurtenances, if they are annexed to the land, would pass though not mentioned, and if not annexed would not pass even by a special grant (*p*). And the estate clause will not pass any interest which it appears was not the intention to pass by the deed (*q*). After the estate clause, exceptions and reservations, if any, may be added. The former comes out of the thing granted, whilst the latter is a graft on the thing granted. The difference is well known between the two. An exception is a subtraction of some part of the thing granted from that which has been previously granted. A reservation must be of some new thing out of that which is granted (*r*). The exception must not be repugnant to the grant created. Both exceptions and reservations are common in the case of easements which are apparent and continuous.

The next part is the *habendum*. In a conveyance the *habendum* begins with the words "To Have And To Hold." The *habendum* restrains the generality of the premises, which is its proper office (*s*). The name of the grantee and the limitations must correspond with the premises usually known as the operative part, otherwise the latter will prevail. Being a necessary part of the deed, it may even be rejected for repugnancy, if inconsistent with the grant. If the *habendum* is bad as limiting a freehold estate *in futuro*, the defect may be cured by the premises containing a valid grant *in presenti* (*t*). Therefore, in the *habendum* you cannot add what is not in the grant. It can neither enlarge the estate granted nor abridge it, but it may qualify. It is, however, not a necessary part of the deed.

After the *habendum* the various covenants follow. No formal words are necessary to make a covenant. Even a recital may be construed as a covenant. A statement of a binding intention on the vendor's part for the purpose of inducing the purchaser to buy, is as good a covenant as could be made by the most formal words (*u*). Covenants for title are real covenants and run with the land at Common Law and the assignee, although not named, may take advantage of them and may sue the executors and the covenantor for a breach. They are framed according as the vendor acquired the estate, as purchaser or by devise or descent. They are usually five in number, first that vendor is seised in fee, secondly that he has a good right to convey, thirdly for quiet enjoyment, fourthly that the land is free from encumbrances, and fifthly covenant against further assurance. The covenant for seisin may be omitted, for by the covenant that the vendor has a good right to convey, it seems superfluous. The covenant for good right to convey not only relates to the vendor's title to the land but extends as well to his capacity to grant. The covenant for quiet enjoyment is of a materially different import from an assurance of consequences of defective title and of any disturbance thereon. It is to be understood only to apply to the acts of persons claiming by title and not against wrongful or tortious acts of strangers, for against the latter, the injured party can maintain an action of trespass. The covenant against encumbrance does not mean that the estate is free from encumbrances but that the purchaser shall enjoy it free from such encumbrances. In order to justify legal proceedings on this covenant, actual interruption must be made. Some hindrance of enjoyment proved for the chance of a mere disturbance will not constitute a breach. The last covenant is of considerable value to the purchaser. It relates both to the title of the vendor and the

(*p*) *Ackroyd v. Smith* (1850) 10 C. B. 164.

(*q*) *Hunt v. Remnant* (1854) 9 Exch. 635; *Rooper v. Harrison* (1855) 2 K. & J. 86, 69 E. R. 704.

(*r*) *Servill Brothers Ltd. v. Bethell* (1902) 2 Ch. 523.

(*s*) *Burton v. Barclay* (1831) 7 Bing. 745, 131 E. R.

288.

(*t*) *Savill Brothers, Ltd. v. Bethell* (1902) 2 Ch. 523; *Boddington v. Robinson* (1875) 10 Ex. 270.

(*u*) *Mackenzie v. Childers* (1889) 43 Ch. D. 265.

S. 55 instrument of conveyance to the purchaser and operates as well to secure the performance of all acts for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter. Under this covenant, if a bad title is sold, the vendor will be decreed to convey to the purchaser such title as he shall always obtain even though it should be for valuable consideration. Covenants on a sale are known as "protective covenants" (v). Considerable doubt exists as to the right of a purchaser to a covenant for production of the title-deeds under the vendor's covenants for further assurance (w). In India these covenants are implied under the Transfer of Property Act and some conveyancers actually omit them in practice. These covenants are not an absolute warranty of title as in a mortgage but qualified. They are, however, very wide. The acts and omissions, inasmuch as they are prefaced and limited by these words "notwithstanding anything by the person who so conveys" covenanted against, are reducible to four heads, those (a) of the vendor himself, (b) of persons through whom he claims otherwise than by purchase for value, (c) of persons claiming through him, (d) of persons claiming in trust for him (x). Defects of title to the estate expressed to be conveyed by a purchase deed, if they come within the terms of the covenants for title, are not to be excluded from their operation on the ground that they appear on the face of the conveyance or are otherwise known to the purchaser (y). Where trustees, executors and others in a fiduciary capacity sell, they are only required to give a covenant against their own acts, but if empowered to sell under the directions of the tenant for life upon a sale in pursuance of the power, the equitable tenant for life must enter into the ordinary and usual covenants for title (z). On a sale by a mortgagee the covenant entered into by the mortgagee would be that he has not encumbered. But a mortgagee's absolute covenants would pass to the purchaser who is consequently in a better position than when the mortgagor joins in the conveyance by the mortgagee, as in the latter case the covenants are qualified. Where the premises are leasehold, a further covenant is added to the effect that the covenants of the lease have been duly observed and that there is no breach of any covenant entitling the lessor to forfeiture and re-enter and there is an additional covenant entered into by the lessee, that during the residue of the lease he will observe the covenants and pay the rents and indemnify the assignor or the lessor against the consequences of any default. After the covenants, what is known as the *testimonium* clause runs thus, "In witness whereof the said (name of the vendor) hath hereunto set his hand and seal the day and year first hereinabove written." The schedule giving the description of the property, is added after this clause unless the property has already been described in the body of the deed. The plan, if annexed, should be signed by the vendor, usually in triplicate; one copy is annexed to the deed, another copy for the registration office and a third copy for the Collector unless the cess is redeemed. Next after the *testimonium* or the schedule, as the case may be, is the attestation clause. The vendor affixes his signature or mark alongside and the deed is then attested, usually by two witnesses, though no attestation is required in the case of a conveyance by law. Nor does the law in India require a seal. The execution may be by a power-of-attorney, in which case care should be taken to ascertain that at the time of execution, the donor is alive and of sound mind and has not revoked the power. The conveyance is to be tendered to the vendor and it

(v) Per North, J., in *Farrington v. Forrester* (1893) 2 Ch. 461, 474.

(w) Platt on Covenants, page 304, *et seq.*

(x) *David v. Sabin* (1893) 1 Ch. 523; *Browning v. Wright* (1799) 2 Bos. & P. 13, 126 E. R. 1128

(y) *Page v. Midland Railway Co.* (1894) 1 Ch. 11; *Wise v. Whitborn* (1924) 1 Ch. 460.

(z) *Re Sawyer & Barrings Contract* (1884) 53 L. J. Ch. 1104; *Poulette (Earl) v. Hood* (1868) L. R. 5 Eq. 115.

must be to him personally at his place of residence or business, if any. If he employs a solicitor, tender to the solicitor would not be valid. Lastly, the receipt for the consideration or price is added, which in practice is also attested. The conveyance should be stamped before execution except in urgent cases when the stamp may be affixed after execution (a) or where the document is an escrow which for the purpose of stamp duty is not considered as executed. The stamp duty must be borne by the purchaser (b) unless there be an agreement to the contrary.

Registration is the last act in the completion. Transfers must also be effected in the office of the Collector unless the cess is redeemed or the land is *fazendari* and also in the records of the municipality. Transfers executed by the Official Assignee of property belonging to an insolvent, are exempt from stamp duty under section 115 of the Presidency Towns Insolvency Act. A vendor cannot object to convey to a purchaser in parcels in separate conveyances at one and the same time if the purchaser requires him to do so and pays him additional expenses thereby incurred, but he may object to convey at different times (c).

Conveyance to whom.—Under this clause, the obligation is to execute a proper conveyance. It does not state to whom. It is commonly stipulated to execute in favour of the purchaser or his nominee. In the absence of such a stipulation the vendor cannot resist execution in whosoever's favour the purchaser may demand (d). Such a course is also warranted by section 28 (3) of the Indian Stamp Act, 1899. Different considerations would prevail where the purchaser has to perform obligations or to indemnify the vendor against liabilities.

Proper time and place.—Ordinarily time is fixed in the contract for sale for completion thereof. On a sale of immoveable property time is not of the essence of the contract (e), unless made so by express stipulation (f), or by nature of the property, as in the case of reversion, mines or trades, or surrounding circumstances, which would depend on the facts of each particular case (g). By giving express notice, which should be reasonable, time may be made of the essence (h). Although time is made the essence of the contract, the purchaser may waive it by his conduct and when once the time has been allowed to pass and parties continue to negotiate for completing the purchase, then it is no longer the essence of the contract. A simple extension of time and nothing more, is only a waiver to the extent of substituting such extended time for the original time and does not cause utter destruction of the essence of the time (i), unless there be a stipulation or some circumstances making it such (j). Where no time is fixed, reasonable time is allowed for completion (k). The vendor must obtain the signature to the conveyance of all necessary parties and if any of them refuse, the contract may be considered as rescinded (l). The sale is completed, usually in the office of the vendor's solicitor, unless it is otherwise agreed between the parties. The vendor must execute the conveyance, though not bound to do so, in the presence of the purchaser or that of a solicitor; nor is he

(a) Sec. 41, the Indian Stamp Act, 1899.

(b) Sec. 29 (c), Indian Stamp Act, 1899.

(c) *Egmont (Earl of) v. Smith* (1877) 6 Ch. D. 469.

(d) *Rahimtulla v. Official Assignee* (1935) 37 Bom. L. R. 440; *Egmont (Earl of) v. Smith* (1877) 6 Ch. D. 469.

(e) *Sri Ram v. Kidari*, A. I. R. (1925) Lah. 481; *Jamshed v. Burjorji* (1916) 40 Bom. 289, 43 I. A. 26.

(f) *Shumsudin v. Dahyabhai* (1924) 48 Bom. 368 (10 days by notice); *Suryanarayana-murthi v. Satyanarayanamurthi*, A. I. R. (1925) Mad. 211.

(g) *Jamshed v. Burjorji* (1916) 40 Bom. 289.

(h) *Karsandas v. Gopaldas* (1923) 25 Bom. L. R. 1144.

(i) *Kamal Krishna v. Chatoorbhuj*, A. I. R. (1925) Cal. 324; *Webb v. Hughes* (1870) 39 L. J. Ch. 606; *Bardlay v. Messenger* (1874) 43 L. J. Ch. 449; *Haji Fakir v. Shaikh Abdulla* (1888) 12 Bom. 658.

(j) *Weston v. Collins* (1885) 34 L. J. Ch. 353.

(k) *Simpson v. Hughes* (1897) 66 L. J. Ch. 334.

(l) *Esdaile v. Oxenham* (1824) 3 B. & C. 225, 107 E. R. 717.

S. 55

entitled to have a conveyance attested, though as a matter of practice it is so done (*m*). Another statement of frequent occurrence in a conveyance is a declaration or affirmation made either by the vendor or the purchaser of certain rights and liabilities. For example, on a conveyance of the equity of redemption, if the mortgagee desires to keep the mortgage security on foot for his own protection, often of great value, when he suspects the existence of mesne encumbrances having been created after the mortgage, the usual form of the *habendum* clause is altered, so that the vendor conveys unto the mortgagee purchaser to hold the same freed and discharged from all right of redemption of the vendor but "otherwise subject to the indenture of mortgage." In such a case the purchaser makes a declaration against merger as follows :—

"The purchaser hereby declares that the said principal of Rs. _____ and the interest due and to accrue due thereon shall not merge in the equity of redemption of the said hereditaments and premises but shall be kept on foot as a charge on the said hereditaments so as to protect the purchaser against all subsequent encumbrances, charges and estates, if any such there be" (*n*). A similar provision is now made in section 101 for the protection of the purchaser.

There is usually a receipt clause at the end of the instrument in spite of all acknowledgment in the body of the deed. Although conclusive in favour of a transferee for value without notice (*o*), it does not operate as an estoppel between the immediate parties (*p*). It is not a necessary part of the instrument. The mere statement is not sufficient. To constitute a receipt it is not sufficient that there should be a statement. There must be an acknowledgment, either express or signified or imported (*q*). It is also usual, after the signature is obtained to the receipt clause, to endorse in detail the consideration paid.

Month.—The word 'month' may mean lunar or calendar, according to the intention of the contracting parties (*r*).

Execution by power-of-attorney.—This clause (*d*) makes it incumbent upon the vendor to execute a proper conveyance but in practice, the conveyance is executed by a person holding a power-of-attorney from the vendor, a practice which should be deprecated. In such cases the purchaser should insist upon the original power-of-attorney being handed over to him with the muniments of title and also to call upon the vendor to adduce satisfactory proof that the agency has not terminated (*a*) by the death or (*b*) unsoundness of mind of the principal, (*c*) that the power has not been revoked, (*d*) that the agent has not renounced his business, and (*e*) the principal has not been adjudged insolvent. If any previous document amongst the title-deeds has been executed by a power-of-attorney, the purchaser should insist upon the original being produced and also for the various proofs above mentioned. If the original cannot be produced, secondary evidence should be called for. The termination of the agent's authority does not, so far as regards him, take effect before it becomes known to him or, so far as regards third persons, before it becomes known to them (*s*). If, therefore, among the title-deeds there are several transfers executed by agents under powers-of-attorney, the purchaser may take objection to the title not being marketable, in the absence of the

(*m*) See Conveyancing and Law of Property Act, 1881, sec. 8.

(*n*) Encyclopædia of Forms and Precedents, 1st Ed., Vol. 12, p. 563.

(*o*) *Powell v. Browne* (1907) 97 L. T. 854.

(*p*) *Burchell v. Thompson* (1920) 2 K. B. 80.

(*q*) *In re Jamnadas Harinaran* (1897) 23 Bom. 54, 56.

(*r*) *Lang v. Gale* (1813) 1 M. & S. 111, 105 E. R. 42.

(*s*) Sections 201 and 208, Indian Contract Act, IX of 1872.

above proofs. Execution by attorney under a power should be avoided unless unavoidable circumstances render it necessary (*t*). A vendor cannot compel the purchaser to accept execution of the conveyance by an agent unless there are strong reasons.

S. 55

Clause (1), Sub-clause (e): Care of Property and Title-deeds.

Vendor's obligation as to property and documents of title pending delivery.—Section 55, sub-section (1), clause (e) attaches obligations to the vendor both as regards the property and the title-deeds which he is to safeguard till delivery of the property. The delivery of the property may take place (a) at the time of execution of the conveyance and payment of the purchase-money, or (b) before execution of the conveyance and before payment of the purchase-money, or (c) on payment of the purchase-money the title being still under investigation, or (d) after execution of the conveyance and the purchase-money not having been paid or (e) it may take place some time after the execution of the conveyance and payment of the purchase-money. It is, however, clear that this obligation under the statute ceases on delivery. This sub-section, however, is defective inasmuch as delivery of the title-deeds does not invariably take place concurrently with the delivery of the property, so that this section, if literally construed, would mean that there was no obligation on the part of the vendor to safeguard the documents of title after the property has once been delivered. This could hardly be the intention of the Legislature so that the duty imposed with regard to title-deeds continues even after delivery of the property, so long as they remain in the vendor's possession. The nature of the obligation is that consistent with prudent ownership. It is not analogous to that of an Indian trustee under section 15 of the Trust Act, 1882. Section 15 of the Trust Act is placed amongst a group of sections dealing with a trustee's duties, namely, sections 11 to 22, while sub-section (e) of section 55 is placed amongst a group of sections dealing with liabilities of the vendor. Trustee's liabilities are dealt with under sections 23 to 30 of the Trust Act. Moreover, section 15 of the Trust Act is distinguishable as it relates to dealing with the trust property, while the present sub-section relates to the preservation of the property.

Nor can it be compared to that of a trustee under English Law, for that is based on the doctrine of equity, that when contract for sale is made, the purchaser becomes in equity the owner of the property and the property is vendible, chargeable and capable of being encumbered as his. Again, this liability of the vendor cannot be likened to that of a mortgagee in possession under section 76 (a) and (e) of the Transfer of Property Act. In English Law, by the contract, according to the principles of equity the right to the property passes to the purchaser and the right of the vendor is turned into a money right to receive the purchase-money. He retains a lien upon the land which he has sold for the purchase-money. Therefore, the contract changes the title to the land. Consequently, the vendor is under the same obligations as those under which any other person, such as the mortgagee would be, having security on the land, and may insist upon the possession of the land as a further security (*u*). Therefore, whether the position of the vendor is looked upon as that of a trustee or of a mortgagee, it is based on the same principle which, however, is inapplicable to this country. When owing to delay on the part of the vendor in completing, the property diminishes in value or deteriorates by permissive

(*t*) *Mitchell v. Neale* (1755) 2 Ves. Sen. 679, 28 E. R. 433.

(*u*) *Phillips v. Silvester* (1872) 8 Ch. App. 173.

S. 55

waste, the purchaser is entitled to compensation (v). As regards the title-deeds, the amount of care required of the vendor cannot be greater than that laid down by the proviso to sub-section (3) to section 55, viz., to keep the documents uncanceled and undefaced unless prevented by fire or other inevitable accident. The vendor is not bound to insure the property for the benefit of the purchaser and if it be lost or destroyed by fire, the loss would fall on the vendor before completion of the purchase.

Such.—The use of this word indicates that the duty is commensurate with the condition of the property. There might be special circumstances tending to shew that the property was not worth being preserved, if the expense of necessary repairs be greater than those which the property would bear. In that case it is further possible that a purchaser might have no claim, if previous notice were given to him that unless he supplied the vendor with funds in order to make the necessary repairs, the property would be left to take its chance.

Purchaser's risk.—Although the loss by fire, flood, etc., would fall on the vendor under this clause, this does not prevent the parties from contracting to the contrary, so that the risk by fire, etc., between the two dates may fall on the purchaser.

Clause (1), Sub-clause (f): Possession.

Possession.—The obligation of giving possession is on the vendor. According to section 37 of the Specific Relief Act, an obligation is a duty enforceable by law. Notwithstanding execution of a proper conveyance which transfers ownership, a buyer is not entitled to possession except on condition of first paying the purchase-money (w), though he may maintain a suit for possession without payment of the purchase-money (x). The time when and the manner in which possession is to be given by the vendor to the purchaser of the property sold, is usually stipulated by the contract for sale, viz., that the vendor shall on execution of the conveyance and on payment of purchase-money give vacant possession of such portions as are vacant and of such portions as are in the occupation of the tenants by asking the tenants to attorn to the purchaser. If a particular kind of possession is agreed upon, any other kind of possession offered will not meet the requirements of the purchaser. In the absence, however, of a contract to the contrary, the vendor is bound to give possession of the property as its nature admits, that is, such possession as he can give to the buyer under the circumstances of the case. If the vendor is aware that the purchaser is buying the property with intent to have a particular kind of possession, no other kind of possession will meet the requirements of the case (y). Possession must be given either to the buyer or to such person as he directs. Till the purchase-money is paid, the right is in the vendor (z). Possession may be given even before payment of the purchase-money, in which case the vendor's remedy is to sue for the amount (a).

A person entitled to the possession of specific immoveable property may recover it in the manner described in the Code of Civil Procedure (b). And a person dispossessed without his consent, of immoveable property otherwise than in due course of law, may sue to recover possession notwithstanding any other title that may be

(v) *Regents Canal Co. v. Ware* (1857) 23 Beav. 575, 53 E. R. 226.

(w) *Balkrishna v. Shripalsingh* (1910) 6 Nag. L. R. 98; *Bajinath Singh v. Pullu* (1908) 30 All. 125 followed; *Velayutha Chetty v. Govindaswami* (1907) 30 Mad. 524, dissented from.

(x) *Yella Krishnamma v. Kotipulli* (1920) 38

M. L. J. 467.

(y) *Morgan v. The Government of Hyderabad* (1888) 11 Mad. 419; *Phillips v. Caldwell* (1868) 4 Q. B. 159.

(z) *Acland v. Cuming* (1816) 2 Mad. 28, 56 E. R. 245.

(a) *Sagaji v. Namdev* (1899) 23 Bom. 525.

(b) Sec. 8, Specific Relief Act, 1877.

set up in the said suit (c). And a vendor who, having put the intending purchaser in possession, sues the purchaser in ejectment, repudiates the transaction, and the Court will not grant him any relief which he seeks in the suit. The purchaser is not a trespasser but in possession under the contract (d). The old practice of the vendor and purchaser entering a property for delivery of possession, though superfluous, is still prevalent. The section is silent as to when possession is to be given, presumably concurrently with the execution of the conveyance and payment of the purchase-money, and as this sub-section follows sub-section (d) which relates to execution and payment, such an inference is justified. Possession does not necessarily mean personal occupation, for the section provides that such possession shall be given as the nature of the property admits. It has been observed that the vendor is liable to deliver possession to the purchaser immediately on the execution of the sale deed (e). Where the vendor of a piece of land, of which he was himself in occupation, contracted to sell the land under conditions of sale, by one of which it was provided that the purchaser should be entitled "to the possession or the receipt of the rents and profits" of the land from a specified date, it was held, on the construction of the written agreement, that the vendor was bound to give possession to the purchaser on the date specified, and no effect could be given to the words referring in the alternative to the receipt of rents and profits; and evidence was not admissible to prove an alleged contemporary parol agreement by which the vendor was to retain possession of the land to a later date, paying the purchaser in the meantime, by way of rent, interest on his purchase-money (f). An agreement by the plaintiff to reconvey the property to the defendant, made contemporaneously with the sale deed, cannot be pleaded in bar of plaintiff's right to recover possession under the deed of sale (g). The plaintiff purchased at a public auction held on February 21, 1918, property belonging to the defendant municipality. The conditions of sale provided that the purchase-money should be paid soon after the sale which was subject to the sanction of the Commissioner and that the purchaser had to vacate a portion of the property which fell within the road-line. The purchase-money was paid in time, and the sanction of the Commissioner obtained on July 10, 1919. The plaintiff was all along asking the municipality to exempt the property from road-line and partially succeeded in getting the exemption. He was put into possession on March 9, 1920. The conveyance was executed on July 18th, 1920. Held, dismissing the suit, that there was under the circumstances no duty on the defendant either on July 10, 1919, or any subsequent date to put the plaintiff in possession before the conveyance was executed or its terms finally settled (h).

Suit for possession after execution of sale deed.—As to a subsequent suit for possession after a decree for specific performance of a contract for sale of land, there is a difference of opinion. In a Madras case, the defendant having agreed to sell land to the plaintiff, failed to execute a conveyance, and the latter sued for specific performance and obtained a decree, the Court executing a conveyance to him. Afterwards the plaintiff sued for possession. It was held that the right to possession arose coincidentally with the right to the execution of a conveyance, that both rights are declared under section 55 of the Transfer of Property Act and the suit was not maintainable (i). On similar facts, the Bombay High Court took a contrary

(c) Sec. 9, Specific Relief Act, 1877.

(d) *Bapu Appaji v. Kashinath Sudoba* (1917) 41 Bom. 438; *Laxmanrao v. Bhagwan Singh* (1921) 45 Bom. 434.

(e) *Sri Ram v. Kidari*, A. I. R. (1925) Lah. 481.

(f) *Anker v. Franklin* (1880) 43 L. T. 317.

(g) *Timangowda v. Benepgowda* (1915) 39 Bom. 472.

(h) *The Kapadvanj Municipality v. Ochhavilal* (1928) 30 Bom. L. R. 1920.

(i) *Narayana Kavirayan v. Kandasami Goundan* (1899) 22 Mad. 24.

S. 55

view and held that the cause of action of the second suit was not a breach of the contract but a new and distinct cause arising from the deed of sale which the defendant had contracted to pass (*j*). It is respectfully submitted that the latter view is correct. For under section 54, delivery of the property is not an essential ingredient in the transfer of ownership and it seems to be an erroneous view to take, that the right to possession arises coincidentally with the right of execution of the conveyance. In a purchaser's suit for possession, it is not competent to pass a decree conditional on payment of price. But the Court may incorporate the statutory charge under section 55 (4) (b) of this Act (*k*).

Possession by co-owner.—Possession by mere attornment of the party in possession who claims a share in it, is not sufficient (*l*).

As its nature admits.—Here it is not clear whether “nature” referred to is “physical” or “juridical” and whether, if property is in possession of tenants, the purchaser can claim vacant possession. In the absence of stipulation, vacant possession would be given under English Law.

Clause (1), Sub-clause (g) : Vendor's Liabilities.

Outgoings : vendor liable for.—In the absence of any stipulation in the contract for sale, the practice is at the date of the sale to apportion all rents and public charges such as local rates and taxes and other outgoings, including amount on encumbrances up to that date. Insurance is not usually included in the apportionment, for the vendor can get back his refund for the residue of the period from the insurance company. According to English Law, in the absence of express stipulation, the vendor must bear all expenses and outgoings of the property sold, down to the time when a good title was first shewn, so that a purchaser could prudently take possession. Interest on purchase-money would run from that time and all expenses and outgoings from that time must be borne by the purchaser (*m*).

Taxes.—Municipal taxes are yearly taxes. A person becoming owner of a house subsequent to assessment becomes liable for the whole-yearly tax. It is not compulsory on the municipality to apportion the obligation of buyer and seller (*n*).

Expenses.—Expenses incurred under a local Act in improving the street in which the house stood, are outgoings (*o*). By conditions of sale of land within the Metropolis, the date fixed for completion was May 8, all outgoings on that date being cleared by the vendor. Before May 8 a magistrate made an order to take down the dangerous structure on the land. This order was not complied with and after May 8, the County Council took down the structure and demanded and received from the purchaser all expenses of so doing. Held that the liability having been incurred before May 8, the purchaser was entitled to recover from the vendor (*p*).

Rents.—On a sale of leasehold the vendor must pay all rents accrued due up to the date of the sale (*q*).

Encumbrances.—When property is encumbered, the question of encumbrance is a question of conveyance and not a question of title (*r*). The rule laid down in

(*j*) *Nathoo v. Budhu* (1894) 18 Bom. 537.
 (*k*) *Basalinga v. Chinnava* (1932) 56 Bom. 556 ;
Velayutha Chetty v. Govindasami (1907)
 30 Mad. 524 ; *Velayutha Chetty v. Govinda-*
sami (1910) 34 Mad. 543 ; *Krishnamma*
v. Mali (1920) 43 Mad. 712.
 (*l*) *Mahomed Siddique v. Li Kan Shoo*, A. I. R.
 (1925) Rang. 372.
 (*m*) *Barshl v. Tagg* (1900) 1 Ch. 231 ; *Re. Highett*
& Bird's Contract (1902) 2 Ch. 214.

(*n*) *The Chairman of the Municipal Council,*
Nellore v. Dwarapally (1907) 30 Mad. 423.
 (*o*) *Midgley v. Coppock* (1879) 48 L. J. Q. B. 674 ;
Stock v. Meakin (1900) 1 Ch. 683.
 (*p*) *Tubbs v. Wynne* (1897) 1 Q. B. 74.
 (*q*) *Phul Kuer v. Rambhajan*, A. I. R. (1924)
 Pat. 822.
 (*r*) *Sober v. Kemp* (1847) 6 Harc. 155, 67 E. R.
 1120.

this sub-section is that the vendor must convey the property freed and discharged from encumbrances, unless there is a specific contract in the sale that the property is sold subject to encumbrances, in which case the purchaser is liable (s). The covenant in this sub-section does not run with the land and the proviso in sub-section 2 does not cover sub-section 1 (g), for sub-section 2 does not import the sale of property free from encumbrances (t). In the event of the property being sold free from encumbrances, the purchaser at the time of completion must take care to see that the encumbrancers receive the amounts due to them and the balance only should be paid by the purchaser to the vendor. Where a conveyance was made free from encumbrances but was subject to mortgages, the vendor was liable under section 55, sub-section 1 (g) and sub-section 2 to make good moneys paid by the purchaser, either (1) for redemption, (2) purchase of the property on sale, or (3) moneys paid to prevent such sales. When after sale to the first purchaser, the vendor sold another item to a second purchaser, who undertook to discharge an encumbrance on the first item sold, a suit by the first purchaser against the second purchaser would be misconceived as the first purchaser was not a party to the second purchase and no trust was created in his favour (u).

The buyer's remedies have been laid down as under (v) :—

- (a) To compel the vendor under this sub-section to discharge all encumbrances on the property.
- (b) Under section 18 (c) of the Specific Relief Act, to compel the vendor to redeem the mortgage and to obtain a conveyance from the mortgagee when he professes to sell unencumbered property and the property is mortgaged for an amount not exceeding the purchase-money.
- (c) He may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale and pay the amount so retained to the person entitled thereto, provided that the property is sold free from encumbrances (w). This right is given to him under section 55 (5) (b).
- (d) On the purchase of one of two or more properties subject to a common charge he may claim to have the mortgage debt under section 56 of the Transfer of Property Act, satisfied out of the property or properties not sold to him so far as the same will extend.
- (e) To be reimbursed by the vendor under section 69 of the Contract Act.

Purchaser discharges encumbrances after completion.—The rule in section 55 (1) (g) applies to the relation between the vendor and purchaser before completion, unless there be fraud or an express covenant to the contrary. Property was purchased by the plaintiff subject to an encumbrance of Rs. 16,300. The plaintiffs had to pay more than Rs. 16,000 in respect of the encumbrance and sued to recover the excess three years after payment. It was held that on the construction of the deed, there was no express covenant of indemnity to pay the excess and the rule

(s) *Jugul Kishore v. Bamwari Lal* (1929) 51 All. 1053.
 (t) *Visalakshi Ammal v. Veeraswami*, A. I. R. (1927) Mad. 1072; *Venkataranga Aiyar v. Ramaswami Ayyar*, A. I. R. (1926) Mad. 173.
 (u) *Nathu Khan v. Thakur Burtonath Singh* (1922) 26 C. W. N. 514, P. C.
 (v) *Bhagwati v. Banarsi Das* (1928) 50 All. 371, 55 I. A. 135; *Nathu Khan v. Thakur*

Burtonath Singh (1922) 24 Bom. L. R. 571; *Manishanker v. Ramkrishna* (1904) 6 Bom. L. R. 832; *Gauri Shankar v. Munnee*, A. I. R. (1935) Oudh 142; *Harcharan Lal v. Nural Hasan*, A. I. R. (1934) Oudh 492.
 (w) *Manindra Chandra v. Jamahir* (1905) 32 Cal. 643; *Mangalathammal v. Narayanaswami* (1909) 17 M. L. J. 250; *Harcharan v. Nural Hasan*, A. I. R. (1934) Oudh 492.

- S. 55** in section 55 (1) (g) cannot be read as an implied covenant to indemnify after the date of the sale (x).

Sale subject to encumbrances.—On such a sale the vendor gets, under section 55 (5) (d), an indemnity which may be express or implied. After the purchase is completed he has no claim to participate in any benefit which the purchaser may derive by the invalidity of the encumbrances (y).

Undisclosed encumbrances.—A stipulation on the sale of immoveable property that in the event of a part of the property being sold as a result of undisclosed encumbrances, the vendor shall repay a proportionate part of the consideration, does not affect the vendor's obligation under section 55 (1) (g) of the Transfer of Property Act, 1882, to pay encumbrances, nor the consequent right of the purchaser under section 69 of the Indian Contract Act to recover from the vendor the amount paid in discharge of a mortgage decree obtained after possession has been taken (z). An express provision for discharge of encumbrances by the vendor, does not exclude his liability to discharge an encumbrance undisclosed at the time, for which no provision has been made (a).

Purchaser not a trustee.—Where property is sold free from encumbrances and the purchaser is allowed to retain the amount of the encumbrance, he is not a trustee for the encumbrancer for those moneys (b). The vendor is entitled to be reimbursed the loss occasioned by the purchaser's default (c).

Covenant to the contrary.—An express covenant excludes the statutory covenant. On a sale of property it was stipulated that if any person made a claim as partner, co-sharer or encumbrancer and the result of the claim was that the property passed out of possession of the purchaser, the vendor should pay to the purchaser compensation to the extent the property sold passed out of his possession. After the conveyance, a suit was brought under an old mortgage and the purchaser had to pay a much larger sum than the purchase price. The purchaser filed a suit to recover these moneys from the vendor. The suit was dismissed on the ground that no portion of the properties passed out of the hands of the purchaser and the circumstances in which alone he could claim damages, had not arisen (d).

Transferees for value.—The statutory liability imposed on vendors to discharge encumbrances does not extend to and cannot be enforced against transferees for value who have paid money in good faith and without notice of the original contract (e).

Reconveyance or release.—A valid discharge must be obtained of encumbrances to deduce a marketable title (f).

Conveyance of the equity of redemption.—A conveyance of the equity of redemption for a sum less than Rs. 100 does not require registration under section 17 (1) (b) of the Indian Registration Act, although the amount of the mortgage is above Rs. 100 (g). The stamp duty on a conveyance of the equity of redemption is for the actual consideration paid and not on the amount due by the mortgagor under article 23 to the schedule to the Stamp Act, 1899.

(x) *Bidhubhushan v. Umeschandra* (1930) 57 Cal. 683.

(y) *Mt. Izzat-un-Nissa Begam v. Kunwar Pertab Singh* (1909) 31 All. 583, 36 I. A. 203.

(z) *Bhagwati v. Banarsi Das* (1928) 50 All. 371, 55 I. A. 135.

(a) *Kaniz Fatma v. Imam Uddin*, A. I. R. (1925) All. 704.

(b) *Sreelal v. Madon* (1925) 52 Cal. 100.

(c) *Venkatanaranyiah v. Subramania*, A. I. R.

(1923) Mad. 492.

(d) *Bhagwati v. Banarsi Das* (1928) 50 All. 371, 55 I. A. 135.

(e) *Venkataranga Ayyar v. Ramaswami*, A. I. R. (1926) Mad. 173; Specific Relief Act, sec. 27.

(f) *Srinivasdas v. Meherbai* (1917) 41 Bom. 300, 44 I. A. 36; *Hirachand v. Jayagopal* (1925) 49 Bom. 245.

(g) *Pitambar v. Rajaram* (1936) 38 Bom. L. R. 205.

Clause (2): Implied Covenant for Title.

S. 55

Covenant.—A covenant may be defined to be an agreement between two or more persons by an instrument in writing sealed and delivered, whereby some of the parties engage, or one of them engages with the other or others of them that some act hath or hath not already been done; or the performance or non-performance of some specified duty (*h*). The party entering into a covenant is called a covenantor and he with whom it is made, a covenantee (*i*). A covenantee without executing the deed may bring an action of covenant against the covenantor (*j*), whether the instrument be a Deed Poll or an Indenture; for right of suit is constituted by the covenantor's execution of the deed (*k*).

Implied covenant for title.—In India there is a statutory guarantee for a good title unless the same is excluded by contract of the parties. The question of the knowledge of the purchaser does not affect the right to be indemnified under Indian Statute Law. Even in England, if, on the face of the conveyance, a *prima facie* title is secured, knowledge of facts which may lead to the discovery of flaws will not lead to a claim for compensation (*l*).

Section 55, sub-section (2) deals with a covenant for title which is deemed to be implied in a conveyance for sale (*m*). It may be expressed or implied, and is deemed to run with the land so as to bind assigns. It abrogates the old rule of *caveat emptor*. The Transfer of Property Act does not apply to any transfer by operation of law (*n*) and, therefore, the implied covenant for title in section 55 (2) is not annexed to the interest of a transferee by Court sale. The effect of section 55, sub-section (2) is clearly to imply a covenant for title somewhat in the same way as such covenants are implied in English Law by section 7 of the English Conveyancing Act of 1881, now section 76 and Schedule II, Part I, of the Law of Property Act, 1925. The covenant is implied only in the absence of a contract to the contrary (*o*). Covenants for title run with the land, and the assignee, though not named, may take advantage of them and may sue the executors of the covenantor for a breach. The vendor's covenant is against his own act and the acts of those claiming under him. Covenants usually entered into on a conveyance in fee simple are five in number. First, that the vendor is seised in fee which usually is in the form of a recital, secondly, that he has a good right to convey, thirdly, the purchaser, his heirs and assigns shall quietly enjoy, fourthly, for indemnity against encumbrances, and fifthly, for further assurance (*p*). These are not separate and distinct covenants but parts of one entire covenant controlled by the words "That notwithstanding anything by the person who so conveys, or anyone through whom he derives title otherwise than by purchase for value." These words render a vendor's covenant qualified as opposed to absolute warranty of title as in a covenant by a mortgagor. By section 55, sub-section (2), the covenant for good title implied runs in this form, "And the vendor doth hereby for himself, his heirs, executors, and administrators covenant with the purchaser, his heirs, executors, administrators and assigns, that notwithstanding any act, deed or thing whatsoever by him the vendor, or by any of his ancestors at any time heretofore done, omitted or knowingly suffered to the contrary, he the vendor now hath in himself good

(*h*) Platt on Covenants, p. 1.

(*i*) Platt on Covenants, p. 2.

(*j*) *Petrie v. Bury* (1824) 3 Barn. & Cres. 353.

(*k*) Platt on Covenants, p. 18.

(*l*) *Subbaroya v. Rajagopala* (1915) 38 Mad. 887;
Page v. Midland Railway Company (1894)
 1 Ch. 11; *Ram Chunder v. Dwarkanath*

(1889) 16 Cal. 330.

(*m*) *Sri Ram v. Kidari*, A. I. R. (1925) Lah. 481.

(*n*) Sec. 2 of the Act; see *Natesa Vanniyan v. Gopalaswami Mudaliar* (1928) 51 Mad. 688.

(*o*) *Bosaraddi v. Enajaddi* (1898) 25 Cal. 298.

(*p*) Platt on Covenants, p. 305.

S. 55 right, full power and absolute authority to grant and assure the hereditaments and premises hereby granted and assured or intended so to be unto the purchaser, his heirs, executors, administrators and assigns in manner aforesaid." A covenant that the vendor has a good right to convey is not confined to his title to the lands but relates as well to his capacity to grant (*q*). An action may instantly be commenced by a covenantee without waiting for a disturbance; since eviction does not constitute the breach but is the consequential damage arising therefrom (*r*). According to section 55, sub-section (2), the vendor is deemed to have impliedly covenanted with the purchaser that he has a good title to convey and that his power to transfer is a valid one. Where the vendors are tenants in common, they covenant severally so far as it relates to their undivided share. Joint tenants, however, may enter into covenants severally so far as regards their own shares to which they will be entitled on a partition or jointly, though the latter is an objectionable form, as rendering each one of them liable for the acts of the other or others of them. Where covenantees are tenants in common of a property to which the covenants relate, the covenants should be entered into with them severally (*s*). And where a vendor becomes owner by descent or devise or otherwise than by purchase, he covenants against the acts of the ancestor, or testator, as the case may be. A covenant for title arising by implication, the onus is on the vendor to prove the contract by displacing that presumption (*t*). It is attached to the transaction of sale and not merely to the contract which precedes the sale (*u*) for, as held by a Full Bench of the Madras High Court (one of the Judges dissenting), the Legislature could not have imported a stipulation of this nature in a transaction of sale without implying at the same time that it should be taken as having formed part of the contract which became perfected in the sale (*v*). Under the English conveyancing practice, all covenants of title and for quiet enjoyment are set out in the deed itself, but under the Transfer of Property Act, they are to be read into the sale deed by reason of the provisions of the Act, though in actual practice the English form is adopted in this country.

Covenant for indemnity.—A covenant for indemnity is distinguishable from a covenant for title, in that the former does not run with the land and that when given by a third party, it cannot be enforced against his assignee (*w*).

Nature of the covenant.—Covenants for title in a mortgage are the same as in a conveyance upon sale, except that they are absolute instead of qualified. That is to say, in a conveyance upon sale, they are restricted to acts and omissions of the vendor and the ancestors and testators through whom he claims, whilst in mortgage deeds and securities for money, they are unrestricted and amount to a warranty against and for the acts and omissions of the whole world (*x*). But although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts and omissions covenanted against are reducible to four heads, viz., (1) the acts and omissions of the vendor himself; (2) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (3) the acts and

(*q*) Platt on Covenants, p. 310.

(*r*) Platt on Covenants, 311.

(*s*) Davidson's Precedents in Conveyancing, Vol. 1, p. 117.

(*t*) *Sri Ram v. Kidari*, A. I. R. (1925) Lah. 481.

(*u*) *Sigamani v. Munibadra*, A. I. R. (1926) Mad. 255; *Arunachala Aiyar v. T. Ramasami Aiyar* (1915) 38 Mad. 1171; *Narayana*

Reddi v. Peda Rama Reddi (1908) 15 M. L. J. 396.

(*v*) *Adikesavan Naidu v. Gurunatha Chetti* (1917) 40 Mad. 338.

(*w*) *Natesa I'anniyar v. Gopalaswami Mudaliar* (1928) 51 Mad. 688.

(*x*) Davidson's Precedents in Conveyancing, Vol. 1, p. 121.

omissions of persons claiming through him ; (4) the acts and omissions of persons claiming in trust for him (y).

S. 55

Under section 55 (2) a vendor contracts with a buyer that he has full proprietary title in the property. This rule applies unless the benefit of it is lost to the purchaser by fraud, notice, waiver or express or implied contract (z). Covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. A covenant for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbances thereupon (a). The latter may be omitted from a conveyance, but its insertion has this advantage, that whilst the purchaser's remedy on a covenant for title is barred by limitation after six years from the date of the conveyance, under section 116 of the Limitation Act, the remedy on the covenant for quiet enjoyment does not arise till there is an interruption or disturbance.

Possession.—A covenant for possession cannot be implied from this section (b).

Express covenant.—In actual practice this covenant is express, so that the parties would be governed by their contract. As the implied covenant for title runs with the land, it follows that an express contract of this nature must also run with the land, so that a purchaser from a pre-emptor is entitled to take the benefit of the express covenant as to title (c).

General indemnifying clause in a sale deed.—A general clause in a sale deed may make the vendor liable for any loss which might accrue in connection with the sale and would include the risk of the purchaser's title being defeated by a pre-emptor (d). Where notwithstanding the fact that a purchaser knew that there were disputes about title, but the vendor assured him that he would give documents to prove that the property was his ancestral by right in such circumstances, the purchaser was held to have a claim against the vendor (e). Nor is the purchaser's remedy destroyed by a condition that the purchaser shall take such title as the vendor can give and it turns out that the vendor has no title at all, for such a condition implies possession of some title in the vendor (f).

Defect known to purchaser.—General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of sale unless the intention of the parties, that they should not do so, is clearly expressed in the covenants themselves (g).

Acts amounting to waiver of implied covenant for title.—The acts of the purchaser may amount to a waiver of the implied covenant for title, as when the purchaser took possession under the agreement, paid the balance of the purchase-money, executed certain repairs to the house and let it to a tenant and enjoyed the rents, and shortly after the agreement, sought to obtain a sale deed from the plaintiff and attempted to raise a sum of money on the mortgage of the house (h). But not when the plaintiff in ignorance of circumstances which rendered the title non-marketable, paid a portion of the purchase-money upon the erroneous advice

(y) *David v. Sabin* (1893) 1 Ch. D. 523.

(z) *Kali Din v. Madho*, A. I. R. (1923) All. 169.

(a) *Howell v. Richard* (1809) 11 East. 633, 103 E. R. 1150.

(b) *Muthusami Iyer v. Dharma Raja*, A. I. R. (1926) Mad. 495.

(c) *Hanwant Rao v. Chandi Prasad* (1929) 51 All. 651; *Sita Ram v. Nanak Chand*, A. I. R. (1926) Lah. 182.

(d) *Kalian Singh v. Fazal Din*, A. I. R. (1926) Lah. 455.

(e) *Parasurama v. Puthuswamy Pillay*, A. I. R. (1925) Mad. 1209.

(f) *Motivahu v. Vinayak* (1888) 12 Bom. 1.

(g) *Mt. Lakpat Kuer v. Durga Prasad* (1929) 8 Pat. 432; *Mahomed Ali v. Venkatapathi* (1920) 39 M. L. J. 449; *Basaraddi v. Enajaddi* (1898) 25 Cal. 298; *Ram Chunder Dutt v. Dwarkinath Bysack* (1889) 16 Cal. 330.

(h) *Ghousiah Begum v. Rustomjah* (1890) 13 Mad. 159.

- S. 55 of his solicitors; nor is the fact that the matter had proceeded to the preparation of the assignment, a bar to the plaintiff's right to maintain a suit for return of the earnest money and the purchase-money which was paid in part (i).

Purchaser's remedy on breach.—Under section 55 (2) a purchaser is entitled to damages for a broken contract of warranty, if by misrepresentation he has been made to purchase a property burdened with a permanent tenancy, represented to be a yearly one (j), the damages being the difference in value of the land. Where the purchaser has expended money on the land and has been evicted, he can claim not only the value of the land but also the house built on the land (k). Defendants sold one anna share and covenanted for title and quiet possession, but did not part with the possession of the share. The purchasers sold the share to the plaintiff but did not give covenant for title. In a suit for possession, the plaintiff recovered possession of the six pies share, as the defendants had no title to the remaining six pies share. The plaintiff having sued, it was held that he was entitled to recover damages in lieu of possession of the remaining six pies under the covenant or, in the alternative, to recover damages (l). A vendor sold for £655 an estate, as unencumbered, which he had previously mortgaged for £1,000, of which he by fraud retained the mortgage deed. He entered into the usual covenants for title as absolute owner. The mortgage decree was made against the purchaser and the vendor became bankrupt. It was held that the purchaser was entitled under the covenant for good title to convey, to prove the amount of principal, interest and costs which he had paid, although the said amount exceeded the purchase-money (m). This clause as to title does not guarantee rents, and the purchaser's remedy is against the tenant and not against the vendor (n). Prior to the passing of the Act the purchaser's claim was either for money had and received or to recover money upon an existing consideration that failed. The Privy Council pointed out that in such cases either article 62 or 97 of the Limitation Act applied. There a suit for possession had failed on the ground that the vendor being a member of a joint family, his conveyance did not operate to create a title to the property of the family that would prevail against a subsequent repudiation of the transaction by other sharers and article 97 was applied. A purchaser's claim to compensation independently of the Act may be grouped into three classes thus :—

- (a) Where from the inception the vendor had no title and the vendee had not been put into possession, article 62 applied. The starting point of limitation is the date of the sale (o).
- (b) Where the sale was voidable on the objection of third parties and possession was taken under a voidable sale (p), article 97 applied for the return of the purchase-money as on a failure of consideration. The starting point is dispossession.

(i) *Meghji v. Tyebally* (1924) 26 Bom. L. R. 1019.
 (j) *Vishwanath v. Bala Kaku* (1918) 18 Bom. L. R. 292.
 (k) *Bunny v. Hopkinson* (1859) 27 Beav. 565, 54 E. R. 223.
 (l) *Bapu v. Kashiram* (1929) 31 Bom. L. R. 658; *Subbaroya v. Rajagopala* (1915) 38 Mad. 887.
 (m) *Re. Hughes, ex-parte Elmes* (1864) 10 L. T. 314.
 (n) *A. L. K. P. V. Chettyar v. Maung Thet Su*, A. I. R. (1927) Rang. 134.
 (o) *Subbaroya v. Rajagopala* (1914) 38 Mad. 887; *Ardesir v. Vajesing* (1901) 25 Bom. 593

(here the sale deed was before the Act came into force in the Bombay Presidency); *Hanuman Kamat v. Hanuman Mandur* (1892) 19 Cal. 123, 18 I. A. 158.
 (p) *Subbaroya v. Rajagopala* (1915) 38 Mad. 887; *Sankara Variar v. Ummer* (1922) 46 Mad. 40; *Hanuman Kamat v. Hanuman Mandur* (1892) 19 Cal. 123, 18 I. A. 158; *Hukumchand v. Pirthichand* (1918) 21 Bom. L. R. 632; *Tulsiram v. Murlidhar* (1902) 26 Bom. 750 (sale deed of 1880).

- (c) Where, though the title is known to be imperfect, the contract in part was carried out by giving possession of the properties, article 97 would apply. The starting point would be date of dispossession (q).

When the remedy is based under the Act on the covenant for title, a different period of limitation has been held applicable, namely, article 116 of the Limitation Act. Here the writing is registered. The seller has a title. The cause of action would arise when it was discovered that the vendor's title was defective (r). It has been pointed out that the expression "compensation" is used in the Indian Contract Act in a very wide sense and that the omission of the words "and not herein specially provided for" is critical. Article 116 is a special provision and is not limited to unliquidated damages but applies to a claim for payment of a sum certain (s). The words "express or implied" contained in article 115 are wide enough to include an implied contract in article 116 (t).

Proviso.—From the implied covenant for title fiduciary vendors such as trustees, guardians, executors, administrators, agents, committees of lunatics, assignee of a bankrupt, receiver of an estate, mortgagee selling under his power of sale are excepted. On a sale by the trustees if the concurrence of the beneficiaries is necessary, the latter are bound to enter into the covenant for title. The only covenant that can be given or implied is that they have done no act to prevent their selling nor have they encumbered the property. The covenant when expressed is in this form, "And A. B. (trustee) doth for himself, his heirs, executors and assigns covenant with E. F. (purchaser), his heirs and assigns, that he, the said A.B., hath not executed or done or knowingly suffered or been party or privy to anything whereby he is in any wise prevented or hindered from making such sale as herein-before mentioned to the use and in manner aforesaid" (u).

Covenant running with the land.—Para 3 enacts that the covenant for title implied in rule 55 (2) shall not only attach to his interest in the land but shall also be transferable as such on a transfer of the land so as to entitle the transferee, in whom the interest in the property is wholly or in part from time to time vested, to the benefit thereof. In other words, the implied covenant for title runs with the land. Every subsequent transferee, subject to the law of limitation, is thus entitled to enforce this contract against his immediate transferor (v).

Clause (3) : Delivery to Buyer of Title-deeds.

Also.—The use of this word is not clear. It imports delivery of something else besides title-deeds which is not readily discernible.

Title-deeds.—Title-deeds follow and are incident to the estate in the hands of the owner. *Prima facie* a person in possession of the estate under a title, that gives

(q) *Subbaroya v. Rajagopala* (1914) 38 Mad. 887; *Narsing Shivabakas v. Pachu Rambakas* (1913) 37 Bom. 538; *Ram Chandar v. Tohfah Bharti* (1904) 26 All. 519; *Jascurm v. Prithichand* (1918) 46 Cal. 670; *Bapu v. Kashiram* (1929) 31 Bom. L. R. 658.
(r) *Injad Ali v. Mohini* (1923) 27 C. W. N. 1926; *Arunachala v. Ramasami* (1915) 38 Mad. 1171; *Ruttonbai v. Ghasiram* (1931) 55 Bom. 565; *Ganapa v. Hammad* (1925) 49 Bom. 596; *Srinivasa v. Rengasami* (1908) 31 Mad. 452; *Multanmal v. Budhumal* (1921) 45 Bom. 955; *Mangladha v. Ganda Mal*, A. I. R. (1929) Lah. 388; *Abdul Aziz v. Mahomed Baksh*, A. I. R. (1921) Lah. 260; *Hanwant Rai v. Chandi Prasad* (1929) 51 All. 651; *Mul Kunwar v. Chattar Singh* (1908) 30 All. 402; *Nabin*

Chandra v. Munshi Mander (1927) 6 Pat. 606; *Sigamani Siddiq v. Muhammad Nuh* (1930) 52 All. 604; *Mt. Lakhpal Kuer v. Durga Prasad* (1929) 8 Pat. 432.
(s) *Tricomdas v. Gopinath* (1916) 44 Cal. 759, 44 I. A. 65.
(t) *Multanmal v. Budhumal* (1920) 45 Bom. 955; *Hanwant Rai v. Chandi Prasad* (1929) 51 All. 651; *Ganapa v. Hammad* (1925) 49 Bom. 596.
(u) Davidson's *Precedents in Conveyancing*, Vol. 2, Part 1, page 193.
(v) *Sheik Abdul v. Kisan* (1931) 27 Nag. 392; *Bapu v. Kashiram* (1929) 31 Bom. L. R. 658; *Hanwant Rai v. Chandi Prasad* (1929) 51 All. 651; *Ramayya v. Kotayya* (1930) M. W. N. 1195.

S. 55 a freehold interest at the least, has a right to the custody of them (*w*). It is the duty of the purchaser to tender a conveyance and he would then be entitled to the title-deeds, but not before (*x*). A purchaser cannot demand title-deeds collateral to the title which deeds he has inspected and of which he has been furnished attested copies (*y*). When the contract for sale provides for their delivery, the purchaser is entitled to such of them as under the general law should be handed over on execution of the sale, excluding mortgages and wills, which a vendor is not bound to hand over (*z*). In the absence of a contract to the contrary, the seller impliedly covenants to deliver to the buyer such title-deeds as are in his possession or power, and which relate to the property, on payment by the buyer of the whole of the purchase-money. It follows that where the whole or a part of the purchase-money remains unpaid, the seller has a right to retain them (*a*). A purchaser is not bound to complete his purchase without title-deeds unless he has a legal covenant to produce them. A covenant to produce the title-deeds runs with the land for the benefit of purchaser but not for the benefit of vendor. And where the vendor had not custody of the original deeds, the title was held not marketable (*b*). As between mortgagor and mortgagee, prior to the introduction of section 60B by Act 20 of 1929, the latter could not be compelled to produce the deeds or give inspection. A mortgagor whose claim has not been satisfied *in toto* cannot be compelled to deliver the mortgage deed to the purchaser, though the contrary has been held in England (*c*). A purchaser under a decree of the Court was held entitled to the village account books, counterpart leases such as *kabuliyats* and title-deeds as accessory to the estate. This was before the Act was applied to the Bombay Presidency (*d*). Between lessor and lessee, the former is entitled to the custody of the original and the latter is entitled to the duplicate or counterpart, as the liability to stamp the former is on the lessee and the counterpart on the lessor (*e*). In an open contract, expenses of obtaining title-deeds required by the purchaser to be handed over on completion, must be borne by the vendor although such title-deeds are not in his possession and are not referred to in the abstract. Sub-section 6 of section 3 of the Conveyancing and Law of Property Act, 1881, does not affect the ordinary rights of a purchaser to have the title-deeds handed over to him on completion and the mere fact that obtaining the deeds for this purpose may cause the vendor trouble and expense, is no answer to the purchaser's demand (*f*).

Proviso.—The proviso has been inserted to meet the case of an estate when sold in lots. On a sale in lots a part of the property may be retained by the seller or different lots may go to different purchasers. Being accessory to the estate to which they relate (*g*), the Legislature has given the seller the right to retain them all, when a part of the property comprised in such documents is retained by him. But the seller impliedly covenants, upon every reasonable request of the buyer and at the cost of the person making such request, to produce the documents and furnish such true copies thereof or extracts therefrom as he may require. In case the whole property is sold to different buyers, the rule is that the purchaser of the more valuable portion is entitled to the documents and he impliedly covenants,

(*w*) *Strode v. Blackburne* (1796) 3 Ves. 222, 30 E. R. 979.

(*x*) *Ma Huit v. Maung Po Pu* (1919) 31 C. L. J. 87 P. C.

(*y*) *Offen v. Harman* (1859) 1 L. T. 315, 45 E. R. 355.

(*z*) *Haji Mahomed Mitha v. Musaji Esaji* (1891) 15 Bom. 657.

(*a*) *Velayutha Chetti v. Govindaswami Naiken* (1907) 30 Mad. 524.

(*b*) *Barclay v. Raine* (1823) 1 Sim. & St. 449, 57 E. R. 179.

(*c*) *In re Williams and Duchess of Newcastle's Contract* (1897) 2 Ch. 144.

(*d*) *Shri Bhavani v. Devrao* (1887) 11 Bom. 485.

(*e*) Sec. 29, Indian Stamp Act, 1899.

(*f*) *In re Duthy and Jesson's Contract* (1898) 1 Ch. 419.

(*g*) *Shri Bhawani Devi v. Devrao* (1887) 11 Bom. 485.

upon every reasonable request by the buyer or buyers of the other lot or lots and at the cost of the person making such request, to produce those documents for inspection and furnish such true copies thereof or extracts therefrom as may be required. In both cases, however, viz., the seller in the first instance, and the buyer of the more valuable portion in the second instance, impliedly covenant that they shall keep the documents safe, uncanceled or unobliterated unless prevented from so doing by fire or other inevitable accident. It is usual, however, in such cases under the conveyancing practice to make the seller or the buyer, as the case may be, enter into an express covenant as above mentioned and to specify a list of the title-deeds to which the covenant relates, in a schedule. Where there were certain title-deeds common to two estates and held by third parties with no title to the properties, and one of the estates had been sold and an acknowledgment of the right to production, etc., given to the purchaser by each of the third parties, on a sale of the other estate by open contract, it was held that the purchaser could not insist that all the title-deeds should be handed over on completion, but that the equitable right to production of the deeds was adequate under the circumstances (*h*). The Act, however, is silent as to whether the implied covenant in this proviso is limited to the party retaining the title-deeds or extends to a purchaser from him. It is, however, presumed that the purchaser from such a party would be entitled to the deeds, but he would have to enter into a similar express covenant.

Covenant to produce deeds.—When deeds are retained by the vendor, he enters into a covenant with the purchaser to produce them whenever required and to furnish copies and give inspection thereof at the purchaser's expense. The covenant may be included in the conveyance and the documents referred to therein. The better course is to set out the arrangement by a separate deed. A covenant of this nature should usually be avoided, for after a lapse of years, it becomes difficult to trace the hand in which they are and the vendor is subject to the purchaser's requisitions which he may not be able to satisfy or may be able to do so at some expense. The documents usually mentioned are those of which the purchaser cannot require attested copies at the vendor's expense. It must be noted that beyond giving information, attested copies are valueless. Documents of record are not covenanted to be produced, for although they form a link in the title, the vendors do not admit the purchaser's right to production or to be handed over copies thereof whether attested or certified. The purchaser who enters into a covenant as above, must also obtain a similar covenant from his purchaser when he sells the property in his turn. The cost of production must be tendered but the right to production must not be made use of to give inspection to a third party, to the covenantor's detriment, which would be a fraud on the covenantor. The covenantor's liability to produce is qualified by the words, "unless prevented by fire or other inevitable accident." In the absence of a stipulation the purchaser is entitled to be furnished with attested copies of documents not handed over to him at vendor's expense. Where the vendor retains any part of the estate to which any documents of title relate, provisions of section 55, clause (3) apply. No covenant for production can be asked for from persons such as trustees and mortgagees. A vendor who covenants for production cannot retain control of the deeds on the ground of his covenant but he must hand them over to the purchaser who must undertake to perform the obligations of his vendor (*i*).

(*h*) *Re. Jenkins and Commercial Electric Theatre Co.'s Contract* (1917) 61 Sol. Jo. 283; *Wright v. Robotham* (1886) 33 Ch. D. 106.

(*i*) Davidson's Precedent in Conveyancing, 4th Ed., Vol. 2, Part. 1, p. 664.

S. 55

Meaning of largest lot.—The section enacts that when the whole property is sold in lots to different buyers, the one who is entitled to retain the deeds is the purchaser of “the lot of greatest value.” Where, however, by the conditions of sale the title-deeds are to be delivered to “the purchaser of the largest lot,” largest means largest in superficial area (*j*). Similarly, where A purchased the largest lot in value and extent but B purchased several lots, whose aggregate value and extent exceeded those of A’s lot, it was held that A was entitled to the custody of the deeds (*k*).

Successive sales.—In the case of successive sales, the last purchaser is entitled to the title-deeds (*l*).

Costs.—A purchaser who cannot have the title-deeds must, if he requires true copies or extracts from documents, pay the costs thereof under the proviso to this sub-section. The cost of covenants to produce title-deeds which cannot be delivered up, fall by the practice of conveyances, on vendors; yet where by the conditions of sale of property in lots, under an order of the Court, provision was made for the largest purchaser to have the title-deeds and to covenant to produce or give copies thereof to buyers of smaller lots without reference to the manner in which costs were to be paid, each purchaser and not the estate, was ordered to bear his own costs of such covenant (*m*).

Loss of title-deeds.—In England an action lies of trover for title-deeds, where the jury may give the full value of the estate to which they belong by way of damages although they are generally reduced to 40s. on the deeds being given up (*n*). Usually the action is for injury or damage for loss or destruction under circumstances of fraud or gross neglect.

Clause (4), Sub-clause (a) : Vendor’s Rights to Rents and Profits.

Profits.—This word denotes advantages which the soil yields in the shape of rents and as arising from the land such as crops, grass, trees, fruits on trees, herbage, etc. They are emoluments which issue or are earned from the land (*o*). The seller is entitled to such only as are ready to be cut and stored or consumed. Waste will not be permitted. The seller’s right to profits determines on the conveyance being executed, when the ownership of the property passes to the buyer. The word “profits” in the fourth clause of section 13 of Regulation VIII of 1819, means that which remains to the patnidar after payment of the rent of the *patni* (*p*).

Ownership of the property.—These words frequently occur in this and the clauses which follow. Ownership is said to pass to the buyer when the sale takes place as laid down in section 54. In *Pandurang Balaji v. Mahadev Gopal* (*q*), it was observed by Shah, J., that ownership does not pass to the buyer under the Transfer of Property Act until a registered conveyance is executed by the vendor.

Apportionment of rent and outgoings.—On a contract for sale it is usual to provide that the rents and outgoings shall be apportioned between the vendor and the purchaser on the date the conveyance is executed and the purchase-money is paid, so that on the date of execution, the parties change their characters and the ownership of the property passes to the buyer, who from that date becomes entitled to the rents and profits and is liable for the outgoings and other taxes, assessments,

(*j*) *Griffiths v. Hatchard* (1854) 23 L. J. Ch. 957, 69 E. R. 350.

(*k*) *Scott v. Jackman* (1855) 21 Beav. 110, 52 E. R. 800.

(*l*) *Re. Lowe, Capel v. Lowe* (1901) 36 L. J. Ch. 73.

(*m*) *Stronge v. Hawkes* (1856) 2 Jur. N. S. 388.

(*n*) *Loosemore v. Radford* (1842) 9 M. & W. 657, 152 E. R. 277.

(*o*) *Errington v. Morewood* (1885) 29 So. Jo. 320.

(*p*) *Lala Bharuch Chandra v. Lalit Mohun Singh* (1885) 12 Cal. 185.

(*q*) (1922) 46 Bom. 195.

ground rent, etc., if any. Therefore, when a sale takes place on a particular day of the month, the usual practice is for the purchaser to pay the rents which have accrued due for the number of days of that month to the vendor and obtain from the vendor a letter in the form of an order to the tenants to pay rents to the purchaser as from the first of that month. If, however, the parties cannot come to an arrangement of this nature, the rents and profits must be apportioned. For the purpose of apportionment according to the Apportionment Act, 1870 (r), on which is based section 36 of the Transfer of Property Act, the rents and profits and other periodical payments in the nature of income shall, as between transferor and transferee, be deemed to accrue due from day to day and to be apportionable accordingly, but payable on the days appointed for the payment thereof. Insurance is not an outgoing and the purchaser is not bound to accept an assignment of a policy issued to the vendor for the residue of the period. It is an ordinary rule between the vendor and purchaser after a time fixed for completion that vendor is entitled to interest and the purchaser to rents and profits (s). But the law of India as set out in section 55 (4) (a) is different. The purchaser, however, may, if the vendor delays and the purchase-money is lying idle, give notice and claim interest. Where a purchaser takes possession and afterwards the contract is determined for want of title, the vendor cannot on these grounds alone recover for use and occupation (t). But the purchaser is liable for the period during which he continues in possession after the contract was off (u).

Clause (4), Sub-clause (b): Statutory Charge of the Vendor.

Amendments.—Sub-clause (b) in clause (4) has been amended by Act 20 of 1929, by the addition of the words “any transferee without consideration or any transferee with notice of the non-payment,” in order to prevent a purchaser defeating the vendor’s charges by parting with the property. The clause being silent as to the date from which interest on the unpaid purchase-money should run, a further amendment has been made by adding the words “from the date on which possession has been delivered.”

Lien.—Though English cases might be useful for the purposes of illustration, the charge under this clause is different in its origin and nature from the vendor’s lien in English Law (v).

Lien when the Act does not apply.—The vendor has a lien for unpaid purchase-money even where the Act does not apply. When he has given possession, it is not open to him to rescind the sale and recover possession, but he can claim a lien for unpaid purchase-money (w).

Non-payment of purchase-money.—Non-payment of the price does not prevent the passing of ownership of the property from the vendor to the purchaser and the latter can, notwithstanding such non-payment, maintain a suit for possession of the property (x).

Charge.—As distinguished from a lien which the English Law gives to a vendor of property, the Transfer of Property Act entitles the seller to a charge as defined

(r) 33 and 34 Vic., Ch. 35, sec. 2.

(s) *Leggott v. The Metropolitan Railway Co.* (1870) 5 Ch. App. 716.

(t) *Winterbottom v. Ingham* (1845) 7 Q. B. 611.

(u) *Howard v. Shaw* (1841) 10 L. J. Ex. 334, 151 E. R. 973.

(v) *Webb v. Macpherson* (1904) 31 Cal. 57, 30 I. A. 238; *Baslingam v. Chinnana* (1932) 56 Bom. 556.

(w) *Virchand v. Kumaji* (1894) 18 Bom. 48;

Umedmal Motiram v. Davu (1878) 2 Bom. 547; *Trimalrav v. Municipal Commissioner* (1879) 3 Bom. 172; *Hari Ram v. Denaput Singh* (1883) 9 Cal. 167; *Moidin v. Avaran* (1888) 11 Mad. 263.

(x) *Sagaji v. Namdev* (1899) 23 Bom. 525; *Umedmal v. Dva bin Dhondiba* (1878) 2 Bom. 547; *Shib Lal v. Bhagwan Das* (1889) 11 All. 244; *Baijnath Singh v. Paltu* (1908) 30 All. 125.

S. 55 in section 100, in the event of the purchase-money or any part thereof remaining unpaid and also for interest on such purchase-money or part thereof. In order that a charge should attach, two ingredients are essential: (1) Ownership of the property must have passed to the buyer and (2) possession must have been delivered. The charge attaches to the property in the hands (a) of the buyer, (b) any transferee without consideration, or (c) any transferee with notice of non-payment. Hence payment of purchase-money or part thereof is not necessary to pass ownership. It enures in favour of the unpaid vendor's assignee (y). A charge is not enforceable against a subsequent transferee for value without notice (z). The charge under section 55 (4) (b) is by operation of law and the charge under section 100 is created by act of parties—otherwise there is no difference between the two.

Nature of charge of unpaid vendor.—It is said that the charge of an unpaid vendor is not possessory. In other words, he has no right to retain possession because the purchase-money or part thereof remains unpaid (a). In England also the vendor's lien for unpaid purchase-money is non-possessory. There is no provision in the Transfer of Property Act for a vendor's lien. The clause gives a charge where the ownership of the property has passed to the buyer. Nothing is said about possession in connection with the creation of the charge. The ownership of the property passes upon a registered instrument being executed by the vendor, but it does not follow that a purchaser can sue for possession without payment of consideration (b).

Extent of vendor's charge.—The statutory charge recognized by this clause is upon the property in the hands of the buyer or any transferee without consideration or any transferee with notice of the non-payment of the amount of the purchase-money or any part thereof remaining unpaid and for interest on such amount or part from the date when possession has been delivered (c).

Change embodied in purchaser's suit.—Under section 55 (1) (f) the purchaser is entitled to possession while this sub-section gives the vendor a statutory charge for unpaid purchase-money. These two rights are not interdependent. To hold that in a purchaser's suit for possession, when the purchase-money is unpaid, the Court should pass a decree conditional on his paying the balance of the purchase-money, would be to enforce equities modifying the provisions of the statute (d) which is not open to the Courts in this country, where the law knows nothing of the distinction between legal and equitable property in the sense that distinction is known and understood by the Courts of Chancery in England (e); nor can it decree payment of the price, according to the Madras High Court, to the vendor in the purchaser's suit for possession (f). Both on the ground of convenience and on equitable considerations, the other Courts have adopted the opposite view and recognized the rights of the parties in one decree (g).

(y) *Dalchand v. Ganpat*, A. I. R. (1927) Nag. L. R. 332.

(z) *Guru Dayal Singh v. Karan Singh* (1916) 38 All. 254.

(a) *Velayutha Chetty v. Govindswami Naiken* (1907) 30 Mad. 524; *Hari Prasad v. Harihar Prasad*, A. I. R. (1923) Pat. 205.

(b) *Umedmal v. Davu bin Dhondiba* (1878) 2 Bom. 547; *Tatia v. Babji* (1898) 22 Bom. 176; *Sagaji v. Namdev* (1899) 23 Bom. 525; *Shib Lal v. Bhagwan Das* (1889) 11 All. 244; *Ikkal Begum v. Govind Prasad* (1881) 3 All. 77; *Achodbandil v. Mahabir* (1886) 8 All. 641; *Ram Lakhan v. Bandan* (1880) 2 All. 711; *Subramania Ayyar v. Poovan* (1904) 27 Mad. 28; *Balkrishna v. Shripatsingh*

(1910) 6 Nag. L. R. 98.

(c) *Basalingawa v. Chinnava* (1932) 56 Bom. 556; *Mackrell v. Symmons* (1808) 15 Ves. 329, 33 E. R. 778.

(d) *Krishnamma v. Mali* (1920) 43 Mad. 712; *Velayutha Chetty v. Govindaswami Naiken* (1911) 34 Mad. 543; *Baij Nath Singh v. Pallu* (1898) 20 All. 125 not followed.

(e) *Webb v. Macpherson* (1903) 31 Cal. 57, 30 I. A. 238.

(f) *Krishnamma v. Mali* (1920) 43 Mad. 712.

(g) *Shib Lal v. Bhagwandas* (1888) 11 All. 244, 251; *Baijnath Singh v. Pallu* (1908) 30 All. 125; *Nilmadhab Parhi v. Hara Proshad* (1913) 17 C. W. N. 1161; *Basalingawa v. Chinnava* (1932) 56 Bom. 556.

Title-deeds.—Though the charge does not entitle the vendor to resume possession, it gives him the right to retain the title-deeds (*h*). Though not necessary to retain the title-deeds when the purchase-money has not been paid, it would be unwise to part with them till satisfaction. His liability to deliver them only arises when the whole of the purchase-money is paid (*i*). In English Law, the vendor has no lien upon the title-deeds for the remainder of the purchase-money unless the conveyance is executed as an escrow (*j*).

Conditional decree for possession.—In a suit by a purchaser to recover possession, it is not competent to the Court to pass a decree conditional on the payment of the purchase-money (*k*).

How charge effected by receipt of consideration.—A vendor was estopped under section 115 of the Evidence Act from relying upon facts necessary for the establishment of the charge, where consideration was by her acknowledged both in the body and at the foot of the instrument and title-deeds had been delivered to the purchaser (*l*). Where estoppel is not pleaded or proved, it is settled law that notwithstanding an admission in a sale deed that the consideration has been received, it is no infringement of section 92 of the Evidence Act to accept proof of an alleged contemporaneous oral agreement, separately entered into between the vendor and purchaser to contradict the statement of fact in the written statement, that no consideration passed (*m*). The burden of proof would rest heavily on the vendor (*n*) to prove the true nature of the contract or that the consideration was something different to that alleged (*o*). Though the Privy Council has laid down in *Balkishen Das v. W. F. Legge* (*p*), that admissibility of evidence must be decided by the Indian Evidence Act, the principle in *Shah Makhanlal v. Sri Krishna* (*q*) appears to have been applied by Courts in British India in construing proviso (1) to section 92 and its application is supported by *Hanif-un-Nissa v. Faiz-un-Nissa* (*r*). An elaborate discussion of this principle will be found in the case of *Chunni Bibi v. Basanti Bibi* (*s*). This view has been doubted in *Lodd Govindoss v. Muthiah Chetty* (*t*). The above rule has no application when the question is not between parties to the instrument or their privies (*u*).

Contract to the contrary.—A lien is a creature of the Court of Equity and may in the circumstances of the case be modified by a Court of Equity; but not so a statutory charge under this clause (*v*). The charge operates in the absence of a contract to the contrary. A contract to the contrary is not to be inferred where the whole or part of the consideration is to be paid to a third party on behalf of the vendor (*w*). It would be lost when by implication it is not intended to be renewed (*x*), as when the whole or part of the price is promised. It has been pointed out by the

(*h*) *Nilmadhab Parhi v. Hara Proshad* (1913) 17 C. W. N. 1161; *Velayutha Chetty v. Govindasami Naiken* (1907) 30 Mad. 524.
 (*i*) See sec. 55 (3).
 (*j*) *Goode v. Burton* (1847) 1 Exch. 189, 154 E. R. 80.
 (*k*) *Basalingava v. Chinmava* (1932) 56 Bom. 556.
 (*l*) *Tehilram v. Kashibai* (1909) 33 Bom. 53.
 (*m*) *Irfanali v. Jogendrachandra Das* (1932) 60 Cal. 1111; *Sah Lal Chand v. Indarjit* (1900) 22 All. 370, 27 I. A. 93; *Meghraj v. Abdullah* (1914) 12 A. L. J. 1034.
 (*n*) *Bai Devmani v. Ravishankar* (1929) 53 Bom. 321.
 (*o*) *Kumara v. Srinivasa* (1887) 11 Mad. 213; *Vasudeva v. Narasamma* (1882) 5 Mad. 6; *Gopal Singh v. Lallo Lal* (1909) 10 C. L. J. 27; *Lala Himmat v. Lleuhellen* (1885) 11 Cal. 486, 15 C. W. N. 408; *Indarjit v. Lal Chand* (1895) 18 All. 168; *Hukumchand*

v. Hiralal (1876) 3 Bom. 159 (1907) 9 Bom. L. R. 393.
 (*p*) (1899) 22 All. 149, 27 I. A. 58.
 (*q*) (1869) 2 Beng. L. R. 44, 12 M. I. A. 157.
 (*r*) (1911) 33 All. 340, 38 I. A. 85.
 (*s*) (1914) 36 All. 537.
 (*t*) (1925) 48 M. L. J. 721.
 (*u*) *Pathammal v. Syed Kalai* (1904) 27 Mad. 330; *Bageshri Dayal v. Pancho* (1906) 28 All. 473; *Jagat Mohini v. Rakhal Das* (1905) 2 C. L. J. 338; *Sah Lal Chand v. Indarjit* (1900) 22 All. 370, 27 I. A. 93.
 (*v*) *Webb v. Macpherson* (1904) 31 Cal. 57 (72), 30 I. A. 238.
 (*w*) *Sivasubramania v. Subramania* (1916) 39 Mad. 997; *Abdulla v. Mammali* (1910) 33 Mad. 446 and *Sivasubramania v. Gnana Sambanda* (1911) 21 M. L. J. 359, overruled.
 (*x*) *Austen v. Halsey* (1801) 6 Ves. 475, 31 E. R. 1152.

- S. 55 Privy Council that it is not abandoned by a conveyance or sale in consideration of a covenant to pay a sum of money in the future, which is different from a sale in consideration of money which the purchaser covenants to pay and which is inconsistent with the existence of a charge (y). Again, there is a distinction between a sale where the consideration is intended to be paid and is not paid and where the consideration is not intended by both parties to be paid at all. In the former case, the title would pass to the purchaser, and in the latter case, though the vendor was tricked into going through the form of execution and registration of the document, the sale deed would be void as a colourable transaction (z). Such a charge is not excluded by a merely personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge (a). Acceptance of a separate bond from the purchaser to secure payment of instalments of the balance of purchase-money, is in no way inconsistent with the existence of a charge (b). Nor is it lost by a personal undertaking (c). It was held that the charge was not lost where money was left with the purchaser to discharge a mortgage on the property sold or comprising the property sold as well as others (d). Nor where part of the consideration was left for payment to the vendor's nominee (e) or to a third person (f), or for payment to a creditor (g). Where for the outstanding purchase-money a mortgage is accepted, the charge is displaced (h), unless the mortgage is not valid for want of formalities. The intention of the parties determines whether the execution of a promissory note by a purchaser, is in addition to or in substitution of the statutory charge, so that when a guardian took a promissory note for the purchase-money on behalf of a minor, it was held that the charge was not lost (i). The defendant sold certain mortgaged property to the plaintiff who retained Rs. 10,000 for payment to the mortgagees and executed a promissory-note for Rs. 9,776-14-0 for the purchase price, it being specifically agreed that if more than Rs. 10,000 were paid, that sum would be deducted from the amount of the promissory note. It was held that the promissory note was collateral security for the unpaid part of the purchase-money and the vendor had a lien for the amount secured by it (j). The charge was extinguished where at the request of the vendor, a promissory note for the purchase-money was given in favour of a third person (k). Also where each of two vendors took a promissory note from one of four purchasers for his share of the purchase-money (l). But not where the vendor obtained a promissory note from a third person at the instance of the vendee and the latter failed to pay (m). Nor where the vendor himself takes a promissory note and assigns it to a third

(y) *Webb v. Macpherson* (1904) 31 Cal. 57, 73, 30 I. A. 238.
 (z) *Baslingawa v. Chinnava* (1932) 56 Bom. 556, 565.
 (a) *Webb v. Macpherson* (1904) 31 Cal. 57, 72, 30 I. A. 238.
 (b) *Webb v. Macpherson* (1904) 31 Cal. 57-30 I. A. 238; *Bashir Ahmed Khan v. Nazir Ahmad Khan* (1921) 43 All. 544.
 (c) *Dalchand v. Ganpat*, A. I. R. (1927) Nag. L. R. 332.
 (d) *Naima Khatun v. Sardar Basant* (1934) 56 All. 766; *Rama Nand v. Sheo Das* (1920) 43 All. 314.
 (e) *Sheopati Singh v. Jagdeo Singh* (1930) 52 All. 761; *Raghukul Tilak v. Pitam Singh* (1930) 52 All. 901.
 (f) *Dorasinga v. Arunachalam* (1899) 23 Mad. 441; *Raghunatha v. Sadagopa* (1911) 36 Mad. 348; *Sivasubramania v. Subramania*

(1916) 39 Mad. 997; *Abdulla v. Mammali* (1910) 33 Mad. 446 and *Siva Subramaniam v. Gnanasamanda* (1911) 21 M. L. J. 359 overruled.
 (g) *Ram Rachhya v. Raghunath* (1929) 8 Pat. 860; *Ahmad Ali v. Raihan Raza*, A. I. R. (1934) All. 525; *S. Alwar Chetty v. K. Jagannatha Aiyar* (1928) 54 M. L. J. 109; *Meghraj v. Abdullah* (1914) 12 A. L. J. 1034.
 (h) *R. M. A. R. S. Chettyar Firm v. Daw Ngwe*, A. I. R. (1934) Rang. 190.
 (i) *Munayya v. Krishanayya*, A. I. R. (1925) Mad. 215.
 (j) *Dyal Das-Chanan v. Harkishan Singh* (1930) 11 Lah. 587.
 (k) *Swaminatha v. Subbarama* (1927) 50 Mad. 549.
 (l) *Krishnaswami v. Subramania* (1918) 35 M. L. J. 304.
 (m) *Karuppiiah Pillai v. T. R. Hari Row* (1911) 21 M. L. J. 849.

person. But where the promissory note is in the name of a third person it is extinguished though not delivered to the payee. Thus when the purchaser renders himself liable to a third party, the charge is defeated.

S. 55

Vendor's agent.—An unauthorized or improper payment to the vendor's agent does not extinguish the lien (*n*).

Premium under a lease.—The rule of the English Common Law laid down in *Shepherd v. Beetham* (*o*) is not law in India, as the matter is governed in this country by the Transfer of Property Act which provides for a charge under this section only in cases of sales under section 54. The rule, therefore, is not applicable to leases, so that a lessor is not entitled to a charge for the premium payable under a lease under the Transfer of Property Act (*p*).

Limitation.—Under this clause unpaid purchase-money is a charge on the property in possession of the purchaser and a suit for enforcement would be against the purchaser personally and the property sold. A suit against the property would be governed by article 132 of the Limitation Act, 1908 (*q*). It does not extend the time allowed otherwise under the Act, to claims to recover the money from the defaulter personally or from his other property (*r*). The limitation for the personal remedy under article 111 is three years (*s*) and for damages under a writing registered would be 6 years under article 116 from the date of actual injury (*t*), though the Allahabad High Court has held that actual damage is not necessary to support the suit (*u*). Where the conveyance was by the vendor to the purchaser's nominee at the latter's direction and to which he was not a party, the Privy Council applied article 116 of the Indian Limitation Act to a suit for the unpaid purchase-money (*v*). There the original purchaser was not a party to the deed and there was a novation, the nominee being substituted for him. The agreement provided for execution of the conveyance to the nominee but not that the original purchaser was to remain liable if the conveyance was to a nominee.

Injunction against purchaser.—A vendor having a lien for unpaid purchase-money can restrain a purchaser in possession from rendering his security insufficient (*w*).

Transfer of charge.—The charge under this clause is assignable or chargeable (*x*) and so is a vendor's lien in English Law (*y*).

Registration.—The charge under this section need not be in writing, but if reduced to writing, must be registered, but a transfer of a charge would necessarily be in writing and must be registered (*z*).

Co-purchasers.—Where the sale was to three persons, it was held that the vendor had a lien for the unpaid purchase-money against all and was not concerned with the proportion paid by the various co-sharers (*a*).

(*n*) *Wroul v. Dawes* (1858) 25 Beav. 369, 53 E. R. 678; *Wilson v. Keating* (1859) 28 L. J. Ch. 895, 54 E. R. 17.

(*o*) (1877) 6 Ch. D. 597.

(*p*) *Venkatachayulu v. Venkatasubba Rao* (1925) 48 Mad. 821.

(*q*) *Chunilal v. Bai Jethi* (1898) 22 Bom. 846; *Virchand v. Kumaji* (1894) 18 Bom. 48; *Ram Din v. Kalka* (1885) 7 All. 502, 12 L. A. 12; *Munir-un-Nissa v. Akbar Khan* (1908) 30 All. 172; *Har Lal v. Muhamdi* (1899) 21 All. 454; *Webb v. Macpherson* (1903) 31 Cal. 57, 30 L. A. 238; *Ramakrishna v. Subrahmanya* (1905) 29 Mad. 305; *Kallu v. Ram Das*, A. I. R. (1929) All. 121.

(*r*) *Gulzari Mal v. Maghi Mal* (1935) 14 Lah. 380.

(*s*) *Chunilal v. Bai Jethi* (1898) 22 Bom. 846; *Virchand v. Kumaji* (1894) 18 Bom. 48.

(*t*) *Gulzar Mal v. Maghi Mal* (1933) 14 Lah. 380.

(*u*) *Raghubar v. Jaij Raj* (1912) 34 All. 429.

(*v*) *Ram Raghubir v. United Refineries (Burma) Ltd.* (1933) 11 Rang. 186, 60 L. A. 183; *Tricumdas v. Gopinath* (1917) 44 Cal. 759, 45 L. A. 65.

(*w*) *Crockford v. Alexander* (1808) 15 Ves. 138, 33 E. R. 707.

(*x*) *Rajagopala v. Ranganatha*, A. I. R. (1934) Mad. 615; *Dalchand v. Ganpat*, A. I. R. (1927) Nag. 332.

(*y*) *Dryden v. Frost* (1838) 8 L. J. Ch. 235, 40 E. R. 1084.

(*z*) *Rajagopala v. Ranganatha*, A. I. R. (1934) Mad. 615; *Dayal Singh v. Indar Singh* (1926) 28 Bom. L. R. 1372, 53 L. A. 214.

(*a*) *Bhagh Mal v. Shiromani*, A. I. R. (1934) Lah. 348.

S. 55

Interest on such amount or part.—Interest is allowed to an unpaid vendor on the purchase-money remaining unpaid from the date of possession because it is not equity that the buyer should enjoy the rents and keep the vendor out of the purchase-money (b). The section does not state at what rate interest is to be computed. No interest can be claimed for delay occurring by the vendor's own wilful default, though the conditions of sale provide for payment of interest, if the balance of the purchase-money be not paid within a certain time "from any cause whatsoever." (c). The vendor's right to interest is not absolute and it is not payable in every case (d). When purchase-money was left with the purchaser to discharge a prior encumbrance which he failed to discharge until a mortgage suit was filed, he was liable for interest (e), unless such amount were insufficient (f). A purchaser is not exempt from payment of interest where delay has been occasioned by defect in the vendor's title not known to the latter at the date of the contract, particularly when the vendor has taken immediate steps to remedy the defect (g). In *Pandurang Balaji v. Mahadev Gopal* (h), interest at the rate of 5 per cent. was allowed on the unpaid purchase-money, though no registered conveyance was executed, merely on the ground that possession had been delivered. Here ownership had not passed to the buyer but interest was allowed in lieu of rents and profits to which he was, under the Transfer of Property Act, section 55 (4) (a), entitled in the absence of a contract to the contrary. An assignment of a one-eighth share in a mortgage decree, assuming it to be a sale of immovable property, does not pass ownership to the buyer to warrant the seller in claiming interest (i). Section 55 (4) (b), in giving vendor a charge for interest, gives that interest by way of damages. Here interest was awarded at 6 per cent. per annum and was held sufficient compensation (j).

Rate of interest.—The rate has varied according to circumstances (k).

Realisation of the charge.—The remedy of an unpaid vendor is to enforce his charge when he has parted with possession (l). The provisions of Order 34 of the Code of Civil Procedure, 1908, which apply to a simple mortgage, apply to a charge within the meaning of section 100 of this Act. The appropriate remedy is sale through the intervention of the Court (m). The lien of the unpaid vendor does not entitle his decree-holder to bring the property to sale in execution of his decree as the property of his debtor. He may attach the unpaid portion of the purchase-money and enforce the lien on the house for the said money but he cannot cause the house to be sold for the recovery of the unpaid purchase-money (n).

(b) *Muthia Chetty v. Sinna Velliam* (1912) 35 Mad. 625; *Dinkar Rao v. Ayub*, A. I. R. (1923) Nag. 37.

(c) *Subhadrabai v. Mahomedali* (1923) 25 Bom. L. R. 1931.

(d) *Muthia Chetty v. Sinna Velliam Chetty* (1912) 35 Mad. 625.

(e) *Kasi Vasi Chokkalinga v. Ramanadan*, A. I. R. (1926) Mad. 1031.

(f) *Siddiq Khan v. Nasir Ullah Khan* (1899) 21 All. 223, 26 I. A. 45.

(g) *Subhadrabai v. Mahomedali* (1923) 25 Bom. L. R. 1931; *Ratanlal Chunilal v. Municipal Commissioner* (1919) 43 Bom. 181, 45 I. A. 233; *Fludyer v. Cocker* (1806) 12 Ves. Jun. 25; *Birch v. Joy* (1852) 3 H. L. C. 565, 590; *Tomlinson v. Harding*, A. I. R. (1930) Lah. 131; *Suryaprakasa v. Venkata*, A. I. R. (1933) Mad. 844.

(h) (1922) 46 Bom. 195.

(i) *Lodd Govindoss v. Muthiah Chetty*, A. I. R.

(1925) Mad. 660.

(j) *Chogalal v. Malkarjunappa*, A. I. R. (1930) Nag. 32; *Lodd Govindoss v. Muthiah Chetty*, A. I. R. (1925) Mad. 660.

(k) *Dalchand v. Ganpat*, A. I. R. (1927) Nag. 332 (5 p. c.); *Ratanlal Chunilal v. Municipal Commissioner* (1919) 43 Bom. 181, 45 I. A. 233 (6 p. c.); *Pandurang Balaji v. Mahadev Gopal* (1922) 46 Bom. 195 (5 p. c.); *Chogalal v. Malkarjunappa*, A. I. R. (1930) Nag. 32 (6 p. c.).

(l) *Balkrishna v. Shripatsingh* (1910) 6 Nag. L. R. 98; *Govindamal v. Gopalachariar* (1906) 16 M. L. J. 524.

(m) *Dalchand v. Ganpat*, A. I. R. (1927) Nag. L. R. 332; *Raghukul Tilak v. Pitam Singh* (1930) 52 All. 901; *Munir-un-Nissa v. Akbar Khan* (1908) 30 All. 172.

(n) *Moti Lal v. Bhagwan Das* (1909) 31 All. 443; *Hari Ram v. Denaput Singh* (1882) 9 Cal. 167.

Personal remedy.—Where a vendor has obtained a decree for sale by enforcement of the vendor's lien, he is entitled to apply for a personal decree for the balance under O. 34, r. 6 of the Civil Procedure Code (o).

Exception to the rule in clause (4) (b).—An exception is made in section 55 (5) (b) which provides that in the event of the property being sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances existing on the property at the date of the sale and pay the amount so retained to the persons entitled. This being the buyer's right of retention under the statute, it would not entitle the seller under this clause to a charge on the property, nor would it entitle him to any interest on the unpaid purchase-money.

Clause 5, Sub-clause (a); Buyer's Duty to Disclose.

Buyer's duty to make disclosure.—Clause (a) of sub-section (5) of section 55 casts a duty on the buyer corresponding to that imposed on the seller by sub-section (1), clause (a), but the duty is very much limited. It is only confined to disclosures which relate (1) to the nature or extent of the seller's interest in the property, (2) of which the buyer is aware but of which he has reason to believe the seller is not aware, and (3) which materially increases the value of such interest. There is no fiduciary relationship between the vendor and the purchaser. Simple reticence does not amount to legal fraud; but a word or gesture, a nod or wink or shake of the head or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existent fact, might well influence the price of the subject to be sold, and would be sufficient ground to refuse specific performance of the agreement. So too any contrivance on the part of the purchaser better informed than the vendor as to the value of the subject-matter, to hurry the vendor into an agreement without giving him an opportunity of fully informing himself of its real value or time to deliberate and take advice respecting the conditions of the bargain (p). And if a man knows that he has committed a trespass on his neighbour's property and in order to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing, the exact state of the circumstances of the case (q). But where a first mortgagee, by verbal contract agreed to sell his interest to A, and a second mortgagee, the value of whose interest was thus increased, but which sale was unknown to him, offered to sell at an undervalue to B who knew of the sale to A, it was held that this concealment was no fraud upon the second mortgagee (r). Inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate with the vendor. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessarily or naturally or probably misleading. A man is presumed to intend the necessary or natural consequences of his own words and acts and the *evidentia rei* would, therefore, be sufficient without other proof of intention. If the vendor was not in fact misled, the contract could not be set aside; because a fraud which neither induced nor materially affected the contract is not enough (s).

(o) *Raghukul Tilak v. Pitam Singh* (1930) 52 All. 901.

(p) *Walters v. Morgan* (1861) 3 De. G. F. & J. 718, 45 E. R. 1056; *Turner v. Green* (1895) 2 Ch. 205; *Coaks v. Boswell* (1886) 11 A. C.

232; *Turner v. Harley* (1821) Jac. 169 37 E. R. 814.

(q) *Phillips v. Homfray* (1891) 6 Ch. App. 770.

(r) *Dolman v. Nokes* (1856) 27 L. T. O. S. 178.

(s) *Coaks v. Boswell* (1886) 11 App. Cas. 232.

S. 55

Clause (5), Sub-clause (b) : Buyer to Pay Purchase-money.

Payment of purchase-money.—This sub-section deals with the liabilities of the buyer in regard to the completion of the sale, such liability being the payment of the purchase price at the time and place of completing the sale. In practice the sale is usually completed at the office of the vendor's solicitors or the vendor's place of residence, as the case may be. The liability of the seller corresponding to this sub-section is enacted in section 55 (1) (d), such liability being to execute a proper conveyance on payment or tender of the amount due in respect of the price. Together these two sub-sections, 55 (1) (d) and 55 (1) (b), would be regulated by the provisions of the Contract Act relating to reciprocal promises as enacted under section 51 and the following sections. The buyer is not liable to pay the whole purchase price when property is encumbered and the sale is free from encumbrances. This sub-section though dealing with the buyer's personal liability includes therein the buyer's right to retain out of the purchase-money, when the property is sold free from encumbrances, the amount of such encumbrances on the property as exist at the date of the sale. Then again follows his liability to pay such amount so retained to the persons entitled thereto.

Personal remedy.—Apart from the charge as created by clause (4) (b) of this section, clause (5) (b) makes the purchaser personally liable for the unpaid purchase-money (t).

Sale freed from encumbrances.—Under this clause the buyer may retain out of the purchase-money the amount of encumbrances subsisting at the date of the sale and pay the same to the person entitled or he may compel his vendor who professes to sell unencumbered property to redeem the mortgage and obtain a reconveyance from the mortgagee (u). Where a purchaser has discharged a prior encumbrance for which the vendor was liable, he may set off the amount against a proportionate part of the unpaid balance or against the entire balance, if the amount be equal to or in excess thereof (v). Where the encumbrance exceeds the purchase-money, he may retain the purchase-money as security till the vendor provides the rest of the money to free the encumbrance. This not being a deposit, the purchaser is not liable for interest, unless he refuses or omits to pay the money when informed by the vendor that he is prepared to pay the balance necessary to pay to the mortgagee (w).

Clause (5), Sub-clause (c) : Buyer to Bear Loss from Destruction, etc.

Ownership has passed to the buyer.—Ownership passes when the conveyance is executed under section 55 (1) (d). Upon passing of ownership all losses, injuries, destruction or decrease in value are to be borne by the buyer. This is different from section 13 of the Specific Relief Act which makes the purchaser, as in English Law, the equitable owner on the contract being executed for the sale of the property. This is clear from illustration (a) to that section. Section 54 of the Transfer of Property Act, however, enacts that a contract for sale by itself creates no interest in immoveable property. Hence the provisions of section 13 of the Specific Relief Act would be inapplicable where this Act extends.

Loss or destruction.—The most important question which arises under this sub-section would be when the ownership of the property, not possession, has

(t) *Raghukul Singh* (1930) 52 All. 901.

(u) Sec. 18 (c), Specific Relief Act, 1877.

(v) *Munir-ud-Nissa v. Akbar Khan* (1908) 30 All.

172 (175).

(w) *Muhammad Siddiq v. Muhammad Nasir* (1899) 21 All. 223, 26 I. A. 45.

passed to the buyer, and the property is destroyed by fire and has not been insured. Whose duty, then, is it to insure the property, that of the seller or of the buyer? It is submitted that the duty is that of the purchaser, for although under English Law, the purchaser becomes the equitable owner as distinguished from Indian Law where he has no interest until the conveyance, still the English authorities establish that where a house is burnt down before the conveyance, the purchaser is bound, if he accepted the title, and the circumstance that the vendor suffered the insurance to expire on the day on which the contract was originally to have been completed, without notice, makes no difference (x). Similar questions would arise where leasehold property is sold and the lessee is under a covenant to insure and owing to his failure the property becomes forfeited to the lessor. By the mere fact of purchase, the purchaser does not acquire a right to the insurance moneys (y).

As to a purchaser's right under a policy of insurance, see notes on section 49.

Nothing is said as to who is to bear the loss if the property depreciates in value by destruction, injury or decrease in value before ownership has passed to the buyer. The case would be governed by sections 13, 14 and 15 of the Specific Relief Act, assuming that the seller is not in default.

Clause (5), Sub-clause (d) : Purchaser's Liabilities.

Generally.—This section imposes a liability on the buyer corresponding to that imposed on the seller in section 55 (1) (g). As soon as the ownership of the property has passed to the buyer, as between himself and the seller the former is bound to pay (1) all public charges, (2) rent which may become payable when the property is leasehold, (3) the principal moneys due on any encumbrances subject to which the property is sold, and (4) interest on encumbrances subject to which the property is sold afterwards accruing due. The liabilities do not arise until a registered instrument is executed. They are independent of possession. Where the equity of redemption is sold, the purchaser is liable to pay the amount of encumbrances together with interest which becomes due after the ownership has passed to him. The liability under this clause attaches as an incident of the transfer, and where adjustment of matters, which form part but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will adjust the same (z).

Interest on encumbrances.—The section casts an obligation on the purchaser to pay interest accruing due after the sale, so that the vendor is liable for interest in arrears at the date of the sale and this is so in the absence of a contract to the contrary under this clause. But interest being a charge on the mortgaged property, and under the contract perhaps liable to be capitalized, the mortgagee would be entitled to recover it from the property and the purchaser would to that extent be liable, unless he takes care to ascertain that there are no arrears and, if there be any, provides against the property becoming liable for it. The liability, therefore, under this clause is *inter se* the vendor and the purchaser, and a third party like the mortgagee, not being a party to their contract, would not be bound.

Encumbrances on sale.—According to section 55 (1) (g) the seller is liable to discharge all encumbrances on the property existing at the date of sale "except where the property is sold subject to encumbrances." According to section 55

(x) *Paine v. Meller* (1801) 6 Ves. 349, 31 E. R. 1088; *Rayner v. Preston* (1881) 18 Ch. D. 1.
(y) *Poole v. Adams* (1864) 33 L. J. Ch. 639;

Rayner v. Preston (1881) 18 Ch. D. 1.
(z) *Arunachella v. Rangiah* (1906) 29 Mad. 519.

S 55

(5) (b) the buyer is given a right to retain out of the purchase-money the amount of encumbrances on the property existing at the date of the sale, "where the property is sold free from encumbrances." According to section 55 (5) (d) the buyer is liable to pay "the principal moneys due on any encumbrances subject to which the property is sold and the interest thereon afterwards accruing due." Reading together sections 55 (1) (g) and 55 (1) (d), where there is no stipulation whatsoever as to what is to happen in case a previous encumbrance not contemplated by the parties is discovered, the vendor is liable to make good to the purchaser the amount which he has had to pay for saving the property at the sale held by the encumbrancer (a), unless the parties had stipulated for the express case in which the prior encumbrance might turn out to exist (b).

Sale of property subject to encumbrances.—On a sale of property subject to a mortgage, the payment of such mortgage under ordinary circumstances forms no part of the consideration for the purchase. The vendor sells and the purchaser buys an encumbered property. It is not essential to the validity of the sale that the mortgage should be paid off (c). A purchaser of the equity of redemption is entitled to establish that the contract of the mortgagee has been such that the Court should not assist him. Hence he can raise the question of the legality of the mortgage deed (d). Whether the price be settled by private treaty or by public auction together with an indemnity against encumbrances affecting the land, the vendor gets his price. The contract of indemnity may be express or implied. The purchaser takes the property subject to the burden attached. He may question the validity of the encumbrance. If the encumbrances turn out invalid, the vendor has nothing to complain of. The notion that after the completion of the purchase, the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of encumbrances has led to a diminution of the price, is without foundation (e).

Public charges and rent.—The purchaser is liable from the date the ownership of the property passes to him. In case of execution sale the purchaser is liable for Government revenue which became due between the date of sale and its confirmation (f). In a Madras case where the liability arose of a purchaser at a Court sale for rent, the contrary was decided (g). A purchaser is not liable for outgoings due to a municipal corporation, nevertheless they must be deducted out of the purchase-moneys (h). But a public body like the municipality cannot be compelled to apportion the tax between the buyer and seller and the former is liable for the whole assessment (i).

Minor purchaser.—There is no exemption from this statutory liability on the ground of the purchaser being a minor (j).

Clause (6), Sub-clause (a): Purchaser's Benefits on Completion.

Increase in value.—Under this clause, on the execution of a registered conveyance of immoveable property, the purchaser has a right (1) to the benefit

- (a) *Mt. Kaniz Fatma v. Imamuddin*, A. I. R. (1925) All. 704.
- (b) *Ram Chunder v. Bhagwati*, A. I. R. (1924) All. 937.
- (c) *Reference Board of Revenue* (1883) 10 Cal. 92.
- (d) *Achhutanand v. Ram Nath* (1913) 18 C. L. J. 354.
- (e) *Izzat-un-Nisa Begam v. Partab Singh* (1909) 31 All. 583, 36 I. A. 203; *Tweddel v. Tweddel* (1787) 2 Br. C. C. 151; *Butler v. Butler* (1800) 5 Ves. 534; *Waring v. Ward* (1802)

- 7 Ves. 332, 336.
- (f) *Bhyrub Chunder v. Sondamini Dabee* (1875) 2 Cal. 141.
- (g) *Ramasami Mudaliar v. Annadorai Ayyar* (1902) 25 Mad. 454.
- (h) *Bibhutibhushan v. Majibar Rahman* (1934) 61 Cal. 956.
- (i) *Municipal Council, Nellore v. Dwarapally* (1907) 30 Mad. 423.
- (j) *Gangai Ammal v. Govinda Padayachi*, A. I. R. (1924) Mad. 545.

of any improvement in, or (2) increase in value of the property, and (3) rents and profits thereof. This clause relates to the buyer's rights to improvements as section 55, sub-section (5) (c) relates to cases where the value has depreciated. Under this clause the buyer is entitled to accretions to the property from the date ownership has passed to him. The clause is silent as to accretions in the interval that lapses between the contract for sale and the passing of the ownership. It is submitted that they would enure for the benefit of the buyer.

Rents and profits.—The right of the seller to rents and profits as enacted by section 55 (4) (a) is clear, for until the sale takes place he is the rightful owner, but the buyer's rights given under this sub-clause are by no means clear. According to this clause, when the registered instrument has been executed and ownership has passed to the buyer he becomes entitled to the rents and profits and this would be so although no possession has been given to him and the possession still remains with the seller. Now under section 55 (4) (b) the vendor, although he is entitled to a charge for the unpaid purchase-money, is not entitled to interest until possession is delivered to the purchaser. If the two clauses are read together they amount to this: if once the sale has taken place and possession remains with the seller the buyer has the double advantage, viz., that he is entitled to the rents and profits under this clause and he is not liable to pay interest on the unpaid purchase-money, so that the seller is deprived both of his rents and profits under this clause and to interest under clause 55 (4) (b). Similarly, under clause 55 (4) (a) the rents and profits belong to the seller till the ownership passes to the buyer, in other words, the buyer is entitled to the rents and profits thereof though he may not have paid the purchase-money.

Buyer's title.—A party claiming a title to land by virtue of purchase cannot succeed until and unless he shews that he has actually purchased it, and the question whether his vendor had title will not help him (k).

Clause (6), Sub-clause (b): Purchaser's Charge.

Amendment.—This clause has been amended by Act 20 of 1929 whereby the words "with notice of the payment" have been omitted so that the buyer's lien is not confined to those having notice of payment of the purchase-money but extends to all persons whether with or without notice of his lien.

Generally.—Analogous to the charge of a vendor a purchaser is given a charge for purchase-money paid in advance against the interest of the vendor and those claiming under him. The clause presupposes that the purchaser is entitled to a return of the money claimed by him. It does not apply when the purchaser claims performance of his contract (l). A contract of sale accompanied by delivery of possession, that is, by part performance, does not give the purchaser a lien on the property. There are observations to the contrary in a Privy Council case (m). The fact that no lien is given by the Act in such a case, while a charge is expressly conferred by this clause, leads to the inference that the Legislature did not intend that delivery of possession should, like payment, create a lien (n).

The property to which the charge attaches.—The charge under clause 55 (6) (b) is against the extent of the seller's interest in the property so that if a property is mortgaged it would be against the equity of redemption. A lien is also given to

(k) *Bholanath Chattopadhyaya v. Mrityunjay Chattopadhyaya* (1934) 59 Cal. L. J. 532.
(l) *Balvanta v. Bira* (1899) 23 Bom. 56; *Mt. Kesar v. Mt. Munna* (1917) 13 Nag. L. R. 19.

(m) *Immudipattam Thirugana v. Periya Dorasami* (1902) 29 I. A. 196.
(n) *Kurri Veerareddi v. Kurri Bapireddi* (1906) 29 Mad. 336 F. B.

S. 55 a purchaser in certain events by section 18 (d) of the Specific Relief Act, I of 1877. It attaches when a purchase goes off by reason of some default on the part of the vendor, for any part of the purchase-money paid (o). So also when the contract is determined without any fault of the purchaser (p). So also on a transaction failing owing to vendor's unreasonable delay, the purchaser has a charge for earnest money and interest thereon (q). The charge does not attach where the seller has no personal interest in the property, nor does the Court in sanctioning a sale guarantee repayment of the money which a purchaser may have paid to a seller in case the bargain falls through (r). In a joint family governed by Mitakshara Law, a coparcener has no power to dispose of his undivided share without the consent of his coparceners. So when a nephew took by survivorship the undivided share of a deceased uncle he was entitled to recover that share from the purchaser to whom the uncle, had sold it without the consent of the coparceners and without necessity. Such a purchaser has no lien on the share for the return of his purchase-money. The nephew having taken by survivorship, was not liable for the debts and obligations of the uncle (s).

Nature of the charge.—Created as it is by operation of law, the rights and liabilities thereunder of the parties would be regulated by section 100 of the Transfer of Property Act. This statutory charge is in respect of the purchase-money properly paid by the purchaser in anticipation of delivery and for interest on such amount, but this right is lost if the purchaser improperly declines to accept delivery of the property, and when he has properly declined to accept delivery he is entitled also to a charge for earnest money paid by him and for costs, if any, awarded to him against a vendor, of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The section is sub-divided into two parts. In the first part interest is awarded, though no rate is mentioned, while in the second part no interest is allowed either on the earnest or costs. Interest on earnest is, however, allowed under section 18 (d) of the Specific Relief Act, I of 1877, though no rate is given. Again, distinction is made between purchase-money and earnest, as if earnest was not a part of the purchase-money. And in the second part, costs of certain actions are made a charge. Unlike the vendor's charge, which arises on the passing of the ownership of the property to the buyer, the time for delivery is the test in case of a purchaser's charge. In the first part the charge is lost by improperly refusing to accept delivery. In the second part the charge attaches on a proper refusal to accept delivery. If the purchaser declines to accept the offer whereby he is put to a loss, he cannot be regarded as acting improperly. For instance, under section 15 of the Specific Relief Act, a purchaser is entitled to specific performance of a large part of a contract when unperformed, provided he relinquishes all claim to further performance and all right to compensation for deficiency for loss or damage sustained by him through the default of the vendor. This section is enacted for the benefit of the purchaser and cannot operate to his detriment, so that his refusal under such circumstances would not deprive him of the statutory charge (t). In this case a charge was given for the deposit but refused in respect of damages claimed by the purchaser. Interest was awarded on the deposit at 6 per cent. per annum from the date of the deposit till date of payment.

(o) *Cornwall v. Henson* (1899) 2 Ch. 710.

(p) *Wythes v. Lee* (1855) 3 Drew. 396; *Whitbread & Co., Ltd. v. Watt* (1902) 1 Ch. 835.

(q) *Karsondas v. Gopaldas* (1923) 25 Bom. L. R. 1144.

(r) *Shailendranath v. Hade Kaza* (1932) 60 Cal.

586.

(s) *Madho Parshad v. Mehrban Singh* (1899) 18 Cal. 157, 17 I. A. 194.

(t) *Sultan Kani v. Mahomed Meera*, A. I. R. (1929) Mad. 189.

On a vendor and purchaser summons declaring that the vendor had not deduced a good title the Court has jurisdiction to order the vendor to pay the purchaser's costs of investigation of title and to charge them upon the vendor's interest in the property (u).

When does the charge come into existence.—The charge created by this clause does not come into existence at the date of the contract. The charge is not in respect of instalment paid, but also in respect of interest paid on the unpaid balance of the purchase-money. It is provided by the clause that a charge comes into existence as regards earnest money, and costs of a suit for specific performance, or for a decree for rescission, at the moment the purchaser properly declines to accept delivery; whilst as regards purchase-money paid in anticipation of delivery (v), the purchaser's lien begins from the moment part of the purchase-money is paid, and can only be lost by reason of his default (w). So also as regards interest on such money.

Extinction of the lien.—The purchaser, if he abandons the contract, is not entitled to a lien (x). It is also lost by a contract to the contrary. Acceptance of security is not a contract to the contrary. It is not extinguished, according to the Bombay High Court, by the sale being held invalid (y); the Madras High Court has expressed a contrary view (z). It is lost by lapse of time or when possession is taken from a mortgagee or when money is paid to a mortgagee, and there is a failure to complete on the part of the purchaser (a).

Nature of the deposit.—The earnest is given as a security for the performance of the contract. It serves two purposes. If the purchase is carried out it goes against purchase-money, but its primary object is that it is a guarantee for the completion of the contract. And where the agreement to purchase was "subject to a proper contract to be prepared by the vendor's solicitors" and a proper contract was prepared by the vendor's solicitor, but the purchaser refused to sign and claimed the return of the deposit, it was held that the agreement being only conditional did not constitute a firm contract and the purchaser was entitled to the return of the deposit (b). The deposit, although to be taken as part-payment of the purchase-money if the contract be completed, is also a guarantee for the performance of the contract and a purchaser failing to perform his contract within a reasonable time has no right to the return of the deposit (c). Upon a sale by auction the vendor determines who is to receive the deposit. The auctioneer is not a stakeholder of the purchaser. If he were stakeholder for both parties, either would have the right to propose to change the stakeholder and the party refusing took upon himself the risk (d). Where the deposit is paid to an auctioneer, he receives it as agent for both parties and cannot part with it without the sanction of both of them, so that the bankrupt's trustee is not entitled to recover the deposit from the defendant, so as to prevent it being forfeited to the vendor upon non-completion of the contract (e).

(u) *Re. Yeilding and Westbrook* (1886) 31 Ch. D. 344. *In re Higgins and Hiltman's Contract* (1882) 21 Ch. D. 95.

(v) *Rose v. Watson* (1864) 33 L. J. Ch. 385.

(w) *Balvanla v. Bira* (1889) 23 Bom. 56; *Masummat Kesar v. Masummat Munna* (1917) 13 Nag. L. R. 19.

(x) *Dinn v. Grant* (1852) 5 De. G. & Sm. 451, 64 E. R. 1194.

(y) *Lalchand v. Lakshman* (1904) 28 Bom. 466.

(z) *Muth Goundan v. Chellappa Goundan* 8

M. L. T. 464; *Kurri Veerareddi v. Kurri Bapireddi* (1906) 29 Mad. 336, F. B.

(a) *Adari Sanyasi v. Nookalamma* (1931) 54 Mad. 708.

(b) *Chillingworth v. Esche* (1924) 1 Ch. 97.

(c) *Howe v. Smith* (1884) 27 Ch. D. 89.

(d) *Fenton v. Browne* (1807) 14 Ves. 144, 33 E. R. 476.

(e) *Collins v. Stimson* (1883) 11 Q. B. D. 142; *Ellis v. Goulton* (1893) 1 Q. B. 350.

S. 55

Forfeiture of deposit.—The deposit paid by purchaser being in the nature of an earnest as well as part-payment of the purchase-money, a vendor obtaining rescission owing to purchaser's default, is entitled to the deposit in the absence of express stipulation to the contrary in the contract. The fact that the deposit is in the hands of a stake-holder cannot affect the rights of the parties (*f*). The acts on the part of the purchaser must amount to repudiation on his part of the contract (*g*). The vendor is entitled to retain the deposit when a contract of sale goes off by default of the purchaser. So where after the title was accepted, the purchaser became bankrupt, the trustee disclaimed the contract and demanded return of the deposit, it was held that the vendor was not liable to return (*h*). But when the vendor unsuccessfully denies the contract *in toto* and there is no repudiation of the contract by the purchaser, the deposit cannot be forfeited (*i*). It is, however, liable to be forfeited where a purchaser fails to perform his part (*j*) or to make out a case for rescission (*k*) or becomes bankrupt (*l*). A purchaser paid the deposit and accepted the title, but committed default for he was unable to provide the balance of the purchase-money. Upon this the vendor gave notice, rescinded the contract and forfeited the deposit. Three years afterwards another purchaser discovered that the title was bad. Upon this the first purchaser brought an action to recover the deposit on the ground of mutual mistake and failure of consideration. Held that the title having been accepted and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit (*m*). However, a purchaser who has admitted the title as good has no right to say that he will put an end to the agreement forfeiting the deposit (*n*). When a vendor has become entitled to retain the earnest money as forfeited under the terms of his contract, he must in a suit for damages for breach of contract give credit for the amount deposited and can only recover the difference between the actual loss and the forfeited amount (*o*).

An agreement to forfeit is not wanting in consideration, as the deposit is not made as part-payment but as security for the purpose of binding the bargain. Neither section 64 nor section 74 of the Indian Contract Act is applicable to such a deposit and a stipulation for its forfeiture in case of breach is not one by way of penalty. A stipulation to forfeit 10 per cent. of the consideration in case of breach, is neither unreasonable nor extraordinary (*p*). Instalments on account of the purchase-money following the deposit, are not liable to forfeiture in case of breach of contract by the buyer, as they do not stand on the same footing as the deposit (*q*).

Recovery of deposit.—The question as to the right of the purchaser to the return of the deposit money must in each case be a question of the conditions of the contract. The following are some of the instances which give him a right to the return of his deposit.

1. **Contract not binding.**—A purchaser was held entitled to recover back the deposit on his refusal to assent to a contract as containing unreasonable terms, and

- (*f*) *Hall v. Burnell* (1911) 2 Ch. 551; *Holford v. Trim* (1921) 65 So. Jo. 768; *Howe v. Smith* (1884) 27 Ch. D. 89; *Natesa Aiyar v. Appavu* (1915) 38 Mad. 178.
 (*g*) *Howe v. Smith* (1884) 27 Ch. D. 89.
 (*h*) *Howe v. Smith* (1884) 27 Ch. D. 89; *Bishan Chand v. Radha Kishan Das* (1897) 19 All. 489; *Natesa Iyer v. Appavu* (1910) 33 Mad. 375; *Workman, Clark v. Lloyd* (1908) 1 K. B. 968; *Harrison v. Holland* (1922) 91 L. J. K. B. 337.
 (*i*) *Alikeshi Dass v. Hare Chand Dass* (1897) 24 Cal. 897.

- (*j*) *Levy v. Stogdon* (1898) 1 Ch. 478.
 (*k*) *Beyfus v. Lodge* (1925) 1 Ch. 350.
 (*l*) *Depree v. Bedborough* (1862) 33 L. J. Ch. 134.
 (*m*) *Soper v. Arnold* (1889) 14 A. C. 429.
 (*n*) *Crutchley v. Jerningham* (1817) 2 Mer. 502, 35 E. R. 1032.
 (*o*) *The Vellore Taluk Board v. Gopalasami Naidu* (1915) 38 Mad. 801; *Ockenden v. Henley* (1858) 27 L. J. Q. B. 361.
 (*p*) *Natesa Aiyar v. Appavu* (1915) 38 Mad. 178.
 (*q*) *William Joseph Mayson v. A. G. Clovel*, 35 M. L. T. 205 (P. C.).

the vendor declared the bargain at an end and resold the property (r). But in a suit by a purchaser for specific performance with an alternative prayer for return of the deposit, the principal relief having been refused, the alternative prayer was also dismissed (s).

2. **Delay by the vendor.**—If there be no delay or default on the part of the purchaser, in the absence of a stipulation to the contrary, he is entitled to recover the deposit from the vendor (t). Where time is the essence of the contract for sale of land at law, and if owing to delay of the vendor, the conveyance is not completed before the specified date, the purchaser may recover back his deposit (u) with interest and costs (v).

3. **Title of vendor defective.**—So also a purchaser may abandon the purchase and demand back his earnest if the vendor has no title (w). The onus is on the purchaser (x), and in addition to deposit he may claim interest and costs of investigation of title when the title depends upon a doubtful question of fact or of law (y). If the purchaser is precluded from making objections to a part of the title which turns out to be defective, he is not entitled to the deposit. The plaintiff offered for sale by auction a leasehold house and defendant purchased it. One of the conditions provided that the purchaser should make no objection to the requisition as to title between date of an under-lease and the date of assignment of that under-lease, but should assume that the assignment vested in the assignee a good title for the residue of the term. The purchaser discovered that there was a vital defect in the intermediate title and refused to complete it. The vendor sued for specific performance and the purchaser counter-claimed for the return of the deposit. Both claims were dismissed (z).

4. **Power of sale defective.**—Where the vendor's power of sale is defective the purchaser is entitled to the return of his deposit. The purchaser objected to the title on the ground that the vendors, who were executors and trustees, had no power of sale, and after the time fixed for completion the vendors offered to obtain the concurrence of the beneficiaries and make a title in that way. Held, the purchaser could not, after the time for completion had passed, be compelled to take that which required investigation; and the vendor must repay the deposit with interest and the costs of investigating title (a). It was not clear there what the beneficiaries' interest was, nor what their position was, and there was no evidence that their concurrence had been obtained.

Misdescription.—See commentaries on section 55 (1) (a) under the same caption.

Misrepresentation.—See commentaries on section 55 (1) (a) under this caption.

Non-disclosure.—See commentaries on section 55 (1) (a) under this heading.

Vendor unable to perform his contract.—If a vendor be unable to fulfil the conditions of the contract the purchaser is entitled to the return of the deposit. Where on a sale of leasehold the vendor is unable to procure the lessor's consent pursuant to a covenant not to assign without licence, the purchaser is entitled to damages beyond return of the deposit with interest and costs for loss of his bargain

(r) *Mooser v. Wisker* (1871) 24 L. T. 134.

(s) *Kendall v. Beckett* (1830) 2 Russ. & M. 88, 39 E. R. 327.

(t) *Levy v. Stogdon* (1898) 1 Ch. 478.

(u) *Beamish v. Owens* (1846) 7 L. T. O. S. 187; *Patrick v. Milner* (1877) 46 L. J. Q. B. 537; *Jamshed v. Burjorji* (1916) 40 Bom. 289, 43 I. A. 26.

(v) *Karsandas v. Gopaldas* (1923) 25 Bom. L. R. 1144.

(w) *Roper v. Coombes* (1827) 6 B. & C. 534,

108 E. R. 548.

(x) *Camfield v. Gilbert* (1802) 4 Esp. 221, 170 E. R. 698.

(y) *Simmons v. Heseltine* (1858) 28 L. J. C. P. 129, 141 E. R. 224.

(z) *Scott & Alvarez's Contract, Scott v. Alvarez* (1895) 2 Ch. 603; *Beyfus v. Lodge* (1925) 1 Ch. 350.

(a) *Re. Head's Trustees and Macdonald* (1890) 45 Ch. D. 310.

S. 55 by reason of the vendor's omission to do his best to procure such licence (b). This was an action for specific performance against the legal representatives of the vendor who had died and the latter, in order to free the estate from the action, induced the lessor to refuse his sanction which the lessor did. If on a sale of leaseholds there be a covenant to repair, and before the sale part of the building has been pulled down, the purchaser is not bound to complete and may recover back his deposit although the building pulled down be not described in the particulars of sale (c). Similarly, where a contract is conditional on the lessor's consent to be obtained, and where the verbal consent originally given is withdrawn, the condition is unperformed so that the deposit has to be refunded (d).

Other cases.—Where a contract contained a provision that the vendor may rescind if the purchaser insisted upon any requisition which the vendor was unable or unwilling to comply with, and it was discovered that the vendor was negotiating with a third party for the sale of the property unknown to the purchaser and did not exercise his power of rescission promptly and in good faith, in a suit by the purchaser for the return of the deposit and the vendor's counter-claim for specific performance, it was held that the purchaser was entitled to be relieved from the contract and to repayment of the deposit (e). At an auction the plaintiff purchased property for £2,500, described in the particulars of sale as "immediate reversion in fee simple." Through deafness he could not hear the condition of sale distinctly. He afterwards discovered that he was to take the property subject to mortgages of £2,500. He was held entitled to rescind on the ground of common mistake and of misdescription in the particulars and to the return of his deposit with interest at 4% per annum and until payment to a lien for the amount on the vendor's interest in the property (f). The vendor having induced the purchaser to believe that he was selling not a revocable licence to occupy the land but the land itself, the purchaser became entitled to the return of the earnest money (g). The fact that the purchaser was not entitled to specific performance is not conclusive against his right to a return of the deposit. If he be justified in refusing the title offered, he is entitled to its return (h). A purchaser has a right to the return of his deposit under section 18 (d) of the Specific Relief Act where a vendor's suit for specific performance is dismissed on the ground of imperfect title.

Both parties in default.—Where both parties are in default the purchaser is entitled to the return of his deposit (i).

No default of either party.—Where a contract goes off and cannot be completed for any reason not being misconduct on either side, the purchaser has a lien on his deposit (j). In an action for the return of purchase-money paid by way of deposit and in instalments, it was held that the purchaser, although in default, was entitled to recover the instalments when the rights of the parties depended on their contract which distinguished between deposit and instalments and provided for the forfeiture of the former only (k).

(b) *Day v. Singleton* (1899) 2 Ch. 320.
 (c) *Granger v. Worms* (1814) 4 Camp 83, 171 E. R. 27.
 (d) *Wright v. Newton* (1835) 1 Gale 67, 150 E. R. 53.
 (e) *Smith v. Wallace* (1895) 1 Ch. 385.
 (f) *Torrance v. Bolton* (1872) 41 L. J. Ch. 643.
 (g) *Ebrahimhai v. Fletcher* (1897) 21 Bom. 827.
 (h) *Ebrahimhai v. Fletcher* (1897) 21 Bom. 827; *Alokeshi Dassi v. Hara Chand Dass* (1897) 24 Cal. 897; *Amma Bibi v. Udil Narain*

Misra (1909) 31 All. 68 P. C.; *Howe v. Smith* (1884) 27 Ch. D. 89; *Parangodan Nair v. Perumtodka* (1904) 27 Mad. 380.
 (i) *Heitzmann v. Goveblock* (1891) 7 T. L. R. 611; *Clerke v. King* (1826) 2 C. & P. 286, 172 E. R. 128.
 (j) *Wythes v. Lee* (1855) 25 L. J. Ch. 177, 61 E. R. 954; *Whitebread & Co., Ltd. v. Watt* (1902) 1 Ch. 835.
 (k) *Mayson v. Clouet* (1924) A. C. 980.

Lunatic purchaser.—A lunatic purchaser is not entitled to the return of his deposit when the vendor acts fairly and without knowledge of the lunacy (*l*).

Interest on deposit.—Interest on deposit is allowed when the vendor fails to make a good title or when the title is doubtful and cannot be enforced on the purchaser (*m*). It was also allowed where the vendor had a defective power of sale (*n*). Similarly, where the sale went off on the ground of misdescription by the vendor or non-disclosure of material fact or in case of sale of leaseholds, the vendor has been unable to procure a licence to assign (*o*), interest was allowed. There must be actual failure of the contract of sale.

Rate of interest.—Interest rate is not given but usually 6% is awarded (*p*). The English Courts have allowed 4%.

Properly.—This word means that the charge is given for the purchase-money paid as such and not for any other purpose.

'Nibandha.'—In consideration of services rendered or to be rendered by defendant to the plaintiff's predecessor in title, the latter executed two documents releasing defendant from assessment due on certain lands. The documents were neither stamped nor registered and the plaintiffs sued to recover the arrears of assessment from the defendant who pleaded exemption. It was held that the transaction was not a sale, but one of gift regarded in Hindu Law as *nibandha* and, therefore, immoveable property, and the deed not being registered, it could not operate even as a gift. Such being the legal aspect of the transaction, section 55, clause (6), sub-clause (b) which relates to a sale had no application (*q*).

Against whom enforceable.—A purchaser's charge is enforceable against the seller and those claiming under him to the extent of the seller's interest whether with or without notice.

How enforced.—The charge under this section is enforced in the same manner as a charge created under section 100 of this Act (*r*).

Balance recoverable.—Part of the purchase-money was left with the purchasers for payment to the vendors' creditors. They having failed, the vendors sued for enforcement of their statutory charge. It was held that the charge could be enforced in all respects as a simple mortgage and that when the net sale proceeds proved insufficient, the balance was legally recoverable under O. 34, r. 6 of the Civil Procedure Code, 1908, under article 116 of the Limitation Act and not article 111, which applied where the purchaser had not paid a portion of the purchase-money to the vendor, and not when he had broken the contract to pay to the creditor of the vendors (*s*). But the mortgagee has no right to avail himself of the undertaking given by the purchaser. He is not within the words of O. 34, r. 6 of the Code of Civil Procedure, a person from whom "the balance is legally recoverable" (*t*).

Sub-purchaser's lien—on deposit repaid to purchaser.—An estate represented to contain 1,530 acres was agreed to be sold for £250,000. The purchaser agreed

(l) *Beavan v. M'Donnell* (1854) 23 L. J. Ex. 94.

(m) *Simmons v. Heselline* (1854) 23 L. J. C. P. 129; *Kapadvanj Municipality v. Ochhalal* (1928) 30 Bom. L. R. 920.

(n) *Re. Bryant & Barningham's Contract* (1890) 59 L. J. Ch. 636; *Re. Head's Trustees & Macdonald* (1890) 45 Ch. D. 310.

(o) *Popledon v. Buchanan* (1858) 4 C. B. N. S. 20, 140 E. R. 986; *Re. Hare and O' More's Contract* (1901) 1 Ch. 93; *Western v. Savage* (1879) 10 Ch. D. 738; *Carlsh v. Salt* (1906) 1 Ch. 335; *Day v. Singleton* (1899) 2 Ch.

320.

(p) *Sultan Kani v. Mahomed Meera*, A. I. R. (1929) Mad. 189; *Ibrahimhai v. Fletcher* (1897) 21 Bom. 827.

(q) *Madhavrao v. Kashibai* (1910) 34 Bom. 287.

(r) *Mt. Kesar v. Mt. Munna* (1917) 13 Nag. L. R. 19.

(s) *Babu Ram v. Inam Ullah* (1935) 57 All. 797.

(t) *Jamna Das v. Ram Autar* (1912) 34 All. 63, 39 I. A. 7; *Nanku Prasad v. Kanta Prasad* (1922) 26 C. W. N. 771 P. C.

S. 55 to sell it to a company for £350,000 of which £150,000 was paid to him, £75,000 in cash and bonds for £75,000 and he paid his vendor £50,000 as a deposit. The estate contained less than 1,530 acres. The company rescinded the contract and the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit and rescinding the contract. The company filed a bill against the purchaser and some other defendants who had agreed to share with him, for a return of the £75,000 and the bonds: held, the company were entitled to repayment of what they had paid, and to a return of the bonds, and that they had a lien on a portion of the £50,000 repaid to the purchaser, which had been paid into Court (u).

Registration.—After the decision of the Privy Council that a charge under this clause required registration (v), an explanation was added to section 17 of the Indian Registration Act that a contract of sale did not require registration by reason only of the fact that it contained a recital of the payment of the earnest or the whole or part of the purchase-money. But where a lien has been specifically created by the contract, registration would be necessary (w).

Purchaser discharging an encumbrance.—A purchaser of property subject to a mortgage who does not complete the purchase and acquire title as owner of the property does not, by reason of his having paid off the mortgagee, become entitled to be subrogated to his rights (x). An application of the rule (y), in this clause, to a case where money borrowed by a vendor to pay off a purchaser at a Court sale, who had not entered into possession but had acquired proprietary rights to the entire property, for setting aside that sale, entitled the lender to be subrogated to the rights of the purchaser, and thus squeezed out an intermediate auction purchaser at a Court sale of the same property, is not easy to follow. The reference to section 55 (4) (b) is apparently an error for section 55 (6) (b).

Remedies of Vendor and Purchaser.

On a sale of land the vendor's remedies are as under :—

- (1) Specific performance.
- (2) Forfeiture of earnest money [see notes to section 55 (6) (b)].
- (3) Re-sale and sue purchaser for deficiency.
- (4) Rescission of the contract (Chapter IV, Specific Relief Act).
- (5) Damages.
- (6) Rectification (Chapter III, Specific Relief Act).
- (7) Cancellation (Chapter V, Specific Relief Act).

On a purchase of land the purchaser's remedies are as follows :—

- (1) Sue for specific performance with or without compensation.
- (2) Sue for return of his deposit with interest and costs [see notes to section 55 (6) (b)].
- (3) To repudiate or avoid the contract (section 19, Contract Act).
- (4) Rescind the contract (section 35, Specific Relief Act).
- (5) Damages.

(u) *Aberaman Ironworks v. Wickens* (1868) 4 Ch. App. 101; *Mycock v. Bealson* (1879) 13 Ch. D. 384.
(v) *Dayal Singh v. Indar Singh* (1926) 28 Bom. L. R. 1372, 53 I. A. 214.

(w) *Abdul Latif v. Debi Mahton* (1934) 13 Pat. 620.
(x) *Adari Sanyasi v. Nookalamma* (1931) 54 Mad. 708.
(y) *Sheo Dulare v. Jahannath, A. I. R.* (1932 Oudh 88.

(6) Rectification (Chapter III, Specific Relief Act).

(7) Cancellation (Chapter V, Specific Relief Act).

Reference may be made to Specific Relief Act, sections 14 to 35 and sections of the Contract Act, 18, 19, 64, 65, 66 and 75.

The English Law is somewhat different and is to be applied with caution in India.

On a sale of land the vendor's remedies are as under :—

(1) **Specific performance.**—Sections 12 to 20, Specific Relief Act, constitute a complete code within the terms of which relief of that character must be brought. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the section must ultimately prevail.

Bar of specific performance of part of the contract.—Section 17 of the Specific Relief Act, 1877, enacts that the Court shall not direct specific performance of part of the contract except in the three cases therein referred to. By a contract in writing two plots of land A and B were agreed to be sold. The price and other terms of the contract dealt with both plots together. The vendor having failed to make a title to plot B, the purchaser sued for specific performance or damages. The purchaser declined, under section 15, a conveyance of plot A only. Held, that specific performance could not be decreed as to plot A with an abatement of price in consequence of the failure to make a good title to plot B; section 16 was not applicable since it did not appear that the contract as to plot A stood "on a separate and independent footing," so as to be within the terms of that section (z).

(2) **Forfeiture of earnest money.**—See commentaries on section 55 (6) (b).

(3) **Resell and sue purchaser for deficiency.**—He is entitled to resell the property to re-imburse the loss caused to him by the breach of contract of sale, and he is bound under section 73 of the Contract Act to minimise the loss arising from the breach (a).

(4) **Rescission of the contract.**—See section 35, Specific Relief Act, also sections 19, 19A, 39, 53, 55, 64 and 65, Indian Contract Act. Also see commentaries on section 55 (1) (c) of this Act under the caption "vendor's rescission clause."

(5) **Damages.**—See section 73 of the Indian Contract Act and section 20, Specific Relief Act.

(6) **Rectification.**—See section 31 of the Specific Relief Act.

(7) **Cancellation.**—See section 39 of the Specific Relief Act.

On a purchase of land, the purchaser's remedies are as follows :—

(1) **Sue for specific performance with or without compensation.**—In a suit under section 27 (b) of the Specific Relief Act against a person claiming title from the vendor under a subsequent registered sale deed, the onus is upon the defendant

(z) *Graham v. Krishna Chunder* (1925) 52 Cal. 335, 52 I. A. 90.

(a) *Motilal v. Seth Jannadas* (1936) 31 Nag. L. R. 101; *Wigzell v. School for Indigent Blind* (1882) 8 Q. B. 357 (364); *Wall v.*

City of London Real Property Co. (1874) 9 Q. B. 249 (253); *Jamal v. Moola Dawood Sons & Co.* (1916) 43 Cal. 493 (502); *Noble v. Edwards* (1877) 5 Ch. D. 378 (388).

S. 55

to prove that he is a *bona fide* purchaser for value without notice of the earlier contract, so as to bring himself within the exception provided by the above section (b). Where he has paid only a small part of the consideration previous to notice, and pays the bulk of the consideration after notice, he cannot be said to have paid his money in good faith without notice so as to be entitled to the protection given by section 27 (b) of the Specific Relief Act (c). A decree for specific performance operates in favour of both parties. But a vendor cannot enforce the decree obtained by a purchaser as regards his own share only, against the will of the subsequent alienees from him with notice of the contract (d). In consideration of Rs. 5,000 advanced by the appellant to prosecute an appeal to the Privy Council, the respondent in writing agreed to sell a village for the sum advanced if he succeeded in the appeal. The appellant sued for specific performance when the appeal succeeded. The District Judge found that Rs. 20,000 would be adequate compensation. In the second appeal the sum was varied. Their Lordships held the findings of the District Judge were binding in the second appeal and that as he had found that pecuniary compensation would be an adequate relief no relief could be granted for specific performance. The sum awarded by him should be allowed as compensation with interest (e).

(2) Sue for return of his deposit with interest and costs.—See commentaries on section 55 (6) (b).

If a suit for specific performance is dismissed the purchaser can still maintain a suit for the return of his deposit (f).

(3) To repudiate or avoid the contract.—See section 19, Indian Contract Act.

The right of repudiation must be exercised by the purchaser no sooner he discovers the existence of a material defect known to but not disclosed by the vendor. If so exercised, it will be a bar to the vendor's relief by way of specific performance, even though the defect has been removed before trial. If, however, after ascertaining the existence of the defect, the purchaser still treats the contract as subsisting, but has not retained the right to repudiate at any subsequent moment he may choose, he must give the vendor reasonable time in which to cure the defect (g). The right of repudiation must be distinguished from the Common Law right of rescission, and arises out of that want of mutuality which unless waived is generally fatal to the relief by way of specific performance. If after ascertaining the defect, the purchaser still treats the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose, *Hoggart v. Scott* (h), *Eyston v. Simonds* (i). Waiver (on the ground of want of mutuality in the contract) must be an intentional act with knowledge (j). A purchaser is entitled to repudiate a contract to purchase an agreement for a lease voidable at the will of a third party (k).

(b) *Bhup Naraun v. Gokul Chand* (1934) 13 Pat. 242, 61 I. A. 115; *Himallal v. Vasudev* (1912) 36 Bom. 466; *Muhammad Sadik v. Masihan Bibi* (1929) 9 Pat. 417; *Baburam v. Madhab* (1913) 44 Cal. 565; *Tiruvengkatachariar v. Venkatachariar* (1914) 26 M. L. J. 218; *Naubat Rai v. Dharmkal Singh* (1916) 38 All. 184, approved; *Peerkha Lalkha v. Bapu Kashiba* (1923) 25 Bom. L. R. 375 disapproved; *Gauri Shankar v. Ram Sewak* (1935) 57 All. 346.

(c) *Gauri Shankar v. Ram Sewak* (1935) 57 All. 346.

(d) *Akshayalingam v. Avayambalammal* (1933) 56 Mad. 796.

(e) *Ramji v. Rao Kishoresingh* (1930) 57 Cal.

509, 56 I. A. 280.

(f) *Parangodan v. Perumtodka* (1903) 27 Mad. 380; *Munni Babu v. Kunwar Kamla* (1923) 45 All. 328.

(g) *Dosibai v. Dhunbai* (1925) 49 Bom. 325; *De Souza v. Daphtary* (1923) 25 Bom. L. R. 610; *Halkett v. Dudley (Earl)* (1907), 1 Ch. 590.

(h) (1830) 1 Russ. & My. 293, 48 E. R. 199.

(i) (1842) 1 Y. & C. Ch. 608, 68 E. R. 1038; *Murrell v. Goodyear* (1860) 1 De. G. F. & J. 432, 45 E. R. 426.

(j) *Darnley (Earl) v. Proprietors of London Chatham & Dover Railway* (1867) 2 H. L. 43.

(k) *Brewer v. Broadwood* (1883) 22 C. D. 105.

(4) **Rescind the contract.**—See section 35, Specific Relief Act.

Sg. 55-56

(5) **Damages.**—See section 73, Indian Contract Act, and section 20, Specific Relief Act.

A buyer of immoveable property is entitled to damages under section 73 of the Indian Contract Act for breach of contract relating to it (*l*). The section is applicable to immoveable properties. Such compensation is not to be given for any remote or indirect loss or damage. In *Bain v. Forthergill* (*m*) it was decided that the purchaser was not entitled to damages for the loss of his bargain beyond the return of his deposit, interest and costs. This rule was thought to be applicable to India. An agreement entitling a vendor to forfeit the deposit and resell the property does not preclude him from suing for damages for breach (*n*). In a suit by a purchaser against his vendor for damages for breach of contract for title, held, the purchaser is not bound to wait till he is evicted or his possession is disturbed before filing the suit inasmuch as the covenant, if broken, is necessarily broken immediately upon the execution of the assurance which contains it. In such a suit the burden lies upon the plaintiff to allege and prove a breach of the covenant (*o*).

Damages instead of rescission.—Where the purchaser has failed to establish that he is entitled to complete rescission of the contract, he is entitled to damages under section 73 of the Indian Contract Act, and in awarding damages it is an ordinary rule that a change of circumstances may be taken into consideration. Where the land is in possession of the purchaser he should be given such compensation as would compensate him for the defective quality of his title (*p*). The proper measure would be the difference between the purchase price and the value of the land as the vendor had power to convey it.

(6) **Rectification.**—See section 35, Specific Relief Act.

(7) **Cancellation.**—See section 39, Specific Relief Act.

56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

Amendment.—This section has been recast and brought into line with section 81 which deals with the marshalling of securities. The two substantial changes are the omission of the words "as against the seller" and the substitution of the word

(*l*) *Motilal v. Seth Jamnadas* (1936) 31 Nag. L. R. 101; *Ranchhod v. Manmohandas* (1908) 32 Bom. 165; *Nabinchandra Saha Paramanick v. Krishna Barna Dasi* (1911) 38 Cal. 458; *Adikesavan Naidu v. Gurunatha Chetti* (1917) 40 Mad. 338 relied on; *Flureau v. Thornhill* (1776) 2 W. B. 1. 1078. *Bain v. Forthergill* (1875) 7 H. L. 158 distinguished.

(*m*) (1875) 7 H. L. 158.

(*n*) *Harold Wood Brick Co., Ltd. v. Ferris* (1935)

1 K. B. 613; *Laird v. Pim* (1841) 7 M. & W. 474 followed; *Henty v. Schroder* (1879) 12 Ch. D. 666, and *Hutchings v. Humphreys* (1885) 54 L. J. (Ch.) 650, explained and distinguished.

(*o*) *V. M. Mee-kanni Rowther v. A. V. Pariyakkaruppan* (1934) 57 Mad. 1016.

(*p*) *Harilal v. Mulchand* (1928) 52 Bom. 883; *Turner v. Moon* (1901) 2 Ch. 825; *G. W. Railway v. Fisher* (1905) 1 Ch. 316; *Eastwood v. Ashton* (1913) 2 Ch. 39.

S. 56 "mortgage" for "charge" and "two or more properties" for "two properties."

As against the seller.—These words occurred in the section prior to its amendment by Act 20 of 1929 (the Transfer of Property Amendment Act). All the High Courts (*q*) construed the section by reason of these words, as not entitling the buyer to exercise his right of marshalling as against the seller's mortgagee, whose choice was unfettered as to the order of sale of the several properties or portions of the same property mortgaged to him. In practice a right given on the one hand to the buyer against the seller was on the other hand taken away by the mortgagee, and he was left without relief. To remedy this anomaly, these words have been omitted from the section.

Marshalling.—The doctrine of marshalling enunciated in section 56 gives the purchaser a right to throw the whole debt exclusively on the property remaining in the hands of the mortgagor but not so as to destroy the mortgagee's security (*r*). To invoke the aid of this doctrine, the properties may be mortgaged at the same time or at different times but the right to redeem must accrue at the same time. The debt must be the same, and both the debtor and the creditor must be the same. Apportionment is the proper principle and should be according to the value of the properties (*s*). The right to marshal is available to a purchaser of a portion of property mortgaged with a covenant against encumbrances, as against the purchaser of the other portion who has, under the sale deed, taken upon himself the burden of the entire mortgage-debt, and the latter, if he discharges the entire debt, is not entitled to claim contribution from the former (*t*). In *Magniram v. Medhi Hoosein* (*u*), two properties K and Y were mortgaged to secure one debt, thereafter X was purchased by A and Y, by B. If the entire mortgage debt is satisfied by the sale to A of the property Y in execution of the mortgage decree, B is entitled to contribution against A in proportion to the value of the properties X and Y, and the rule of inverse order does not apply to such a case.

In the absence of a contract to the contrary.—The provisions of the section apply when nothing is said between the parties as to how the mortgage debt is to be satisfied on a sale of one or more out of two or more properties subject to a common mortgage. The parties may by express words contract themselves out of the rule. One of two properties subject to a mortgage was sold. It was agreed in the sale deed and a deed of agreement which was executed by the purchasers, that in case it was necessary to pay more than what the vendor left with the vendee to the mortgagee under the mortgage, the vendor would provide the balance and in case of his failure, the same could be recovered from him personally with interest and costs. Held, the statutory charge under section 56 does not provide for any payment of interest nor for costs. It cannot be said that the vendor agreed to be liable, not only under the statutory charge, but also for interest and costs, and therefore the stipulation excluded the charge provided by section 56 (*v*).

Limit of the rule.—Section 56 is limited in its operation to the case in which the party claiming marshalling, is a purchaser and the party against whom it is

(*q*) *Kommineri Appaya v. Mangala* (1908) 31 Mad. 419 F. B.; *Bhikari v. Dalip Singh* (1895) 17 All. 434; *Subraya v. Ganpa* (1911) 35 Bom. 395; *Lala Dilawar v. Dewan Bolakiram* (1884) 11 Cal. 258; *Indukuri v. Yerramith* (1882) 5 Mad. 387; *Banwari v. Muhammad* (1887) 9 All. 690.
(*r*) *Flint v. Howard* (1893) 2 Ch. 59.

(*s*) *Barnes v. Racster* 1 Y. & C. Ch. 401, (1842) 62 E. R. 944; *Bugden v. Bignold* (1843) 2 Y. & C. Ch. 377.
(*t*) *Kamla Singh v. Chaturbhuj Singh* (1929) 8 Pat. 585.
(*u*) (1904) 31 Cal. 95.
(*v*) *Pirthiraj Singh v. Rukmin Kunwar*, A. I. R. (1926) All. 415.

claimed, is the original mortgagor (w). It does not apply to a case between purchaser and purchaser (x). Nor between subsequent purchasers but only between a purchaser and his vendor, while section 81 only applies to subsequent mortgagees and not to subsequent purchasers (y). Nor does the section apply to mining leases, for the mortgagee, being entitled to rents and royalty from the lessees, has a right superior to that of the lessees (z). The section does not apply to the case of a sale by auction (a), so that when the contest is between two auction purchasers, there is no such equity between them and no marshalling of assets (b).

Court sales.—These provisions do not apply to sales in execution (c). But in appropriate circumstances the Courts have power under the section to direct in what order the mortgaged properties shall be sold (d).

Notice.—The question, whether the purchaser had or had not notice of the encumbrance, is for the purpose of this rule immaterial.

Presumption.—The rule in section 56 is founded upon the general presumption that if one or more of two or more properties subject to a common mortgage was sold by the mortgagor, the intention of the parties to the sale was that it should be sold free of that mortgage (e).

But not so as to prejudice the rights of the mortgagee.—The purchaser has no right to hold the property in such a way as to prejudice the mortgagee. This is likely to occur when a moiety or portion is sold after the creation of an encumbrance on the whole. It would obviously be trenching on the rights of the mortgagee to insist upon the unsold moiety or portion being sold, as it would realize far less than when the whole was sold. In such a case the mortgagee being likely to be prejudiced, the whole would have to be sold and the mortgagee would be entitled to be indemnified as to his portion out of the other portion (f).

On the 16th October 1840 Henry Edgar Jones executed a mortgage of his absolute moiety derived under his father's will and of his contingent moiety derived under his brother's will to secure £1,500. On the 17th October 1840, Henry Edgar Jones executed a deed by which he absolutely sold and conveyed to his mother, Mary Ann Jones, his contingent moiety derived under his brother's will in consideration of a debt of £1,000 owing from him to her. This deed contained no reference to the mortgage of the 16th October, and was not expressed to be subject to it. The question was whether the £1,500 which was charged on both moieties of the property ought, as between the owners of the two moieties, to be treated as a charge upon the absolute moiety only. In answering the question in the affirmative, it was held that as between the two moieties the contingent moiety ought to be indemnified against the mortgage debt out of the other moiety. The conveyance of the contingent moiety to the mother contained not a covenant against encumbrances but a covenant for further assurance and it being a conveyance for

(w) *Din Dayal v. Gur Saran Lal* (1920) 42 All. 336; *Magniram v. Mehdi Hossein* (1904) 31 Cal. 95.

(x) *Din Dayal v. Gur Saran Lal* (1920) 42 All. 336; *Magniram v. Mehdi Hossein* (1904) 31 Cal. 95; *Sitaram v. Ramrao*, A. I. R. (1931) Nag. 91.

(y) *Sitaram v. Ramrao*, A. I. R. (1931) Nag. 91.

(z) *Low & Co. v. Hazarimull*, A. I. R. (1926) Cal. 525.

(a) *Naubat Lal v. Mahdeo Prasad* (1929) 51 All. 606; *Rama Shankar v. Ghulam Husain*,

A. I. R. (1921) All. 323, 43 All. 589.

(b) *Upendra Nath v. Kali Charan*, A. I. R. (1930) All. 634.

(c) *Rama Shankar v. Ghulam Husain* (1921) 43 All. 589; *Naubat Lal v. Mahadeo Prasad* (1929) 51 All. 606.

(d) *Tara Prasanna v. Nilmoni* (1913) 41 Cal. 418; *Sitaram v. Ramrao*, A. I. R. (1931) Nag. 91.

(e) *Rama Shankar v. Ghulam Husain* (1921) 43 All. 589.

(f) *In re Jones, Farrington v. Forrester* (1893) 2 Ch. 461.

Ss. 56-57 value, it was held the grantee was by reason of that covenant entitled to call upon the grantor to pay off the charge (g).

Persons claiming under him.—By section 59A reference to a mortgagee is deemed to include person deriving title from him. But it is restricted to Chapter IV, hence the necessity for this addition.

Any other person who has for consideration acquired an interest in any of the properties.—These words have been inserted in the section to meet the case of several properties being mortgaged in the first instance and some of them going into the hands of different purchasers at the same or different times. For example, suppose three properties X, Y and Z are mortgaged to A by B who afterwards sells X to C and Y to D. In the absence of a contract to the contrary A must exhaust Z and for the surplus X cannot say that as he was the first purchaser A should exhaust Y before coming on X, but according to this provision both X and Y should contribute according to their respective value (h).

Discharge of Incumbrances on Sale.

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court :—

Provision by Court
for incumbrance, and
sale freed therefrom.

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and
- (2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(g) *In re Jones, Farrington v. Forrester* (1893) 2 Ch. 461.

(h) *Magniram v. Mehdi Hossein* (1903) 31 Cal.

95; *Din Dayal v. Gur Saran Lal* (1920) 42 All. 338.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official *Gazette*, declare to be competent to exercise the jurisdiction conferred by this section.

English Law.—This section is modelled on section 5 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict., c. 41).

The object of the section.—This section has been enacted to prevent an encumbrance being a bar to a sale and for the protection of the purchaser against injury by an encumbrancer.

Ingredients of the section.—To invoke the aid of the section the following elements are essential :—

- (a) The property must be immoveable.
- (b) The existence thereon of an encumbrance whether immediately payable or not.
- (c) Sale of such property by the Court or in execution of a decree or out of Court.
- (d) There must be an application by any party to the sale.

Incumbrance.—This includes a charge as well as a mortgage (i).

(i) *Milford Haven Railway and Estate Company v. Mowatt* (1885) 28 Ch. D. 402.

S. 57

Direct or allow payment into Court.—Pearson, J., observed that the word “direct” applies to a sale by the Court and the word “allow” to a sale out of Court (j).

The amount to be deposited :—

- I. (a) Where the property is charged with an annual or monthly sum, or
(b) a determinable interest is charged with a capital sum.

Such sum as when invested in Government securities the Court considers will by means of the interest thereof keep down or otherwise provide for the charge.

- II. In any other case where a capital sum is charged on the property.

An amount sufficient to meet the encumbrance and interest due thereon.

In either case I or II a further one-tenth of the original amount to be paid in shall be deposited to meet further costs, expenses and interest unless the Court directs a larger amount.

Investment.—The liability under this section excludes depreciation of investments permitted.

The Court and its powers.—The powers conferred by this section are on the (1) High Court in its ordinary or extraordinary civil jurisdiction, (2) District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court empowered by the Local Government. The powers are to make the declaration, order or direction specified in clauses (b) and (c) of the section.

Declaration.—On the deposit required by this section having been made the property is declared by the Court as free from encumbrance with or without notice to the encumbrancers. In the latter case the Court should record in writing its reasons for dispensing with notice.

Orders.—After the aforesaid declaration the Court shall order execution of the conveyance or make a vesting order for giving effect to the sale and give directions for retention and investment of the money in Court. This may also be done with or without notice to the encumbrancer provided that the Court in the latter case records its reasons in writing.

Directions.—Having made the above declaration and order, the Court proceeds to give directions, after notice to the persons interested in or entitled to the money or fund in Court, for payment or transfer thereof to the persons entitled to receive or give a discharge.

Appeal.—An appeal lies against the aforesaid declaration, order or direction under this section.

What is to happen to the sum or securities after the object is fulfilled.—This is provided in clause (c).

Further interest.—This is provided for in the last part of clause (a).

Section not applicable.—The section was held not to govern a case which involved a question of adjustment of a decree out of Court. There the decree was not for payment of money but an ordinary mortgage decree for sale, in case the money due was not paid (k). Nor where the result of so doing would be to inflict a great hardship on the vendor (l).

(j) *In re Great Northern Railway Co. and Sanderson* (1884) 25 Ch. D. 788, 794.
(k) *Mallikarjuna Sastri v. Narasimha Rao* (1901)

24 Mad. 412.
(l) *In re Great Northern Railway Company and Sanderson* (1884) 25 Ch. D. 788.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

58. (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. S. 58

"Mortgage," "mortgagee," "mortgagor," "mortgage-money" and "mortgage-deed" defined.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Simple mortgage.

(c) Where the mortgagor ostensibly sells the mortgaged property,

Mortgage by conditional sale.

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

S. 58 the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:—

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgage.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

Section 58 (a): Mortgage Generally.

S. 58

A mortgage is :—

1. A transfer of an interest,
2. In specific immoveable property,
3. For the purpose of securing
 - (a) Payment of money
 - (i) advanced or
 - (ii) to be advanced by way of loan,
 - (b) An existing or
 - (c) Future debt or
 - (d) The performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest the mortgage money, and the instrument a mortgage deed.

Title-deeds.—A mortgage is not a title-deed nor its relative reconveyance.

Transfer of an interest.—A mortgage as defined in section 58 (a) differs from a sale as defined in section 54 of the Act (m). The one is a transfer of ownership, the other is a transfer of an interest. While sale is an exchange for a consideration, a mortgage is made for the purpose of securing the consideration. This interest which is transferred is defined in section 60 of the Act (n) dealing with the right of a mortgagor to redeem. There the words used are "to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished." It is this right or interest which on a mortgage passes from the borrower to the lender. Further, while the Calcutta High Court says, "it is correct, however, not to regard what is left in the mortgagor as an equitable estate, but it is nevertheless some estate, an interest only in the estate having been transferred under the mortgage (o), the Allahabad High Court says a mortgage is a conveyance and not a mere contract for a loan (p). Under the Registration Act, section 17, clause (b), all non-testamentary instruments which create, etc., any right, title or interest, etc., to or in immoveable property are compulsorily registrable. These include conveyances as well as mortgages.

Description of the property.—Both under this Act and the Registration Act (q), it is necessary that there should be an accurate description of the property so as to render it capable of identification. No particular form of description is required, as may be seen from the cases noted below (r).

The purpose of a mortgage.—A mortgage, like every other contract, requires consideration. Hence the purpose referred to in the section is the consideration for the mortgage, which consideration may be a loan or debt or the performance of an engagement which may give rise to a pecuniary liability. It may take any one or more of the several types mentioned in the definition. On a partial failure of consideration, effect is given to the extent of the consideration that is valuable (s).

(m) IV of 1882.

(n) IV of 1882.

(o) *Falakrishna v. Jagannath* (1932) 59 Cal. 1314, 1330.

(p) *Sehopati Singh v. Jagdeo Singh* (1930) 52 All. 761.

(q) Sections 21 and 22.

(r) *Darshan Sing v. Hanwanta* (1876) 1 All. 274 "their house and landed property"; *Phul Kuar v. Musli Dhar* (1880) 2 All. 527 "house owned and possessed by us"; *Bishen Dayal v. Udit Narain* (1886) 8 All. 486 "our rights and property in"; *Shadi Lal v. Thakur Das* (1890) 12 All. 175, "our

zamindari property"; *Tribhovandas v. Krishnaram* (1894) 18 Bom. 283 "leading description correct—supplementary description incorrect"; *Land Mortgage Bank of India v. Abdul Kasim* (1899) 26 Cal. 396 P. C. "general language and no contradictory recital."

(s) *Rajani Kumar v. Gaur Kishore* (1908) 35 Cal. 1051; *Rajai Tirumal v. Pandla Muthiah* (1912) 35 Mad. 114; *Rashik Lal v. Ram Narain* (1912) 34 All. 273; *Tatia v. Babaji* (1896) 22 Bom. 176 (183); *Motichand v. Sagun* (1905) 29 Bom. 46.

S. 58 Where it is not a security for the payment of any money or the performance of any engagement and no accounts are to be rendered or taken and there is no provision for repayment, express or implied, it is not a mortgage (t). Where there is no stipulation for interest, no agreement for the repayment of the amount borrowed, and where in the event of the grantee's disturbance by a right paramount to the grantor's, the stipulation is for payment only, of damages, and where the grant is for a term instead of money and the grant extinguished the debt, it could not be said to be a mortgage (u). In such cases the test of mutuality of remedy insisted on by Lord Cottenham in *Williams v. Owen* (v), should be applied. It is not the name given to a contract but its contents, the jural relations constituted by it, that determine its nature.

Loan.—This is one of the purposes for which a mortgage is executed by a borrower. The loan may be "advanced" when made at the time of executing the mortgage, or "to be advanced" when the mortgage contains a covenant by the lender to advance money at a future date, or it may be both for the purpose of securing a loan made at the time of execution as also to secure future advances, in which latter case, generally, a maximum is fixed as in section 79.

Debt.—This is another of the purposes for which a mortgage as defined in the Act is executed by a borrower. The debt may be already due and as such an "existing debt," or it may be to secure a liability which may arise in future and thus a "future debt" (w). It includes a contingent liability (x). A debt secured by mortgage of immoveable property can only be transferred in accordance with section 54 of the Transfer of Property Act (y) for which purpose, it is immoveable property (z).

Performance of an engagement, etc.—A mortgage may be executed by a person as security for the performance of a contract or the fulfilment of a promise, the failure to perform which or the non-fulfilment of which, may result in a pecuniary liability flowing from the borrower to the lender. A familiar example is a guarantee or indemnity.

Principal money and interest.—These are together known as mortgage-money, to which the mortgagee is entitled till the date of realization or actual payment at the time of the reconveyance, whether the mortgage deed expressly mentions interest as payable after the due date or not. It was only on the institution of a suit for foreclosure, sale or redemption, that questions arose as to the date upto which the mortgagee was entitled to interest and on which there was a conflict of decisions which, however, has been set at rest by Order 34, rule 11 of the Code of Civil Procedure which has been introduced by section 6 of the Transfer of Property (Amendment) Supplementary Act, 21 of 1929.

Interest is a charge upon the mortgage property in the absence of any contract to the contrary (a) and is allowed even after the stipulated period at the same

(t) *Nidha Sah v. Murli Dhar* (1903) 25 All. 115, 30 I. A. 54.

(u) *Abdulbhai v. Kashi* (1887) 11 Bom. 462.

(v) (1839) 5 My. & Cr. 303, 59 E. R. 664.

(w) *Bhola Das v. Bish Nath* (1912) 10 A. L. J. 162; *Tokhan v. Girwar Singh* (1905) 32 Cal. 494; *Girindra Nath v. Bejoy Gopal* (1899) 26 Cal. 246; *Nagarusu v. Tangatur* (1908) 31 Mad. 330, 332.

(x) *Nand Lal v. Dharamdeo*, A. I. R. (1925) Pat. 288.

(y) *The Official Receiver, Trichinopoly v. Lakshman Aiyar* (1919) 41 M. L. J. 453; *Elumalai*

Chetty v. Balakrishna (1921) 44 Mad. 965; *Perumal Ammal v. Perumal Naicker* (1921) 44 Mad. 196 dissented from.

(z) *Sakhiuddin v. Sonaullah* (1917) 22 C. W. N. 641; *Banarsi Das v. Ram Chandar*, A. I. R. (1933) Lah. 210.

(a) *Ganga Ram v. Natha Singh* (1924) 5 Lah. 425, 51 I. A. 377; *Manghi v. Dayal Chand*, A. I. R. (1926) Lah. 624; *Abbas Khan v. Ram Das*, A. I. R. (1928) Lah. 342; *Rang Raj Singh v. Sheonarain Lal*, A. I. R. (1928) Pat. 398.

rate (b). But where no interest is given by the deed, there is nothing in the Transfer of Property Act which entitles a mortgagee to claim interest (c). The mere fact that there has been an express reference to interest in the personal covenant and none in the hypothecation clause, is not a contract to the contrary so as to disentitle the mortgagee to interest (d). The term "mortgage money" does not include costs (e).

Distinction between a mortgage and a charge.—As to this, see commentaries on section 100.

Date of mortgage deed.—A mortgage deed when registered shall operate from the time from which it would have commenced to operate, if no registration had been required (f), that is to say, it is the date of execution and not the date of registration that counts.

Mortgagor and mortgagee.—See commentaries under section 7.

Mortgagee's costs.—On completion, the mortgagor pays the mortgagee's costs of investigation and preparation of the mortgage (g), but in the absence of any stipulation the mortgagor is not liable, if the transaction be not completed (h), unless the mortgage is sanctioned by the Court and the transaction without any default of the mortgagee is not completed (i). They cannot be added to the security (j). A solicitor mortgagee cannot charge his client profit costs (k), though he be acting for a co-mortgagee and himself (l), but his partner can (m).

Breach of agreement to mortgage.—An agreement to mortgage usually precedes the actual execution of the mortgage deed embodying the terms on which the loan is agreed. Being a document entitling the parties to the execution of a formal deed, it is exempt from registration. No earnest or part payment of the loan is made in general. The borrower's remedy on breach would be in damages (n) for the loss of his bargain, being the difference in the rate of interest agreed and that which he is compelled to pay ultimately in securing another lender for the period agreed together with costs, if any, incurred by him in connection with the abortive transaction. The lender's remedy would be also in damages (n), the measure being the loss of interest till the money is invested together with costs, if any, incurred by him in the abortive transaction (o), the difference, if any, between the rate of interest agreed and the interest on the money realized by the investment for the period agreed. Damages would be assessed and allowed under sections 73 and 74 of the Indian Contract Act under which the Court has a discretion.

As to the remedy of specific performance, it is to be observed that section 21 of the Specific Relief Act enacts that a contract for non-performance of which compensation in money is an adequate relief cannot be specifically enforced. The Calcutta High Court has held that a suit for specific performance of a contract to

(b) *Abbas Khan v. Ram Das*, A. I. R. (1928) Lah. 342; *Mahadeo Prasad v. Dhiraj Singh* (1922) 44 All. 772.

(c) *Manikchand v. Rangappa* (1921) 45 Bom. 523.

(d) *Rang Raj Singh v. Sheonarain Lal*, A. I. R. (1928) Pat. 398.

(e) See sec. 60 of the Act.

(f) See sec. 47, Indian Registration Act, 1908.

(g) *Re. Foster, Barnats v. Foster* (1920) 3 K. B. 306.

(h) *Melbourne v. Cottrell* (1857) 5 W. R. 884.

(i) *Craggs v. Gray* (1886) 35 Beav. 166, 55 E. R. 858.

(j) *Wales v. Carr* (1902) 1 Ch. 860.

(k) *Re. Roberts, ex-parte Evans* (1889) 43 Ch. D. 52; *Field v. Hopkins* (1890) 44 Ch. D. 524.

(l) *Re. Doody, Fisher v. Doody* (1893) 1 Ch. 129; *Welby v. Still* (1893) 37 So. Jo. 481.

(m) *Eyre v. Wynn—Mackenzie* (1894) 1 Ch. 218.

(n) *Datubhai v. Abubaker* (1888) 12 Bom. 242, (lender's suit); *Anakaran v. Saidamadath* (1879) 2 Mad. 79, (borrower's suit); *Seth Jaidayal v. Ramsahae* (1890) 17 Cal. 432 P. C. (lender's suit); see *Meenakshisundara v. Rathnasami* (1918) 41 Mad. 959.

(o) *Datubhai v. Abubaker* (1888) 12 Bom. 242, (lender's suit).

- S. 58 lend or borrow money is not maintainable (p), and so also the Courts of Madras (q), Allahabad (r) and Oudh (s).

The Bombay High Court (t) has observed that in India an agreement to create a mortgage is not within the provisions of the Act which defines various types of mortgages. Although the Act applies to mortgages by deposit of deeds, it is studiously silent whether a mere agreement to create a mortgage amounts in itself to an equitable charge. But exceptions have been engrafted on the above rule, the soundness of which may well be questioned. In two earlier Madras cases (u), the Court held that where money had been advanced wholly or in part, the Court will not decree specific performance if the debtor is prepared to pay off the advance but will decree specific performance if the debtor is not prepared to pay off the advance. The Court proceeded on the English decisions which, it is submitted, are not applicable to India. In a later case of the same Court this doctrine was not referred to (v). Again, the Oudh Court has held that a promise to execute a mortgage of immoveable property in lieu of consideration advanced, with a promise to transfer title in such property, can be specifically enforced where money compensation cannot be an adequate relief (w). There reliance was placed on the explanation to section 12 of the Specific Relief Act which is "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money." It is submitted that a mortgage is not a transfer of immoveable property. It is a transfer of an interest in immoveable property subject to defeasance in certain events. Treating a usufructuary mortgage where possession had been delivered, as different from a contract to lend, the Allahabad High Court decreed specific performance (x). Here also the mortgagor could have sued for restoration of possession as on a failure of consideration and for damages. In a converse case the Privy Council awarded damages when performance of the contract by delivery of possession had become impossible (y). In England, however, the law is different. There the agreement to give a legal mortgage would then and there create an equitable mortgage which could be enforced by a suit for specific performance and also to enforce the equitable mortgage itself (z). In India an agreement, oral (a) or written (b) to execute a mortgage does not constitute a mortgage or charge upon the property within the meaning of section 58 or section 100 of the Act, but only a right to obtain another document (c). On a partial failure of consideration the mortgage is effective to the extent of the consideration paid (d). It seems

- (p) *Sheikh Galim v. Sadarjan Bibi* (1916) 43 Cal. 59, (borrower's suit); *Rogers v. Challis* (1859) 27 Beav. 175 (lender's suit); *Sichel v. Mosenthal* (1862) 30 Beav. 371 (borrower's suit); *Larios v. Bonany* (1873) L. R. 5 P. C. 346 (borrower's suit); *The South African Territories v. Wallington* (1898) A. C. 309, (borrower's suit.)
 (q) *Yadavendra v. Srinivasa* (1924) 47 Mad. 698 (borrower's suit); *Anakaran v. Saidmadath* (1879) 2 Mad. 79 (borrower's suit); *Rajagopala v. Sheik Davood* (1918) 34 M. L. J. 342.
 (r) *Phul Chand v. Chand Mal* (1908) 30 All. 252.
 (s) *Hukmichand v. Pioneer Mills, Ltd.*, A. I. R. (1927) Oudh 55 (lender's suit.)
 (t) *Maneklal v. Saraspur Manufacturing Co., Ltd.* (1927) 29 Bom. L. R. 253.
 (u) *Meenakshisundara v. Rathnasami* (1918) 41 Mad. 959 (lender's suit); *Rajagopala Aiyar v. Sheik Davood* (1918) 34 M. L. J. 342 (borrower's suit).
 (v) *Yadavendra v. Srinivasa* (1924) 47 Mad. 698

- (borrower's suit).
 (w) *Hukmichand v. Pioneer Mills, Ltd.*, A. I. R. (1927) Oudh 55 (lender's suit).
 (x) *Sheopati Singh v. Jagdeo Singh* (1930) 52 All. 761; *Thakar Singh v. Jagat Singh*, A. I. R. (1933) Lah. 1 (borrower's suit).
 (y) *Seth Jaidayal v. Ramsahae* (1890) 17 Cal. 432 P. C. (lender's suit.)
 (z) *Maneklal v. Saraspur Manufacturing Co., Ltd.* (1927) 29 Bom. L. R. 253.
 (a) *Ram Hait v. Pohkar*, A. I. R. (1932) Oudh 54.
 (b) *Hukumchand v. Radha Kishen* (1929) 34 C. W. N. 506 P. C.
 (c) *Hukumchand v. Radha Kishen* (1929) 34 C. W. N. 506 P. C.
 (d) *Rajani Kumar Das v. Gaur Kishore Shaha* (1908) 35 Cal. 1051; *Rashik Lal v. Ram Narain* (1912) 34 Cal. 273; *Bajiangi v. Udit Narain* (1906) 10 C. W. N. 932; *Subba Rau v. Deva Shetti* (1894) 18 Mad. 126; *Tatia v. Babaji* (1896) 22 Bom. 176; *Rajai Tirumal v. Pandla Muthial* (1912) 35 Mad. 114.

inconceivable that a lender would make payment of the whole or part of the loan without securing the title-deeds in his possession, so that if a borrower after receipt of the sum or part of the consideration, refused to execute the mortgage, the lender's remedy would be to file a suit for a declaration and enforcement of his charge on the property or treat the deposit as creating an equitable mortgage by deposit of title-deeds and sue for sale of the property. A suit filed for either purpose would bring the property within the *lis pendens* doctrine and render it inalienable in the meantime. A right to obtain damages cannot be transferred and an assignee from the mortgagee of a part of the unpaid consideration cannot sue (e), nor would the doctrine of part performance apply to contracts which under section 21 of the Specific Relief Act cannot be specifically enforced.

Hypothecation.—The too frequent and indiscriminate use of this word has given rise to confusion. It has been used as synonymous with a mortgage bond, a pledge, a mortgage of moveables and even a simple mortgage of immoveables. To none of the above transactions does this word in its true significance apply. It is confused with the word "hypothèque" which resembles a simple mortgage in which immoveable property is assigned to a creditor for debt although he is not in possession of it. Hypothecation is a species of pledge in which the creditor has no possession and is distinguished from pignus pledge known to the Contract Act, where possession is transferred from the pawnor to the pawnee. Borrowed from the Roman Civil Law, there are hardly any cases, either in English or in Indian Law, relating to hypothecation. The origin of the word is lost in obscurity. It is more commonly used in Maritime Law, for example, bottomry bonds and cases relating to wages and remuneration of seamen in the merchant service who have a claim against the ship *in rem*. Even these, strictly speaking, are not hypothecation. As distinguished from a mortgage or pledge, it confers only an enforceable right against a vessel for necessities supplied to the Master under stress. Unlike a mortgage it does not transfer any interest in the property nor is it dependent as a pledge upon actual possession. In view of the unsettled state of authorities, both English and Indian, on the subject, a learned Judge of the Calcutta High Court observed in one of his decisions (f) that the use of this word should be abandoned as being equivocal and, therefore, dangerous. The word is used in the definition of "actionable claim" in section 3 of the Act, perhaps in reference to mortgages of moveable property. Neither this Act nor the Indian Contract Act applies to such a transaction as a bottomry bond. It is liable to stamp duty under article 16 of the Indian Stamp Act but a letter of hypothecation accompanying a bill of exchange is exempt under article 40 (2). For forms of security treated as hypothecation, reference may be made to (g).

Chapter VIII.—The provisions of this chapter of the Act do not apply to debts secured by mortgages of immoveable property or by hypothecation or pledge of moveable property (h).

Mortgage of moveables.—This subject is not governed either by this Act or by the Contract Act. Mortgages of moveables are created by way of security for repayment of loan. They comprise not only the goodwill and stock-in-trade existing

(e) *Yadavendra v. Srinivasa* (1924) 47 Mad. 698.
 (f) *Manmohan v. Kesrichand* (1935) 62 Cal. 1046.
 (g) *Co-operative Hindusthan Bank, Ltd. v. Surendranath De* (1932) 59 Cal. 667; *H. V. Low & Co. v. Pulinbiharilal* (1932) 59 Cal. 1372; *Rangasami v. Muthukumarappa* (1887) 10 Mad. 509; *Chetti Gaundan v. Sundaram* (1879) 2 Mad. H. C. 51;

Kishan Lal v. Ganga Ram (1891) 13 All. 28; *Sheoratan v. Mahipal* (1885) 7 All. 258; *Girwar Singh v. Thakur Narain* (1887) 14 Cal. 730; *Venkatesh v. Narayan* (1891) 15 Bom. 184; *Khimji v. Rama* (1886) 10 Bom. 519.

(h) See sec. 3, definition of "actionable claim."

S. 58

at the date of the mortgage but are made to include "all plants and machinery, fittings and furniture, etc., used or to be brought in the said premises and in any subsidiary business carried on in connection therewith (i). At times they are followed by possession and at others they are not accompanied by any delivery of possession. Regarded in the nature of hypothecation known to English Law, the validity of such mortgages have been recognized in India and sometimes enforced even against *bona fide* purchasers without notice (j). With regard to priority in mortgages of moveables, the maxim "*qui prior est tempore potior est jure*" applies. On a mortgage of moveables the goodwill of a business, though not mentioned, passes (k), unless it is a personal goodwill (l). Stamp on a mortgage of moveables is the same as on a pledge under article 6 of the Indian Stamp Act, 1899.

For discussion as to the nature of a simple mortgage, hypothecation, charge and lien, see the undermentioned cases (m).

The rules of O.34 of the Code of Civil Procedure are based on well-settled rules of equity which in the absence of a statutory provision to the contrary should be applied in suits on mortgages of moveables as well (n). But the Bombay High Court, taking a contrary view, has held that the provisions of Order 11, rule 2 of the Code of Civil Procedure do not apply to a mortgagee of moveables who has sued and obtained a decree on the personal covenant without reserving his claim against the mortgaged property (o). These mortgages do not require attestation (p) nor registration under section 17 of the Registration Act.

A pledge was created of moveable property by a director of a company who held it as the lender's agent. The contemplated mortgage was not executed and the company went into liquidation. For want of registration, the pledge was inoperative (q).

Mortgage of non-existent moveables.—Such a transaction is not governed either by the Transfer of Property Act or by the Contract Act, but it is regarded as being in the nature of an agreement to mortgage moveable property that may come into existence in future (r). The principle laid down in *Collyer v. Isaacs* (s) and *Hollroyd v. Marshall* (t) that an assignment of non-existing chattels constitutes a contract to give after-acquired chattels, has been followed in numerous cases in India (u). The equitable title arising in a transaction of this kind would not avail against a subsequent transferee without notice of that title (v).

- (i) *Co-operative Hindusthan Bank, Ltd. v. Surendranath De* (1932) 59 Cal. 667; *Webster v. Power* (1868) L. R. 2 P. C. 69; *H. V. Low & Co. v. Pulinbiharilal* (1932) 59 Cal. 1372.
- (j) *The Co-operative Hindusthan Bank, Ltd. v. Surendranath De* (1932) 59 Cal. 667; *Deans v. Richardson* (1871) 3 N. W. P. H. C. R. 54; *Shyam Soonder v. Cheita* (1871) 3 N. W. P. H. C. R. 71; *Ko Kywetnee v. Ko Koung Bane* (1866) 5 W. R. 189; *Shivram v. Dhau* (1901) 4 Bom. L. R. 577; *Srish Chandra Roy v. Mungri Bewa* (1904) 9 C. W. N. 14; *Damodar v. Almaram* (1905) 8 Bom. L. R. 344; *In the matter of Ambrose Summers* (1896) 23 Cal. 592; *Puninthavelu v. Bhashyam Ayyangar* (1901) 25 Mad. 406; *Narasiah v. Venkataramiah* (1919) 42 Mad. 59 *contra*.
- (k) *Pile v. Pile ex-parte Lambton* (1876) 3 Ch. D. 36; *Ex-parte Punnett, In re Kitchin* (1880) 16 Ch. D. 226.
- (l) *Ex-parte Punnett, In re Kitchin* (1880) 16 Ch. D. 226; *Cooper v. Metropolitan Board of Works* (1884) 25 Ch. D. 472.
- (m) *Co-operative Hindusthan Bank, Ltd. v. Surendranath De* (1932) 59 Cal. 667; *Kishan Lal v. Ganga Ram* (1891) 13 All. 28.

- (n) *Co-operative Hindusthan Bank, Ltd. v. Surendranath De* (1932) 59 Cal. 667.
- (o) *Official Assignee of Bombay v. Chimmiram* (1933) 57 Bom. 346 *contra*.
- (p) *Jati Kar v. Mukunda Deb* (1912) 39 Cal. 227.
- (q) *Padamjee & Co. v. Moos* (1925) 27 Bom. L. R. 1218.
- (r) *Co-operative Hindusthan Bank, Ltd. v. Surendranath De* (1932) 59 Cal. 667; *Misri Lal v. Mozhar Hossain* (1886) 13 Cal. 262.
- (s) (1881) 19 Ch. 342.
- (t) (1882) 10 H. L. C. 191, 11 E. R. 999.
- (u) *Bansidhar v. Sant Lal* (1887) 10 All. 133, (future indigo produce); *Palaniappa v. Lakshmanan* (1893) 16 Mad. 429 (proceeds of an intended appeal); *Baldeo Parshad v. Miller* (1904) 31 Cal. 667 (indigo cakes to be manufactured); *Ram Sarup v. Mohan Lal, A. I. R.* (1924) All. 833 (future crops); *Babu Ram v. Ram Sarup, A. I. R.* (1926) All. 164 (future crops.)
- (v) *Joseph v. Lyons* (1885) 15 Q. B. D. 280; *Hallas v. Robinson* (1885) 15 Q. B. D. 288.

Lien.—This is an active right of retainer possessed by a person who has custody of the goods on which some skill or labour has been employed by him. It arises by operation of law and not by express contract. The subject is dealt with in sections 47, 48 and 49 of the Indian Sale of Goods Act, 1930. A building contractor who has brought materials on the land and used and employed them for constructing a building for his employer, has no charge or lien on the property and cannot claim to remain in possession, unless the lien or charge is created by contract and registered.

Pledge.—This subject is governed by the Contract Act, section 172, which defines a pledge and the sections which follow deal with the rights and liabilities of the pawnor and pawnee. To create a valid pledge there must be bailment of goods as defined in section 148 of the Contract Act. The essential ingredient of a pledge is delivery of goods upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The distinction between a mortgage and pledge has been explained from different points of view in the under-mentioned cases (*w*). There can be no pledge without possession (*x*). From the distinction between the two as indicated in the English cases, it would appear that in a mortgage the whole legal title passes to the mortgagee conditionally and, if there is no redemption, the title becomes absolute. In the case of a pledgee with possession a special property passes to him and he is entitled to detain the goods to secure repayment of the debt due to him. The question of priority in transactions of this character has been considered in several cases. In one, the subsequent purchaser bought with actual notice and it was held that the mortgage would take effect as against him (*y*). In another case the mortgagee was allowed to enforce his security against a purchaser without notice (*z*). But in *Pema Gaoli v. Ganpat Rao* (*a*), a different view was taken. The principle of priority has been adopted in Burma (*b*). A transaction regarding moveable property which cannot operate as a pledge for want of possession, cannot be an effective mortgage whether it be styled a mortgage or hypothecation (*c*). A receiver may be appointed of pledged property (*d*). The pledgee has a right to sue the pledgor on default in payment at the stipulated time and to retain the goods pledged as a collateral security or he may sell the goods either at the time originally appointed or after reasonable notice (*e*). A mistake as to the amount due may destroy the effect of the notice as between pledgor and pledgee (*f*). This is not the law, however, as between mortgagor and mortgagee (*g*). Where no time is fixed for repayment, the debt is payable on demand. In such a case notice must give reasonable opportunity to pay what is due and a day should be fixed for that purpose and if the pledgor makes default the pledgee may then enforce his rights (*h*). A suit by a pledgor is governed by article 120 of the Limitation Act (*i*). For personal remedy, article 57 applies (*j*).

(*w*) *Ryall v. Rolee* (1749) 1 Atk. 165, 26 E. R. 107 ;
Jones v. Smith (1794) 2 Ves. 372, 30 E. R. 679 ;
Ex-parte Official Receiver in re Morrit (1886) 18 Q. B. D. 222.
(*x*) *Manmohan v. Kesrichand* (1935) 62 Cal. 1046 ;
Co-operative Hindusthan Bank, Ltd. v. Surendranath De (1932) 59 Cal. 667.
(*y*) *Ko Kywetnee v. Ko Koung* (1866) 5 W. R. 189.
(*z*) *Shyam Soonder v. Cheila* (1871) 3 N. W. P. H. C. R. 71.
(*a*) (1887) 2 C. P. L. R. 108.
(*b*) *Backer Khorasane v. Ahmed Esmail* (1927) 5 Rang. 633.
(*c*) *Manmohan v. Kesrichand* (1935) 62 Cal. 1046.
(*d*) *Official Assignee of Bombay v. Chinniram*

(1933) 57 Bom. 346.
(*e*) Sec. 173 of the Indian Contract Act.
(*f*) *Pigot v. Cubley* (1864) 15 C. B. (N. S.) 701, 143 E. R. 960.
(*g*) *Stubbs v. Slater* (1910) 1 Ch. 632.
(*h*) *Deverges v. Sandeman Clarke & Co.* (1902) 1 Ch. 579.
(*i*) *Mahalinga v. Ganapathi* (1904) 27 Mad. 528 ;
Nim Chand v. Jagabandhu (1895) 22 Cal. 21 ;
Madan Mohan v. Kanhai Lal (1895) 17 All. 284.
(*j*) *Yellappa v. Parasharamappa* (1906) 30 Bom. 218 ;
Sayid Alli v. Debi Prosad (1902) 24 All. 251.

S. 58

Second mortgage.—When a mortgagor, whose property is already subject to a mortgage, borrows a further loan on the security of the same property from a person other than the original mortgagee, the transaction is known as a second mortgage. On a sale by the first mortgagee, the second mortgagee does not become a first mortgagee, for the second mortgage is of the equity of redemption, and on sale by the first mortgagee, the equity of redemption is extinguished. If there be a balance, the first mortgagee holds in trust for the second mortgagee if he has notice of his claim.

Further charge.—Where a mortgagor borrows a further loan from the original mortgagee on the security of the same property the instrument is known as further charge.

Mortgage of the equity of redemption.—This may be either a second mortgage or a further charge, as above explained.

Collateral security.—This is an instrument whereby to further secure a debt, the debtor gives to the creditor additional security for any deficiency which may result on realization from the primary security. Under Stamp Act rules, on a collateral security the maximum duty is Rs. 20. In a collateral security there is no personal covenant to pay (*k*).

Mortgage for payment of gold in specie.—The defendant company on the 1st of August 1884 issued £6,000 first mortgage gold bonds of like amount, tenor and date, secured by a first mortgage deed of the same date repayable on the 1st of August 1934. The material clause of each bond was to pay to the bearer or registered holder thereof a sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness. The plaintiffs claimed in respect of each bond such sum in sterling as then represented the gold value of £100 on 1st August 1934, and interest thereon. Held, that the contract in each bond was one for repayment of loan and not for delivery of gold in specie and the defendant company had discharged its legal obligation by offering to pay £100 sterling on each bond and interest at 5 per cent. calculated in sterling and that each bond was a separate contract (*l*).

Stock mortgage.—This is a form of mortgage rarely adopted in India, whereby the lender instead of paying cash, transfers securities at market value at date of delivery, with a stipulation that on re-transfer the borrower shall return the mortgage-money in the shape of similar securities to the like amount at the then market value, a form which sometimes results in a benefit to the borrower for the securities may fall in value after the date of the mortgage and thus he reaps the advantage. In such cases the securities are endorsed and delivered over to the mortgagor at the time of the execution of the mortgage deed. Trustees cannot invest upon a stock mortgage (*m*).

Sub-mortgage.—A mortgage of the mortgagee rights, that is, a mortgage of the debt and the security, gives rise to what is known as a sub-mortgage, sometimes spoken of as a derivative mortgage (*n*). It differs from mere assignment or transfer of mortgage debt and security inasmuch as it comprises a personal covenant by the sub-mortgagor coupled with the transfer of the mortgage debt and mortgaged

(*k*) See Pridgeaux, Vol. 1 (1882) Ed., p. 597.

(*l*) *British and French Trust Corporation v. New Brunswick Railway Co.* (1936) 154 L. T. 191.

(*m*) *Bromley v. Kelly* (1870) 39 L. J. Ch. 274; *Whitney v. Smith* (1869) 4 Ch. App. 513,

521; *Pell v. De Winton* (1857) 2 De. G. & J. 13.

(*n*) *Mulhu Vija v. Venkatachallam Chetti* (1897) 20 Mad. 35; see Form II, App. D., Code of Civil Procedure, 1908.

property subject to redemption, together with all benefits to which the sub-mortgagor is entitled, including the power of sale and other powers and remedial clauses comprised in the original mortgage (o). The sub-mortgagee can exercise all the rights which the original mortgagee can exercise under the original mortgage deed subject to any stipulation to the contrary in the sub-mortgage. A sub-mortgagee has two distinct powers of sale, viz., power to sell the original mortgage which does not affect the mortgagor and if the original mortgagee makes default, a power to sell the land (p) which will extinguish the sub-mortgagor's equity of redemption. The power of sale comprised in the sub-mortgage entitles the sub-mortgagee to sell the mortgage debt and security at less than the actual amount of the mortgage debt. Two receipts will, however, be necessary in case the power of sale is exercised, one which will be a receipt under the original mortgage which will be an effectual discharge to the purchaser as regards the mortgagor and those claiming under him and another receipt exonerating the purchaser from the necessity of seeing that the sub-mortgagee, after satisfaction of the debt secured by the sub-mortgage, pays the balance, to the original mortgagee (q). A sub-mortgage may be made to whom and in as many parcels as the mortgagee pleases (r).

Where a sub-mortgage is made of several mortgages, it would be improper to transfer the original mortgages to the derivative mortgagees by one deed, as the result would be to bring that deed into the title of each of the original mortgagors. In such cases the proper method is to have separate transfers of the original mortgages and then to have a collateral deed regulating the rights of the sub-mortgagor and sub-mortgagee. This is the proper course, in all cases, except possibly where the mortgages, or some of them, are originally, or have been converted into, mortgages by demise or sub-demise. The alternative is to have a separate sub-mortgage in respect of each mortgage, taking care to insert a provision allowing consolidation (s).

In the case of a sub-mortgagee, the position of the original mortgagee is analogous to that of a surety (t), the original mortgagor being the principal debtor and the sub-mortgagee being the creditor, for the latter gets, not only the security of the mortgage debt and the security comprised therein, but also the personal covenant of the original mortgagee who remains liable in case of any deficiency. On a sub-mortgage two equities of redemption arise, one contained in the original mortgage and the other in the sub-mortgage. As regards foreclosure and sale, the same cannot be divided and these powers continue to remain the same as in the original mortgage. The sub-mortgagee, however, is not bound to exercise his powers in order to realize the security or take steps or proceedings for that purpose and is not responsible for any loss occasioned by omission to enforce or to realize the same. The sub-mortgage is effected by assigning the mortgage debt and conveying to the sub-mortgagee the property comprised in the original mortgage subject to the usual proviso for redemption on payment by the sub-mortgagor to the sub-mortgagee the sub-mortgage money on the due date. It must, as required by section 59, be both attested and registered. On repayment by the original mortgagor of what is due by him, the sub-mortgagee is bound to hand over to him the

(o) Davidson's Precedents in Conveyancing, Vol. 2, Part 2, p. 139; *Ram Shankar v. Ganesh Prasad* (1907) 29 All. 385.
(p) Encyclopædia of Forms and Precedents, 1st Ed., Vol. 8, p. 867; *Viswanatha v. Chimmukutti* (1932) 55 Mad. 320.
(q) Davidson's Precedents in Conveyancing,

Vol. 2, Part 2, p. 139.
(r) *Taylor v. Russell* (1892) A. C. 244.
(s) Encyclopædia of Forms and Precedents, 2nd Ed., Vol. 10, p. 620.
(t) *Gurney v. Seppings* (1847) 15 L. J. Ch. 385 47 E. R. 719.

S. 58 title-deeds. When effecting a transfer of a part of mortgage, the sub-mortgage is the best method of carrying out the transaction unless the mortgagor joins (*u*). A trustee may lend on a sub-mortgage (*v*). Though notice is not necessary to be given to the original mortgagor in order to validate the sub-mortgage, it is, however, always prudent even before the sub-mortgage is completed, to inquire from the original mortgagor whether the mortgage debt is due, because the sub-mortgage takes effect subject to the accounts and equities (*w*) then subsisting between the original mortgagor and the sub-mortgagor. It is extremely unfit and very rash and a very indifferent security to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due (*x*). If no notice be given, subsequent dealings between mortgagor and mortgagee bind the sub-mortgagee (*y*), the risk to the sub-mortgagee being that his security may disappear by redemption (*z*). But if the mortgagor has notice, he cannot by redemption destroy the security (*a*). Mere registration is no notice and payment by mortgagor to the original mortgagee without notice of the sub-mortgage, is not vitiated (*b*); on such payment the mortgage is extinguished and the sub-mortgagee has no remedy (*c*). His remedy is only to obtain a personal decree against his mortgagor and he can either bring the property mortgaged to his mortgagor or what was mortgaged to himself, to sale. A sub-mortgage is outside the operation of Chapter VIII of the Act (*d*).

If the sub-mortgagee refuses to exercise his rights, it is competent to the sub-mortgagor to exercise his mortgage rights under the original mortgage subject, however, to his obligation to pay the amount realized to the sub-mortgagee, the sub-mortgage being a borrowing by the creditor from a third person on the security of his mortgage debt, secured by the indenture of mortgage in his favour. The sub-mortgage is usually considered to be supplemental to the principal indenture of mortgage and usually takes that form, when effected in writing.

Equitable sub-mortgage.—On the creation of an equitable sub-mortgage by re-depositing all deeds originally deposited by way of equitable mortgage, it is not necessary that the written memorandum accompanying the first mortgage should be deposited (*e*). A legal mortgagee may create an equitable sub-mortgage by deposit of title-deeds held by him as mortgagee. Such a sub-mortgage can only be made in towns where mortgages by deposit of title-deeds may be made (*f*). No conveyancer of established practice would recommend it as a good title, to take an assignment of the mortgage without making the mortgagor a party and being satisfied that the money was really due (*g*).

Substitution of original mortgage by subsequent mortgage.—A subsequent mortgage in consideration of further advances cannot prejudice a sub-mortgagee or affect his rights to bring the mortgagee's rights under the earlier mortgage to sale (*h*), even though in ignorance of the sub-mortgage, he executes in substitution

(*u*) Encyclopædia of Forms and Precedents, 2nd Ed., Vol. 10, p. 614.

(*v*) *Smethurst v. Hastings* (1885) 30 Ch. D. 490.

(*w*) *Morrish v. Marshall* (1821) 5 Mad. 475, 56 E. R. 977; *Cockell v. Taylor* (1851) 21 L. J. Ch. 545, 51 E. R. 475.

(*x*) *Matthees v. Wallwyn* (1798) 4 Ves. 118, 31 E. R. 62.

(*y*) *Reeve v. Whitmore* (1863) 9 L. T. 311, 46 E. R. 814.

(*z*) *Viswanatha v. Chimmukutti* (1932) 55 Mad. 320.

(*a*) *Ma Myat Gyi v. Ma Ma Nyan* (1924) 2 Rang. 561.

(*b*) *Viswanatha v. Chimmukutti* (1932) 55 Mad.

320; *Sadashiv v. Shekh Papa* (1905) 29 Bom. 199; *Williams v. Sorrell* (1799) 4 Ves. 389, 31 E. R. 198.

(*c*) *Viswanatha v. Chimmukutti* (1932) 55 Mad. 320; *Maung Shan v. U. Po, A. I. R.* (1928) Rang. 30.

(*d*) See "actionable claim" in sec. 3.

(*e*) *Re. Hildyard Ex-parte, Smith* (1842) Mont. D. & De. G. 587.

(*f*) *Gokul Dass v. Eastern Mortgage and Agency Co.* (1905) 33 Cal. 410.

(*g*) *Matthees v. Wallwyn* (1798) 4 Ves. 118, 31 E. R. 62.

(*h*) *Narayana v. Raghavammal* (1907) 18 M. L. J. 462.

of the original mortgage, two mortgages covering two distinct portions of the property, whereby the original mortgage is discharged (i). Where some of the items in the original mortgage are sub-mortgaged, the right of the original mortgagee to bring any one of those items to sale is vested in the sub-mortgagee and the mortgagor's remedy is to redeem (j).

Right of sub-mortgagee to a sale.—A sub-mortgagee of mortgagee rights is entitled to a decree for sale of these rights (k); also to a decree for sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief (l). He can sue the original mortgagor and original mortgagee in one suit, the balance, if any, of the sale proceeds, being applicable to what may be due to the original mortgagee (m). This is on the principle that as the law recognizes the right of the original mortgagor to redeem a sub-mortgage, it should give the sub-mortgagee the generally correlative right (n).

Privity between original mortgagor and sub-mortgagee.—In *Padgaya v. Baji Babaji* (o), the statement of Parsons, J., that there is no privity between the original mortgagor and sub-mortgagee is, it is submitted, not correct. There the son of the original mortgagor sued the original mortgagee and the sub-mortgagee for redemption. During the pendency of the suit the original mortgagee died and his representatives were not brought on record and the suit was held to have abated and the sub-mortgagee not being an assignee, no cause of action survived to the plaintiff against him. The Madras High Court took a contrary view (p).

Right of sub-mortgagee to redeem a prior mortgage.—A sub-mortgagee of the second mortgagee's interest is entitled to redeem a prior mortgage. Such a right is recognized by section 91 of the Transfer of Property Act (q).

Accounts between mortgagee and sub-mortgagee.—In a mortgagor's suit for redemption of land sub-mortgaged, to which the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of the sub-mortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee and that on payment to the latter of what is due to him, not exceeding what is due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee, both the original and the derivative mortgagees are bound to reconvey to the mortgagor (r). In default of payment, foreclosure follows.

Sub-mortgagee's rights to foreclose.—A sub-mortgagee is entitled to bring a suit for foreclosure against the original mortgagee. He may so frame his suit as to enforce the original mortgage against the original mortgagor (s).

Subsequent acquisition by original mortgagee of his mortgagor's equity of redemption.—The enlargement or renewal of encumbrances from the estate of an encumbrancer effected by himself, will generally enure for the benefit of the

(i) *Papala Chakrapani v. Latchmi Achi* (1918) 35 M. L. J. 309.

(j) *Papala Chakrapani v. Latchmi Achi* (1918) 35 M. L. J. 309.

(k) *Viswanatha v. Chimmukutti* (1932) 55 Mad. 320; *Ram Shankar Lal v. Ganesh Prasad* (1907) 29 All. 385; *Ram Ratan Rai v. Ramhil Singh* (1905) 27 All. 511, overruled.

(l) *Muthi Vijia v. Venkatachallam Chetti* (1897) 20 Mad. 35; *Isri Prasad v. Rai Ganga Prasad* (1910) 14 C. W. N. 165; *Hobart v. Abbot* (1731) 2 P. Wms. 642. Seton on Decrees, sec. 12, Ch. 47.

(m) *Singhai Kanchadilall v. Shridhar* (1923) 19 Nag. L. R. 64.

(n) Daniel's Chancery Practice, 6th Ed., p. 1412. Form No. 11, App. D., Code of Civil Procedure, 1908.

(o) (1897) 20 Bom. 549.

(p) *Muthu Vijia v. Venkatachallam Chetti* (1897) 20 Mad. 35.

(q) *Ram Subhag v. Nar Singh* (1905) 27 All. 472.

(r) *Narayan v. Ganoji* (1891) 15 Bom. 692; *Gokul Das v. Debi Prasad* (1906) 28 All. 638.

(s) *Zaki Hasan v. Deo Nath Sahai* (1909) 10 C. L. J. 470.

- S. 58** mortgagee by increasing the value of his security (*t*). If after execution of a sub-mortgage, the original mortgagee purchases the equity of redemption of his mortgagor, such acquisition will enure for the benefit of the sub-mortgagee and he will be entitled to sue for sale of the property in the same way as if the proprietary interest had been mortgaged to him from the first (*u*). The purchase makes the original mortgagee absolute owner, subject to the mortgage created in favour of the sub-mortgagee.

Transfer by a mortgagee.—There is no provision for a mortgagee similar to that enacted in section 60A for the benefit of the mortgagor. The mortgagee, however, is entitled to assign the mortgage debt and transfer the mortgaged property to a third person, either with or without the concurrence of the mortgagor. In the latter case, the transferee would be bound by the state of accounts between mortgagor and mortgagee and it is therefore prudent to add the mortgagor as a party to the transfer or assignment. The mortgagee as transferor covenants against his own encumbrances only. The transferee, however, when he chooses to take a mortgage without the concurrence of the mortgagor, runs the risk of losing his security entirely, where a transferor holds a sum belonging to the mortgagor which the latter is entitled to set-off. A testator mortgaged certain property for £700 and after his death the mortgage was transferred to J. whose firm had in their hands £2,384 of the mortgagor. The testator's trustees did not ask J. to appropriate any part of the £2,384 in payment of the mortgage debt. Subsequently by an equitable assignment D. became equitable mortgagee. No notice of the equitable assignment was given to the mortgagors. Subsequently, both J. and his firm became bankrupt. Held, as the mortgagors had a right of set-off against the assignor J., the assignee D. was in no better position than J. would have been. The burden of the mortgagors could not be increased by any step taken by the mortgagee without notice to them. As the mortgage came to an end when J. took the transfer of the mortgage, for J's firm had at the time more than enough of the mortgagor's funds in their hands to pay off the mortgage, it followed that D. could not claim any rights under the mortgage and must hand over all documents of title to the mortgagors, namely, the trustees of the testator's estate (*v*). A mortgagee may assign a part of the mortgage debt and part of the property secured with the concurrence of the mortgagor apportioning the debt and the mortgagee's powers.

Indian Companies Act, VII of 1913.—Section 109 of this Act enacts that every mortgage or charge created by a company, unless registered within 21 days of its creation with the Registrar of Joint Stock Companies, containing particulars required by that section, shall be void against the liquidator and any creditor of the company (*w*). Such a mortgage cannot be repudiated by the company itself. But the non-compliance with the provisions of section 109 may be remedied under section 120 of the same Act. On August 10, 1922, a company created upon its immoveable property a mortgage and a second mortgage. Neither complied with section 109, but in each case the time was extended under section 120. The second mortgage was registered on November 23, 1922, and the mortgage on December 22, 1922. The order granting extension dated December 6th, 1922, was without prejudice to the rights of any mortgagee, accrued in the meantime. Upon a question

(*t*) *Shyama Churn v. Ananda Chandra* (1899) 3 C. W. N. 323.

(*u*) *Ajudha Prasad v. Man Singh* (1903) 25 All. 46; *Surja Narain v. Nanda Lal* (1906) 33 Cal. 1212; *Kishen Dutt Ram v. Mumlas*

Ali Khan (1878) 5 Cal. 198, 6 I. A. 145.

(*v*) *Parker v. Jackson* (1936) 155 L. T. 104.

(*w*) *Aung Ban v. Chettiar Firm*, A. I. R. (1927) Rang. 288.

of priority in liquidation, it was held that the effect of the order was not to give the second mortgage a priority over the first mortgage (x).

S. 58

Income-tax.—A covenant to pay interest free from income-tax is void in the case of a company, which under the Income Tax Act is liable to deduct it (y). A company having mortgaged its property and assets, went into voluntary liquidation. No profits had been made between the date of the mortgage and the commencement of the winding-up. Three yearly sums by way of interest on the mortgage had been paid less income-tax. These deductions were claimed by the Crown but the claim was disallowed, as the deduction could not be said to answer the description of a tax assessed on the company (z). To circumvent this the rate of interest is increased. In the case of a private individual, a covenant by a mortgagor to pay income-tax for the mortgagee is not enforceable, but the parties may agree to a rate of interest to be unaffected by income-tax (a), with a proviso that the aggregate amount of such interest for such income-tax year was the entire income of the mortgagee.

Section 58 (b) : Simple Mortgage.

In a simple mortgage

- (1) No possession is delivered.
- (2) There is a personal covenant to pay.
- (3) An agreement, expressed or implied, that in the event of failure to pay
 - (a) the mortgagee shall have the right to cause the mortgaged property to be sold, and
 - (b) the proceeds applied in payment of the mortgage-money.

Thus the security is twofold, the personal security and the security of the property (b). The mortgagee is called a simple mortgagee. There is no transfer of ownership (c). In the Bombay Presidency it is known as *Nazar Gahana* or *Taran Gahan* (d).

Possession.—It is an essential factor of this mortgage that possession is neither given nor claimed. If a Court decreed possession, such a decree would be an error. It could not work foreclosure and the mortgagee must submit to be redeemed (e).

Personal obligation.—A loan imports a personal liability to pay (f). In every simple mortgage, unless there is a specific covenant to the contrary (g), a personal obligation to pay the debt exists (h). The fact that there is no express personal covenant is no bar to a decree against the mortgagor, for a personal covenant to pay is implied in and is an essential part of every simple mortgage (i).

(x) *Ram Narain v. Radha Kishen* (1929) 57 I. A. 76.

(y) *Lang, in re* (1927) 1 Ch. 120.

(z) *Lang Propeller, Ltd. in re* (1927) 1 Ch. D. 120.

(a) *Encyclopædia of Forms & Precedents*, 1st Ed., Vol. 16, p. 388.

(b) *Wahid-un-nissa v. Gobardhan Das* (1900) 22 All. 453.

(c) *Papamma v. Pratapa* (1896) 19 Mad. 249, 23 I. A. 32.

(d) *Datto v. Vitlu* (1896) 20 Bom. 408; *Onkar Ramshet v. Goverdhandas* (1890) 14 Bom. 577.

(e) *Papamma v. Pratapa* (1896) 19 Mad. 249, 23 I. A. 32; *Priya Sakhi v. Manbodh* (1917) 44 Cal. 425.

(f) *Ram Narayan Singh v. Adhindra Nath Mukerjee* (1917) 44 Cal. 388, 44 I. A. 87; *Chathu v. Kunjan* (1889) 12 Mad. 109.

(g) *Abbake Heggadhi v. Kinkhiamma Shetty* (1906) 29 Mad. 491; *Wahid-un-nissa v. Gobardhan* (1900) 22 All. 453; *Jangi Singh v. Chandra Mol* (1908) 30 All. 388; *Chennapatnam v. Tadakawalla* (1904) 27 Mad. 86.

(h) *Jangi Singh v. Chandra Mol* (1908) 30 All. 388; *Wahid-un-nissa v. Gobardhan* (1900) 22 All. 453; *Sawaba Khandapa v. Abaji Jotirav* (1887) 11 Bom. 475 *contra*; *Hamid-ud-din v. Kedar Nath* (1898) 20 All. 385; *Abbake Heggadhi v. Kinkhiamma Shetty* (1906) 29 Mad. 491; *Ram Kishore v. Sevrav Deo* (1911) 9 C. L. J. 5.

(i) *Jangi Singh v. Chandra Mol* (1908) 30 All. 388; *Abbake Heggadhi v. Kinkhiamma Shetty* (1906) 29 Mad. 491; *Wahid-un-nissa v. Gobardhan* (1900) 22 All. 453, 461; *Pall v. Gregory* (1925) 52 Cal. 828.

S. 58

Sale.—Besides the right to obtain a personal decree against the mortgagor, the mortgagee's other remedy is to obtain a decree for judicial sale (*j*). Under the Code of Civil Procedure, O. 34, rr. 4 and 5, the power of causing the property to be sold being the essence of the transaction, it need not be expressly stated in the deed and will be implied (*k*).

Remedies of a simple mortgagee.—The mortgagee has concurrent remedies. He may obtain a decree on the personal covenant or a decree for judicial sale which he must work out in execution proceedings, or adopt both remedies (*l*). A simple mortgagee has no right of foreclosure (*m*).

Receiver.—A simple mortgagee is not entitled to a receiver (*n*).

Differs from a charge.—See commentaries under section 100.

Suit for redemption.—A suit to redeem a simple mortgage is regulated by Order 34, rules 7 and 8 of the Code of Civil Procedure, 1908.

Limitation Act, 1908, Schedule II, articles 132, 147 and 148.—A suit on a simple mortgage bond to enforce payment is governed by section 132 and not by article 147 (*a*), while a suit against a mortgagee to redeem is governed by article 148. The period in the former case is 12 years, in the latter case 60 years (*o*).

Section 58 (c) : Mortgage by Conditional Sale.

In a mortgage by conditional sale, the mortgagor ostensibly sells the mortgaged property on condition

- (a) that the sale shall become absolute on default of payment of the mortgage money on a certain date, or
- (b) that the sale shall become void on such payment being made, or
- (c) that the buyer shall transfer the property to the seller on such payment being made.

The transaction is called a mortgage by conditional sale, *Bai-bil-wafa* (*p*), the mortgagee, a mortgagee by conditional sale. The condition in whatever form should be embodied in the same document which effects or purports to effect the sale. The word "ostensibly" does not mean :

- (i) Merely that the object bears a certain form or appearance without suggesting that it is or is not that, of which it has the superficial appearance, but
- (ii) That the object bears a certain appearance but it is not really that of which it bears the appearance (*q*).

Alteration in the Law.—It is the third class of ostensible sales mentioned above which conflicts with a real sale, that has given rise to the difficulty of distinguishing the transaction of a sale from a mortgage. Oral evidence of intention was not admissible by reason of section 92 of the Indian Evidence Act and the cases had to be decided on a consideration of the contents of the document, with such extrinsic evidence of surrounding circumstances as might be required to shew in what manner the language of the document was related to existing facts. Intention

(j) *Papamma v. Pratapa* (1896) 19 Mad. 249, 23 I. A. 32; *Kishanlal v. Ganga Ram* (1891) 13 All. 28.

(k) *Ram Brahman v. Venkatanarasu* (1912) 23 M. L. J. 131; *Motiram v. Vitai* (1888) 13 Bom. 90.

(l) *Papamma v. Pratapa* (1896) 19 Mad. 249, 23 I. A. 32.

(m) See sec. 67 of this Act.

(n) *Nrisingha Charan v. Rajniti Prasad*, A. I. R. (1932) Pat. 360; *Rameshwar Singh v. Chuni Lal* (1920) 47 Cal. 418 *contra*.

(o) *Vasudeva v. Srinivasa* (1907) 30 Mad. 426, 34 I. A. 186.

(p) *Ali Ahmad v. Rahmat-ullah* (1892) 14 All. 195.

(q) *Mt. Mumtaz Begum v. Mt. Lachmi*, A. I. R. (1929) All. 174.

of the parties to the instrument was the test. The ascertainment of the true intention used to be a matter of considerable difficulty. The Legislature has come to the rescue of the Courts and laid down a statutory test from which the intention is to be gathered, viz., that no transaction shall be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which effects or purports to effect the sale. According to the proviso, therefore, the transaction is to be carried out by a single instrument and the condition of transfer which formerly used to be embodied in a separate instrument is now required by proviso to be embodied in the same deed. The proviso which is added by Act 20 of 1929 is, however, not retrospective (r). On the construction of the proviso there is some conflict. The Rangoon High Court, after stating that the word "deem" meant "consider as" or "equivalent to," held that when the transaction is an outright sale and the agreement to repurchase is contained in a subsequent document, the transaction is not a mortgage but a sale (s). The view of the Bombay High Court is that an inference of mortgage would not necessarily arise when there is a separate deed (t). In doing so the Bombay High Court followed the under-mentioned decisions (u) but not those in note (v).

Intention of parties the test.—In considering these mortgages questions often arise, whether the transaction is in reality a mortgage by way of conditional sale, or a transaction of absolute sale with the subsequent grant of an option of repurchase. These cases occur with considerable frequency and have given rise to a good deal of discussion in the Courts. The law on the subject has been definitely laid down by their Lordships of the Privy Council in the case of *Balkishan v. Legge* (w). It was there stated that in cases of this kind, what has to be determined is the intention of the parties at the time the transaction was entered into, and in order to ascertain this intention it was ruled that regard might be had to the surrounding circumstances, which shew how the language of the documents to be construed was related to the then existing facts. On the other hand, it was definitely ruled that no oral evidence could be given by the parties in order to shew what their intention was. It is to be observed that in *Alderson v. White* (x) oral evidence of intention was given on both sides. Their Lordships in the case of *Balkishan v. Legge* (y) held that this could not be done here, regard being had to the rule of evidence laid down in section 92 of the Indian Evidence Act. A different rule obtains in the English Courts for reasons set forth in *Lincoln v. Wright* (z) and other cases, owing to the Statute of Frauds. If no agreement was come to between the parties to carry out the transaction by deed of sale and a contract for repurchase before the deed of sale was executed, and the latter deed was only an after-thought suggesting itself after the sale had been executed and delivered, it would not suffice. The execution of the deed of sale and the contract of repurchase would then form two separate and independent transactions, not two

- (r) *Ma Sein Go v. Maung San Pe*, A. I. R. (1935) Rang. 212; *Mt. Gomti v. Meghraj Singh*, A. I. R. (1933) All. 443.
 (s) *Ma Sein Nyo v. Maung San Pe*, A. I. R. (1935) Rang. 212.
 (t) *Kuppa Krishna v. Mhasti Goli* (1931) 33 Bom. L. R. 633; *Mt. Mumtaz Begam v. Mt. Lachhmi*, A. I. R. (1929) All. 174.
 (u) *Muthuvelu Mudaliar v. Vythilinga Mudaliar* (1919) 42 Mad. 407; *Situl Purshad v. Luchmi Purshad* (1883) 10 Cal. 30; *Bhagwan Sahai v. Bhagwan Din* (1890) 12 All. 387; *Balkishan Das v. W. E. Legge* (1899) 22 All. 149; *Jhanda Singh v. Wahid-*

- ud-din* (1916) 38 All. 570; *Narasingerji Gyanagerji v. Panuganti Parthasaradhi* (1924) 47 Mad. 729, 51 I. A. 305; *Kastur-chand v. Jakhia* (1915) 40 Bom. 74; *Narayan Ramkrishna v. Vighneshwar* (1916) 40 Bom. 378.
 (v) *Ram Charan Lal v. Dharamsingh* (1923) 46 All. 173; *Laltaprasad v. Jagdish Narayan* (1926) 48 All. 787; *Mathura Kurmi v. Jagdeo Singh* (1927) 49 All. 405.
 (w) (1899) 22 All. 149, 27 I. A. 58.
 (x) (1858) 2 De. G. & J. 97, 44 E. R. 924.
 (y) (1899) 22 All. 149, 27 I. A. 58.
 (z) (1859) 28 L. J. Ch. 705, 45 E. R. 6.

S. 58

connected and interdependent parts of one and the same transaction (a). The converse of the proposition is not necessarily true. The Full Bench of the Madras High Court in *Muthuvelu Mudaliar v. Vythilinga Mudaliar* (b), held that their Lordships did not mean to lay down that if there was a single settlement and the two documents were connected and interdependent, it necessarily led to the inference that there was a mortgage and not a sale. The Bench thought that all that was said was, that an essential requisite for construing such documents as a mortgage was, that they should be dependent upon a single arrangement, and not that such a test was a conclusive criterion of the transfer being a mortgage. These were the observations in a later case by the Allahabad High Court (c). In *Maungh Kyin v. Ma Shwe La* (d), the Judicial Committee pointed out that a considerable body of authority (e) which had decided on the principle laid down in *Lincoln v. Wright* (f) that notwithstanding section 92, evidence was admissible to shew the acts and conduct of the parties to such deeds as inconsistent with the absolute transfer of the property and consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage, definitely ceased to be binding after the judgment in *Balkishen v. Legge* (g). The Privy Council decisions lay down that in cases in India not governed by Bengal Regulation XVI of 1806, instruments of this kind are to take effect according to their tenor, unless it appears from the terms of the instrument or surrounding circumstances excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage. The cases before their Lordships of the Privy Council except the Madras one, were cases of deeds not governed by the Transfer of Property Act. In *Situl Purshad's* (h) case, though the documents were of the same date, full price had been paid.

In *Bhagwan Sahai's* (i) case where the suit was brought more than 50 years after, the burden lay heavily on the person alleging that the transaction was not what, on the face of it, it appeared to be. On the other hand, in the cases of *Ram Saran Lal v. Amirta Kuar* (j) and *Balkishen Das v. Legge* (k), though there were separate documents of the same date, the transactions were held to be mortgages. In *Jhanda Singh's* (l) case the transactions, which were at an interval of seven days, were challenged after 50 years. There the question for determination was whether a deed of sale dated 28th August 1852 acted upon as such ever since, and a deed of agreement dated 5th September 1852 by the vendees to resell upon conditions which were not availed of and lapsed, should be held to be a mortgage by a conditional sale with a right of redemption, or an out and out sale with a contract to repurchase, the Judicial Committee held the latter. Even in the Madras case (m) which was under the Transfer of Property Act, the Privy Council disposed of the same with no reference to any oral evidence other than that of surrounding circumstances such as was clearly required to shew in what manner the language of the document related to existing facts. Undoubtedly, therefore, the real intention is the primary question.

(a) *Jhanda Singh v. Wahid-un-din* (1916) 38 All. 570 (P. C.).
 (b) (1919) 42 Mad. 407.
 (c) *Mathura Kurmi v. Jagdeo Singh* (1927) 49 All. 405.
 (d) (1918) 45 Cal. 320, 44 I. A. 236.
 (e) *Baksu Laxman v. Govind Kanji* (1880) 4 Bom. 594; *Hem Chunder Soor v. Kally Churn Das* (1882) 9 Cal. 528; *Rakhen v. Alagappudayan* (1893) 16 Mad. 80; *Preonath Shaha v. Madhu Sudan* (1898) 25 Cal. 603; *Khankar v. Ali Hafez* (1901) 28

Cal. 256; *Mahomed Ali Hoosain v. Nazar Ali* (1901) 28 Cal. 289.
 (f) (1859) 4 De. G. & J. 16.
 (g) (1899) 22 All. 149, 27 I. A. 58.
 (h) (1883) 10 Cal. 30, 10 I. A. 129.
 (i) (1890) 12 All. 387, 17 I. A. 98.
 (j) (1890) 3 All. 369.
 (k) (1890) 22 All. 149, 27 I. A. 58.
 (l) (1916) 38 All. 570.
 (m) *Narsingerji v. Panuganti* (1924) 47 Mad. 729, 51 I. A. 305.

Though the Privy Council cases dealt with transactions before the Transfer of Property Act was passed, the Act has made no difference in the law on this subject (n). *Balkishen Das v. Legge* (o) has been followed in numerous cases since (p). After a lapse of 30 years the Court requires cogent evidence to induce it to come to the conclusion that the instrument is not what it purports to be (q). This remark of Lord Cranworth was relied on where a suit was instituted 44 years after the period fixed for redemption had determined (r). Intention is a material factor in testing whether the transaction is a sale or mortgage (s).

Difference between a mortgage by conditional sale and a sale with an option to repurchase.—The question whether a deed or deeds together constitute a mortgage by conditional sale or out and out sale with a contract of repurchase, is an extremely slender one and often gives rise to considerable difficulty in distinguishing which of the two transactions such deed or deeds constitute. In *Balkishen v. Legge* (t), a case before the Transfer of Property Act, the respondent sued for redemption of an alleged mortgage of 4th February 1873, on which date he executed to the appellant's bankers a deed of sale of his estate, the price stated being Rs. 1,50,000. A second deed was executed on the same day by the respondent and bore even date with the first deed whereby the bankers agreed that they would sell the property back to the respondent if he paid on 1st of March 1876, a sum of Rs. 1,65,000 and certain other expenditure incurred on the factories. The Privy Council held that the case must be decided on a consideration of the contents of the documents with such extensive evidence of surrounding circumstances shewing in what manner the language of the document related to existing facts. The oral evidence of intention was held not admissible under section 92 of the Indian Evidence Act, nor did the cases in the English Courts of Chancery have any application to the law of India as laid down in the Acts of the Indian Legislature. They, however, held that the words of the second deed gave the transaction the character of a mortgage, and if it be to some extent a mortgage, may well be held so entirely. Therefore, the transaction was intended to be held to be a mortgage of conditional sale. The distinction between a mortgage by conditional sale and a transaction which merely amounts to a sale with an option to repurchase, depends upon the construction to be placed on the two deeds by which the transaction is generally carried out. *Prima facie*, an absolute conveyance containing nothing to shew that the relationship of debtor and creditor existed between the parties, does not cease to be an absolute conveyance, and become a mortgage merely on the ground of the existence of an agreement giving the vendor a right to repurchase (u). Where the transaction was carried out by two deeds, the first being an absolute sale, and on the same date another document was executed whereby the purchaser as a matter of favour, mercy, kindness and indulgence stipulated to cancel the deed if the amount of the purchase-money was paid within 10 years, during which time he was to remain in

(n) *Muthuvelu v. Vythilinga* (1919) 42 Mad. 407.

(o) (1890) 22 All. 149, 27 I. A. 58.

(p) *Faiz-un-nissa v. Hanif-un-nissa* (1905) 27 All. 612; *Tukaram v. Ramchand* (1902) 26 Bom. 252; *Dattoo v. Ramchandra* (1906) 30 Bom. 119; *Sowana v. Gadigeya* (1911) 35 Bom. 231; *Shazadi v. Sheik Jamal* (1913) 17 C. W. N. 1053; *Achutaramaraju v. Subbaraju* (1902) 25 Mad. 7; *Mollayappan v. Palani* (1915) 38 Mad. 226; *Jhanda Singh v. Wahid-ud-din* (1916) 38 All. 570; *Mathura Kurmi v. Jadeo Singh* (1927) 49 All. 405; *Narasingerji v. Panuganti* (1924) 47 Mad. 729, 51 I. A. 305; *Kasturchand v. Jakhia* (1916) 40 Bom. 74; *Madhavrao v. Saheb Rao* (1915) 39 Bom. 119; *Muthuvelu v.*

Vythilinga (1919) 42 Mad. 407; *Maung Kyin v. Maw Shwe La* (1918) 45 Cal. 320, 44 I. A. 236; *Maruti v. Balaji* (1900) 2 Bom. L. R. 1058; *Altapali Khan v. Uzirali Khan* (1933) 60 Cal. 167.

(q) *Alderson v. White* (1858) 2 Dc. G. & J. 97, 44 E. R. 924.

(r) *Jhanda Singh v. Wahid-ud-din* (1916) 38 All. 570.

(s) *Mt. Mumtaz Begum v. Mt. Lachhmi*, A. I. R. (1929) All. 174.

(t) (1900) 22 All. 149, 27 I. A. 58.

(u) *Alderson v. White* (1858) 2 Dc. G. & J. 97, 44 E. R. 924; *Manchester, Sheffield and Lincolnshire Ry. Co. v. North Central Waggon Company* (1888) 13 A. C. 554.

- S. 58** possession, collect the rents and enjoy the profits and be liable for loss and not claim any interest from the vendors, who were not to demand any profit from him after the expiry of the term, but in case the whole principal was not paid the vendors should not be able to cancel the sale by payment of the principal, the document was construed to be a sale and not a mortgage (v). But two documents executed on the same day, the first a sale out and out subject to the terms of the deed, and an agreement executed by the purchaser for reconveyance, were construed as a mortgage by conditional sale (w). If the agreement to repurchase is executed on the same day, giving the vendor a right of repurchase within a definite time at the same price, the transaction is a sale and not a mortgage (x).

The best test in such cases is existence or non-existence of power in the original purchaser to recover the sum named as the price of the repurchase. Tried by this test, if there is no such power there is no mortgage (y). The transaction may be regarded as a sale and not a mortgage if the two deeds were separately stamped and were registered on different dates (z). In such cases it is necessary to consider whether the conveyance, and agreement in substance, represent one transaction, or whether the transferor was really content to have a mere voluntary and gratuitous promise from the transferee which he could not enforce against the transferee's will, or whether he intended to convey the property subject to the conditions of retransfer, in which case there would be consideration passing from either party. A voluntary promise to reconvey unsupported by consideration would be void as a contract (a). Though described as a sale a transaction is nevertheless a mortgage, if the apparent purchaser treats the consideration money as a continuing debt, or where the instrument gives him a right to recover the money with interest, or the sum paid is less than the value of the property or the vendor remains in possession (b). Where on a sale and resale in 1892, possession remained with the vendors since 1895 as tenant of the purchaser, who paid the assessment of the land which was transferred to the name of one of the vendors in the revenue records; coupled with inadequacy of price, the transaction was regarded as a mortgage by conditional sale (c). The plaintiff executed in favour of the defendants a deed of sale for Rs. 2,500, a major portion of which consisted of old debts. Simultaneously with this an agreement to reconvey was made on payment of the said sum by a specified date together with repayment of sums paid as further loans with interest. The third document was a lease by which the vendor became tenant for 10 years at an annual rent of Rs. 287 made up of Rs. 62 as assessment and Rs. 225 reserved as rent representing 9 per cent. interest on the sum of Rs. 2,500. The transaction was held in reality a mortgage by conditional sale inasmuch as the apparent price of Rs. 2,500 was not the real price, but treated as a continuing debt between the parties, the property being its security (d). In *Mathura Kurmi v. Jagdev Singh* (e), a deed of sale was accompanied by an agreement of even date whereby the purchaser gave the vendor an option to repurchase within seven years from the date of the sale provided the purchase-money was not borrowed. Before this transaction the relation of the parties was that of a creditor and debtor. It

(v) *Bhagwan Sahai v. Bhagwan Din* (1890) 12 All. 387, 27 I. A. 58.

(w) *Wajid-Ali Khan v. Shafakat Husain* (1911) 33 All. 122.

(x) *Ghulam Nabi Khan v. Niaz-un-nissa* (1911) 33 All. 337.

(y) *Jhanda Singh v. Wahid-ud-din* (1916) 38 All. 570.

(z) *Jhanda Singh v. Wahid-ud-din* (1916) 38 All.

570.

(a) *Mathura Kurmi v. Jagdeo Singh* (1927) 49 All. 426.

(b) *Maruti v. Balaji* (1900) 2 Bom. L. R. 1058.

(c) *Madhevarao v. Sahebrao* (1915) 39 Bom. 119.

(d) *Kasturchand v. Jakhia* (1916) 40 Bom. 74; *Maruti v. Balaji* (1900) 2 Bom. L. R. 1058.

(e) (1927) 49 All. 405.

was held that the documents and circumstances shewed that the transaction was a mortgage by conditional sale. Where a sale deed by three was followed more than two months after by an agreement in favour of one of them giving the right of purchase which was subsequently assigned to the plaintiff, it was held that the sale deed and agreement not being between the same parties and being independent transactions, could not be construed as constituting a mortgage (f). Such a right is personal and not alienable (g). Where the grantor and grantee dealt, with knowledge, that the property belonged to a third person who was not a party to the deeds, it was held that section 92 of the Evidence Act was not a bar to the admission of evidence to shew the fraudulent dealing with a third person's property (h). In *Narsingerji v. Panuganti* (i), the inadequacy of price, the fact that time was not of the essence of the contract, reinforced by provisions such as the reservation of minerals and mineral rights, the covenant for indemnity and the inconsistent provisions as to actual time limited for the exercise of the vendor's right to repurchase, led the Privy Council to regard it as a mortgage. A transaction is not a mortgage where there is nothing to shew that the relation of debtor and creditor continued to exist, and there is nothing about interest or its equivalent, and the price is fair and a very long period has been allowed to elapse before action (j). The test applied by Lord Manners in *Goodman v. Grierson* (k) was, "are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to." Summed up, the following may be regarded as *indicia* of a mortgage:—

Inadequacy of consideration of the apparent sale (l), possession remained with the vendor (m), the purchase price was in its origin a debt and continued as such (n), assessment paid to Government by the debtor both before and after the apparent sale (o), interest taken in the guise of rent (p), the purchaser to reconvey within a certain date whenever the vendor elected to make payment (q), whether with or without interest (r), provision for accountability between the parties (s), transactions disclose mutuality of remedies as the Courts have ordinarily held to be characteristic of the relation between mortgagor and mortgagee (t), provisions in the deed suggesting an inference that the creditor looked to the recovery of his money and not to the ownership of the land (u). After the amendment which is not retrospective (v), one is guided by the proviso to the section in the construction of such deeds.

- | | |
|--|--|
| <p>(f) <i>Sitalprasad v. Luchmi Prasad Singh</i> (1883) 10 Cal. 30, 10 I. A. 129.</p> <p>(g) <i>Uthandi Mudali v. Ragavachari</i> (1906) 29 Mad. 307.</p> <p>(h) <i>Maung Kyin v. Ma Shwe La</i> (1918) 45 Cal. 320, 44 I. A. 236.</p> <p>(i) (1924) 47 Mad. 729, 51 I. A. 305.</p> <p>(j) <i>Mt. Mumtaz Begum v. Mt. Lachhmi</i>, A. I. R. (1929) All. 174.</p> <p>(k) (1840) 2 My. & Cr. 303.</p> <p>(l) <i>Maruti v. Balaji</i> (1900) 2 Bom. L. R. 1058; <i>Mahdevrao v. Sahebrao</i> (1915) 39 Bom. 119; <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74; <i>Balkishen Das v. W. F. Legge</i> (1899) 22 All. 149, 27 I. A. 58; <i>Narasingerji v. Panuganti</i> (1924) 47 Mad. 729, 51 I. A. 305; <i>Kuppa Krishna v. Mhasti Goli</i> (1931) 33 Bom. L. R. 633.</p> <p>(m) <i>Maruti v. Balaji</i> (1900) 2 Bom. L. R. 1058; <i>Mahadevrao v. Sahebrao</i> (1915) 39 Bom. 119; <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74; <i>Kuppa Krishna v. Mhasti Goli</i> (1931) 33 Bom. L. R. 633.</p> <p>(n) <i>Maruti v. Balaji</i> (1900) 2 Bom. L. R. 1058; <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74; <i>Wajid Ali v. Shafakat</i> (1911) 33 All. 122; <i>Mathura Kurmi v. Jadev Singh</i> (1927) 49 All. 405; <i>Balkishen Das v. W. F. Legge</i></p> | <p>(1899) 22 All. 149, 27 I. A. 58; <i>Jhanda Singh v. Wahid-ud-din</i> (1916) 38 All. 570; <i>Gurunath v. Yamanava</i> (1911) 35 Bom. 258; <i>Kuppa Krishna v. Mhasti Goli</i> (1931) 33 Bom. L. R. 633; <i>Ganesa Mudaliar v. Ganasikhamani</i> (1924) 47 M. L. J. 385.</p> <p>(o) <i>Madhevroa v. Sahebrao</i> (1915) 39 Bom. 119; <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74.</p> <p>(p) <i>Maruti v. Balaji</i> (1900) 2 Bom. L. R. 1058; <i>Madhevroa v. Sahebrao</i> (1915) 39 Bom. 119; <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74.</p> <p>(q) <i>Maruti v. Balaji</i> (1900) 2 Bom. L. R. 1058; <i>Madhevroa v. Sahebrao</i> (1915) 39 Bom. 119; <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74; <i>Mathura Kurmi v. Jadev Singh</i> (1926) 49 All. 405; <i>Balkishen v. Legge</i> (1899) 22 All. 149, 27 I. A. 58; <i>Narasingerji v. Panuganti</i> (1924) 47 Mad. 729, 51 I. A. 305; <i>Jhanda Singh v. Wahid-ud-din</i> (1915) 38 All. 570.</p> <p>(r) <i>Kuppa Krishna v. Mhasti Goli</i> (1931) 33 Bom. L. R. 633.</p> <p>(s) <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74.</p> <p>(t) <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74.</p> <p>(u) <i>Kasturchand v. Jakhia</i> (1916) 40 Bom. 74.</p> <p>(v) <i>Ma Sein Ngo v. Maung San Pe</i>, A. I. R. (1935) Rang. 212; <i>Mt. Gomti v. Meghraj Singh</i>, A. I. R. (1933) All. 443.</p> |
|--|--|

S. 58

Mortgage by conditional sale.—A contract of mortgage by conditional sale is a form of security known under various names throughout India, as *kut kubala* or 'conditional bills of sale' in the Presidency of Bengal (*w*); as *muddatakriyan* in Madras (*x*); as *gahan lahan* in Bombay, Central Provinces and the Mahratta country (*y*); as *bai-bi-wafa* in Allahabad (*z*) and the Central Provinces (*a*); as *peruarthum* confined to one or two taluks of Malabar (*b*). This is a security which by the ancient law of India, which must be taken to prevail in every part of India, when it has not been modified by actual legislation or established practice, is enforceable according to its letter, whether evidenced by one instrument or two separate instruments and whether or not the transaction appears on the face of the deed, in its inception, to be a mortgage. The essential feature of this mortgage is that on the breach of the condition of repayment, the contract executes itself and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them (*c*). This form of security has long been common in India. The fact is mentioned in Bengal Regulation I of 1798.

This form of mortgage was introduced to enable Mahomedans to lend money at interest contrary to the precept of the Mahomedan Law and to obtain security for the repayment of the principal and interest. There are three varieties of these mortgages prescribed in the Act. It may be effected in different ways, as, for instance, by a deed which purported to assign the property absolutely, but which contained a stipulation for a right of repurchase, or by two contemporaneous deeds, one of which purported to effect an absolute and unconditional sale, and the other of which was an agreement, that the apparent vendor should have a right of repurchase. As a rule, the common lump price, mentioned in each of such deeds, does not represent the actual price paid by the apparent vendee, but that price plus interest calculated, frequently at a usurious rate, for the period during which it is agreed that the right of repurchase should subsist, an arrangement which could hardly be consistent with such a transaction being one of an absolute sale and not one in the nature of a mortgage (*d*). Both deeds should be registered (*e*). There is no personal covenant for payment attached to such a mortgage (*f*). The mortgage is foreclosed without any proceedings being adopted by the mortgagee. The equity of redemption is extinguished as soon as default takes place.

Regulations governing redemption.—Incidents of this mortgage, as above described, were altered in the Presidency of Bengal by Bengal Regulation I of 1798 and XVII of 1806, as there the possible mischief that might result from leaving mortgages by conditional sale to take effect according to their tenor became apparent early, and the Legislature stepped in to apply a remedy.

By Bengal Regulation I of 1798, entitled "a regulation to prevent fraud and injustice in conditional sales of land under deeds of *bai-bil-wafa* or other deeds of the same nature," provision was made for the case of the lender refusing to receive

- (*w*) *Modun Mohun Chowdhry v. Ashad Ally Bepari* (1884) 10 Cal. 68, 70; *Girwar Singh v. Thakur Narain* (1887) 14 Cal. 730, 737.
 (*x*) *Lakshmi v. Krishna* (1875) 7 Mad. H. C. 6 (in which form is given); *Ramasami v. Samiyappanayakan* (1882) 4 Mad. 179.
 (*y*) *Ramji v. Chinto* (1884) 1 Bom. H. C. 199 (where form is given); *Bapuji v. Senanaraji* (1878) 2 Bom. 231; *Venkatesh v. Narayen* (1891) 15 Bom. 183.
 (*z*) *Ali Ahmad v. Rahimtullah* (1882) 14 All. 195.

- (*a*) *Goculdas Kirparam* (1874) 13 Beng. L. R. 205.
 (*b*) *Shekari v. Mangalom* (1876) 1 Mad. 57 (where the price of redemption was the market value and not the amount paid.)
 (*c*) *Thumbusawmy v. Hoosain* (1875) 1 Mad. 1, 12 I. A. 241.
 (*d*) *Ali Ahmad v. Rahmat-ullah* (1892) 14 All. 195.
 (*e*) *Mutha Venkatachelapati v. Pyanda Venkatachelapati* (1904) 27 Mad. 348.
 (*f*) *Balkishen v. Legge* (1900) 22 All. 149.

the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the *Dewanny Adawlut* of the city or zillah in which the land might be situate. If the lender had obtained possession of the land, the principal sum only was to be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he had been in possession. By Regulation XVII of 1806 the mortgagor under deeds of this description, was empowered to redeem the land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier v. Vencatrow* (g) it was decided that according to the ancient law of India a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the Regulation applied, the English doctrine of equity of redemption as applicable to the class of deeds referred to in it. In Madras, however, and in Bombay, there were no such regulations and the Courts there proceeded to apply to these mortgage transactions, the equitable principles of the English Courts of Chancery independently of any regulation or legislative enactment. In Madras, the decisions may be divided into three groups: Down to the year 1858 the Madras Courts construed mortgages by conditional sale strictly, and on default, the mortgagee was considered to have become an absolute owner. From 1858 to 1862 the decisions proceeded on the view that the condition in the mortgage providing for forfeiture on default of payment, was in the nature of penalty and could not be enforced. From the year 1862 the Courts applied the equitable principles of the English Courts of Chancery, namely, that time was not of the essence of the contract. The later decisions are admittedly at variance with the earlier. They introduce a new principle and are not merely declaratory of a previously existing rule (h). The Madras decisions were not approved of by the Judicial Committee in the case of *Pattabhiramier v. Vencatrow* (i), where the sole question for their Lordships' determination was, whether under the law of the Madras Presidency the interest of a mortgagee under a deed of conditional sale did or did not become absolute according to the terms of the mortgage, on the failure of the mortgagor to redeem on or before the time specified in the instrument. There the deed contained a condition that on failure of the mortgagor to redeem within five years, the conditional sale was to become absolute. The mortgagor failed to redeem as provided by the deed and the mortgagee, without having foreclosed, sold the mortgaged premises. In a suit by the representative of the mortgagor against the purchaser to redeem the estate, it was held that the interest of the mortgagee had become absolute after the expiry of five years. This decision, however, did not alter the view of the Madras High Court owing to a passage in that judgment, in which their Lordships stated, "it must not then be supposed that in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the Forum wherever such may prevail or to affect any title founded thereon." In Bombay likewise, Regulations being silent on the subject, the Courts followed the same view as in Madras and adopted the equitable principles of the English Courts of Chancery. The Judicial Committee disapproved the course

(g) (1870) 13 Moo. I. A. 560.

(h) *Balkishen Das v. Legge* (1899) 22 All. 149,

27 I. A. 58.

(i) (1870) 13 Moo. I. A. 560.

S. 58

of decisions of the Madras (j) and Bombay (k) High Courts, in the case of *Thumbysawmy Moodelly v. Hoosain Rowthen* (l), in which their Lordships said, "From the year 1858 the Courts of the Madras Presidency have erroneously and in contravention to the law of India, as declared by the earlier decisions, adopted with regard to this class of securities, doctrines which the English Courts of Equity have applied to mortgages in England." There land was mortgaged on condition that the rents were to be applied in payment of Government revenue, salary of a manager and then in reduction of the debt. The mortgagors stipulated further to pay certain instalments upto a certain date and if on that date a settlement of accounts shewed a balance against the mortgagor, and he failed to pay the same on the date fixed, the mortgagee was to become the purchaser and fix the value of so much of the land as would satisfy such balance, retaining his right to sue the mortgagor personally for any further sum that might remain due, owing to the whole of the land as valued proving insufficient to satisfy such balance. It was held that the contract was not a mortgage by conditional sale. This form of mortgage was made to assume the appearance of a sale under various names in India to enable Mahomedans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. In no true mortgage by conditional sale will any debt be apparent. It would be idle, therefore, to criticize such mortgages by reference to the essential conditions of a mortgage in the English sense of the word. A stipulation for repurchase will not of itself convert a case of sale into one of mortgage. To make a mortgage there must be a debt (m).

"On a certain date" and "such payment."—The expression "on a certain date" refers to the default and not to the payment of the mortgage-money, while the expression "such payment" refers only to the payment of the mortgage-money (n). In a Calcutta case Maclean, C. J., said, "It is not necessary to decide it finally, but I do not think that there was any 'certain date' of payment within the meaning of sub-section (c) of section 58 and that is an essential element in a mortgage of conditional sale" (o). This was mere *obiter* and the Madras High Court refused to follow it.

Personal covenant.—In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan (p). But by special agreement or local custom, the mortgagor may confer on the mortgagee the option of recovering the money from the mortgagor personally (q). The very definition is opposed to such a construction, for the mortgagee takes the property in lieu of his debt and interest upto a certain date.

Limitation.—A suit to redeem a mortgage by conditional sale is governed by article 148 of the Limitation Act, 1908. A suit for foreclosure of a mortgage by conditional sale is governed by article 132 and not by article 147 of the second

- (j) *Venkata v. Parvati* (1863) 1 Mad. H. C. 460; *Venkatachellam v. Tirumala* (1864) 2 Mad. H. C. 289; *Raja Lakshmi v. Krishna Bhupati* (1869) 7 Mad. H. C. 6.
 (k) *Ramji Chinto* (1864) 1 Bom. H. C. 199; *Anandray v. Ravji* (1868) 2 Bom. H. C. 214; *Shankarbhai v. Kassibhai* (1872) 9 Bom. H. C. 69; *Kaishnaji v. Ravji* (1872) 9 Bom. H. C. 79; *Bapuji v. Senavarji* (1877) 2 Bom. 231; *Ladu v. Babaji* (1883) 7 Bom. 532; *Mahomed v. Jijibhai* (1885) 9 Bom. 524; *Ramchandra v. Janardhan* (1890) 14 Bom. 19; *Abdul Rahim v. Madhaurav* (1890) 14 Bom. 78.
 (l) (1875) 1 Mad. 1 12 I. A. 241.

- (m) *Vasudeo v. Bhau* (1897) 21 Bom. 528.
 (n) *Padmanabha v. Sitarama*, A. I. R. (1928) Mad. 28.
 (o) *Kinuram v. Nitye Chunder* (1907) 11 C. W. N. 400.
 (p) *Balkishen v. Legge* (1900) 22 All. 149; *Ramasami v. Samiyappanayakan* (1882) 4 Mad. 179; *Haji Mahomed v. Ramappa* (1929) 25 Nag. L. R. 187; *Kundanmal v. Wasudeo* (1922) 19 Nag. L. R. 67; *Govind v. Jagannath* (1915) 12 Nag. L. R. 19; *Pall v. Gregory* (1925) 52 Cal. 828.
 (q) *Ramasami v. Samiyappanayakan* (1882) 4 Mad. 179.

schedule of the Limitation Act (r). But the Madras (s) and Bombay (t) High Courts have held that article 147 applies; so also the Courts of the Central Provinces (u). In a Madras case (v) dealing with a single mortgage, the Privy Council made certain observations with regard to the application of article 147. Their Lordships stated that there were two views under the Limitation Act of 1877 which was then in force. "According to one view, article 147 applies to every suit by a mortgagee in which he asks either for foreclosure or for sale. According to the other view, article 147 applies only to the class of mortgages (English mortgages) in which the suit may be, and in fact always is, brought for "foreclosure or sale" while article 132 means what the corresponding articles meant before." According to this view, the construction of article 147 is restricted to those class of cases, where the suit can be and always is brought for "foreclosure or sale." But in cases where the suit is "for foreclosure" or "for sale" then article 132 applies. But this was not the point to be decided by their Lordships in that case. There was nothing in Act IX of 1871 corresponding to article 147 of Act XV of 1877, enacting a period of 60 years for a suit by a mortgagee for foreclosure or sale, nor was there in Act XIV of 1859 which preceded it, any provision for suits for foreclosure. Foreclosure took place by virtue of legislative enactment on the expiry of the year of grace (see Regulation XVII of 1806) and a claim of that kind under a mortgage was treated as a suit for possession of immoveable property and was governed by clause 12 of section 1 of Act XIV of 1859, and later by article 132 of Act IX of 1871. Article 147 of Act XV of 1877 was enacted to apply to mortgages in the English form where foreclosure or sale was asked for and that article should be read distributively.

Onus.—The section has not the effect of raising a presumption that a sale with an agreement to reconvey, is a mortgage (w). It is on the party contending that a document, *prima facie* connoting an absolute sale, is really a mortgage, to prove his contention (x). There is no presumption in favour of a mortgage by conditional sale (y). An opposite view is taken in Allahabad (z). A stipulation for repurchase will not of itself convert a case of sale into one of mortgage (a).

Possession.—It is generally, though not universally, accompanied by the delivery of possession to the mortgagee, with permission to enjoy the usufruct either in lieu of or in part-payment of, the interest (b). When wrongfully dispossessed, he may recover possession by a suit brought within time though his remedy for foreclosure be barred by limitation. The possession recovered is subject to the mortgagor's right of redemption (c).

Waiver or acquiescence.—A mortgagee lent Rs. 30,000 on the security of certain property. *Inter alia*, it was provided that the mortgagee should have possession and take the profits in lieu of interest. The mortgagee took no possession nor

(r) *Sheoram v. Babu Singh* (1926) 48 All. 302; *Balaram v. Mangta Dass* (1907) 34 Cal. 941; *Girwar Singh v. Thakur Narain Singh* (1887) 14 Cal. 730; *Nilcomal Pramanick v. Kamini Koomar Basu* (1893) 20 Cal. 269; *Shib Lal v. Ganga Prasad* (1884) 6 All. 551 *contra*.
(s) *Narayan Ayyar v. Venkataramana Ayyar* (1903) 25 Mad. 220.
(t) *Datto v. Vithu* (1896) 20 Bom. 408.
(u) *Gashi Ram v. Dulichand* (1887) 2 C. P. L. R. 57; *Jagmohan v. Chaita* (1893) 8 C. P. L. R. 65; *Murat Singh v. Ram Lal* (1893) 8 C. P. L. R. 83; *Mahomed Amir v. Jan Patel* (1897) 12 C. P. L. R. 26.
(v) *Vasudeva Mudaliar v. Srinivasa Pillai* (1908) 30 Mad. 426, 34 I. A. 186; *Gaya Din v. Jhumman Lal* (1915) 37 All. 400.

(w) *Muthuvelu Mudaliar v. Pythilinga Mudaliar* (1919) 42 Mad. 407; *Narsingherji v. Panuganti Parthasarathi* (1924) 47 Mad. 729, 733, 51, I. A. 305.
(x) *Ganesa Mudaliar v. Ganasikhamani* (1924) 47 M. L. J. 385.
(y) *Ganesa Mudaliar v. Ganasikhamani* (1924) 47 M. L. J. 385.
(z) *Man Singh v. Guman Singh*, A. I. R. (1929) All. 619; *Ram Dhani v. Ram Rikh* (1931) 53 All. 607.
(a) *Ghulam Nabi v. Niaz-un-nissa* (1911) 33 All. 337; *Bhagwan Sahai v. Bhagwan Din* (1890) 12 All. 387.
(b) *Ramasami v. Samiyappanayakan* (1882) 4 Mad. 179; *Ammanna v. Gurumurthi* (1893) 16 Mad. 64.
(c) *Aman Alli v. Azgar Ali Mia* (1900) 27 Cal. 185.

S. 58 recovered the moneys for nine years, during which time no interest was paid. The creditor's inaction was construed as a waiver of the provisions for securing interest and the transaction was regarded as simply one of loan for a specified period at the agreed rate of one per cent. per mensem (*d*).

Rights of the parties.—Under a mortgage by conditional sale the mortgagor has a right to redeem (*e*). The remedy of the mortgagee is foreclosure, not sale, if the terms of the mortgage entitle him to foreclose (*f*). Prior, however, to the Transfer of Property Act, this matter was regulated by Bengal Regulation XVII of 1806. In places where this Regulation applied, the mortgagee has a right to take legal proceedings with a view to foreclosure, and that foreclosure he could have obtained, if after proper steps had been taken, the mortgagor had failed to redeem within the time limited for the purpose by the terms of the Regulation (*g*). In the provinces, however, where this Regulation was not in force, as has already been pointed out, the mortgage executed itself (*h*).

Mortgagee taking possession without foreclosure proceedings.—A mortgagee by way of conditional sale is entitled to adopt foreclosure proceedings, but he has no right to take possession of the property without proceedings prescribed by law. Where, therefore, the representative of a mortgagee entered into possession he was held to be a trespasser and the heirs of the mortgagor were entitled to sue him for ejectment as such (*i*).

Punjab.—A sale deed and a contemporaneous agreement to reconvey constitute a single transaction which amounts to a mortgage (*j*).

Section 58 (d): Usufructuary Mortgage.

Amendments.—By Act 20 of 1929 two changes have been made in the section :

(1) To clarify the anomalous result which followed owing to the conflict of decisions of the various High Courts on the question of possession, the words "or expressly or by implication binds himself to deliver possession" have been inserted.

(2) To render the definition of usufructuary mortgage more exhaustive, the words, "or any part of such rents and profits and to appropriate the same" have been added. Amendments to section 58, clause (d), are not retrospective (*k*).

In a usufructuary mortgage.—Possession—

- (1) is delivered
- (2) or agreed to be delivered expressly or by implication
- (3) and to be retained till payment of the mortgage-money.

The rents and profits or any part thereof are :—

- (1) To be received, and
- (2) appropriated

in lieu of :—

- (a) interest, or
- (b) mortgage-money, or

(d) *Ganga Sahai v. Lachman Singh* (1886) 8 All. 194.

(e) Sec. 60 of the Act, Code of Civil Procedure, O. 34, rr. 7 and 8.

(f) Sec. 67 of the Act, Code of Civil Procedure, O. 34, rr. 2 and 3; *Kalika v. Ajudhia* (1929) 51 All. 780; *Venkatarami v. Subramanya* (1888) 11 Mad. 88; *Haji Mahomed v. Ramappa* (1929) 25 Nag. L. R. 187.

(g) *Hub Ali v. Wazir-un-nissa* (1906) 28 All. 496,

33 I. A. 107.

(h) *Thumbusawmy v. Hossain Rowthen* (1875) 1 Mad. 1.

(i) *Hub Ali v. Wazir-un-nissa* (1906) 28 All. 496 (P. C.) 33 I. A. 107.

(j) *Amir v. Indar Singh*, A. I. R. (1934) Lah. 453.

(k) *Ram Khilawan v. Ghulam Husan*, A. I. R. (1933) Oudh 35; *Mt. Gomti v. Meghraj Singh* (1933) A. L. J. 907; *Ma Sein Ngo v. Maung San Pe*, A. I. R. (1935) Rang. 212.

(c) partly interest, or

(d) partly mortgage-money.

The mortgagee is called a usufructuary mortgagee. No time is fixed and there is no personal covenant.

Different kinds of usufructuary mortgages.—There are four kinds of usufructuary mortgages mentioned in section 58 (d). First, the transaction is one in which the usufruct is taken wholly on account of interest and the mortgagor is entitled to redeem on payment of principal. Secondly, the usufruct is appropriated towards both interest and principal, so that when the debt is paid off, the mortgagee must reconvey without payment by the mortgagor (*l*). Thirdly, a part of the usufruct is taken for interest so that the mortgagor redeems on payment of the principal and balance of interest. Fourthly, the usufruct is taken to wipe off a portion of the interest and principal, so that the mortgagor redeems on payment of the balance due both on account of interest and principal (*m*). The third kind contemplates the usufruct to be less than the agreed interest, while in the fourth case it is contemplated to exceed the interest. In the first two cases no term is fixed, while in the other two a term may be fixed though it is not essential. In the last two the mortgagor undertakes to pay the balance so that there is a personal covenant to pay. It is known in Madras as *bhogyadhi* (*n*), in Bengal as *bhagbandak* or *bandaknama* (*o*) or *sudbharna* (*p*), in Malabar as *otti* (*q*), in Kanara as *iladarawara*, the mortgagee being in possession and taking rents and profits in lieu of interest and the security carrying a right to redeem, but none to foreclose. The *iladarawara*, mortgagee pays the Government revenue (*r*). In the Punjab it is known as a *lekha mukhi* mortgage (*s*). An express statement that the mortgagee shall receive the rents and profits and appropriate them in lieu of interest is not necessary (*t*). The Privy Council observed that under such a mortgage, the mortgagee takes his chance of the rents and profits being greater or less than the interest, which might have been reserved by the bond and the mortgagor is entitled to redeem on payment of the mortgage-money (*u*). Known as the *vivum vadium* or the Welsh mortgage in English Law, or the *bhoga bandukom* of Hindu Law, it is for an indefinite period in which there is no contract, expressed or implied, on the part of the mortgagor to repay the debt though he is at liberty to redeem (*v*). As to setting profits against interest, in a Welsh mortgage notwithstanding agreement, the Court will direct accounts where the profits exceed the interest (*w*). A usufructuary mortgage may be made by a mortgage deed together with a lease, whereby the mortgagor becomes tenant of the mortgagee so that the mortgagee instead of taking actual possession, grants a lease to the mortgagor for a rent equivalent to interest payable on the mortgage, the lease being adopted as a mode of payment of interest on the mortgage-money. In such a case, the mortgage and the lease form one transaction, viz., that of usufructuary mortgage, the lease providing the manner in which the usufruct is to be taken in lieu of interest. As under the terms of the mortgage, the

(*l*) See sec. 62 (a) of the Act.

(*m*) See sec. 62 (b) of the Act.

(*n*) *Lakshmi v. Ramappa* (1863) 1 Mad. H. C. 70.

(*o*) *Ishan Chandra v. Sujan Bibi* (1871) 7 Beng. L. R. 14.

(*p*) *Luchmeswar v. Dookh Mochan* (1897) 24 Cal. 677.

(*q*) *Edathil Itti v. Kopashon Nayar* (1863) 1 Mad. H. C. 122; *Kumini Ama v. Pakram* (1863) 1 Mad. H. C. 261; *Ali Husain v. Nillakandan Nambudri* (1863) 1 Mad. H. C. 356.

(*r*) *Mayularayar v. Subbaraya Bhat* (1863) 1 Mad. H. C. 81 (note); *Perlathail Subba Rau v. Mankude Narayana* 1881) 4 Mad. 113.

(*s*) *Khandu Lal v. Fazal* (1920) 1 Lah. 89; *Karam Chand v. Shera*, A. I. R. (1931) Lah. 498.

(*t*) *Kandula Venkiah v. Donga Pallaya* (1920) 43 Mad. 589.

(*u*) *Parlab Bahdur Singh v. Gajadhar Bakshi Singh* (1902) 24 All. 521, 29 I. A. 148.

(*v*) *Chathu v. Kunjan* (1889) 12 Mad. 109, 112; *B. Dorappa v. K. Mallikarjunudu* (1868) 3 Mad. H. C. 363.

(*w*) *Fulthorpe v. Foster* (1687) 1 Vern. 477, 23 E. R. 602; *Manlove v. Bale* (1688) 2 Vern. 84, 23 E. R. 664; distinguished in *Alderson v. White* (1858) 2 De. G. & J. 97.

S. 58

mortgagee is entitled to remain in possession until the principal amount and interest are realized, he has a right to continue in possession so long as interest payable to him is in arrear, and the mortgagor is not entitled to redeem without payment of the arrears of rent which is equivalent to interest. The lease money *qua* lease money is not a charge on the mortgage property, but *qua* interest it is a charge, and the mortgagee is entitled to hold the property as security not only for the principal mortgage-money but also for interest (x). Under such circumstances the mortgage and the lease form merely different parts of the same transaction. The mortgagee is not obliged to resort to a Court of Revenue, but he can recover the rent by means of a suit in a Civil Court (y). But where the tenancy agreement is drawn up in the form of a lease between landlord and tenant giving to the former a right to eject the tenant under section 36 of the Rent Act, the remedy is in a Court of Revenue (z).

Personal covenant.—A usufructuary mortgagee cannot have a personal remedy against the mortgagor, yet there is no rule of law that if the mortgagor is so minded, he may not also give his usufructuary mortgagee the power to sue him personally or to sell the land, or both, at any time (a). Such a mortgage would be anomalous. In the absence of an express agreement to pay, a usufructuary mortgagee cannot obtain a personal decree (b). Where the mortgagee was to remain in possession till payment of principal and interest, which the mortgagor agreed to pay in two years, and if he failed, to pay interest, the mortgage was held not to be usufructuary (c). A mortgage is not usufructuary if there is a covenant to pay the mortgage debt (d). Where a mortgage comprised a covenant for payment by the mortgagor of the mortgage amount and otherwise answered the definition of a usufructuary mortgage, the mortgagee was not precluded by section 67 of the Transfer of Property Act from bringing the property to sale under the mortgage (e). A loan *prima facie* involves a personal liability which is displaced by reason of the fact that security is given for its repayment, but the nature and terms of the security may negative any personal liability on the part of the borrower. Even if the borrower in the first instance be under no personal liability, such liability may arise under section 68 (b) or 68 (c) of the Transfer of Property Act. Any personal liability on the part of the mortgagor under a usufructuary mortgage is excluded (f), similar to that of a Welsh mortgage (g). In the absence of an express agreement to pay, a usufructuary mortgagee cannot obtain a personal decree (h). When the document expressly provided that the debtor would be responsible for the deficiency, there is a personal obligation to pay (i). Where the mortgagee was to remain in possession till payment of principal and interest, which the mortgagor agreed to pay in two years, and if he failed, to pay interest, the mortgage was held not to be usufructuary (j). Under a usufructuary mortgage, the mortgagee has only

(x) *Imdad Hasan Khan v. Badri Prasad* (1898) 20 All. 401.

(y) *Altaf Ali Khan v. Lalita Prasad* (1897) 19 All. 496; *Baghelin v. Mathura Prasad* (1882) 4 All. 430, followed.

(z) *Chimman Lal v. Bahadur Singh* (1901) 23 All. 338; *Altaf Ali Khan v. Lalita Prasad* (1897) 19 All. 496.

(a) *Munnoolal v. Baboo Rut Bhoobun Singh* (1866) 6 W. R. 283.

(b) *Govindrao v. Jivanji* (1899) 2 Bom. L. R. 201; *Sadashiv v. Vyankatrao* (1896) 20 Bom. 296; *Luchmeshwar v. Dookh Mochan* (1897) 24 Cal. 677; *Pell v. Gregory* (1925) 52 Cal. 828.

(c) *Shridhar v. Gangaram* (1903) 5 Bom. L. R. 119.

(d) *Chathu v. Kunjan* (1889) 12 Mad. 109.

(e) *Ramayya v. Guruva* (1901) 14 Mad. 232.

(f) *Ram Narayan Singh v. Adhindra Nath Mukherji* (1917) 44 Cal. 388, 44 I. A. 87; *Chathu v. Kunjan* (1889) 12 Mad. 109; *Mani Lal v. Koti Bhai* (1889) 13 Bom. 233; *Luchmeshwar v. Dookh Mochan* (1897) 24 Cal. 677; *Haji Mahomed v. Kamappa* (1929) 25 Nag. L. R. 187 (*Gahan Lahan*).

(g) *Lawby v. Hooper* (1745) 3 Atk. 278, 26 E. R. 962.

(h) *Govindrao v. Jivanji* (1900) 2 Bom. L. R. 201.

(i) *Ram Narain Singh v. Adhindra Nath Mukherjee* (1917) 44 Cal. 388, 44 I. A. 87.

(j) *Shridhar v. Gangaram* (1903) 5 Bom. L. R. 119.

one remedy and that is to get his debt paid by collection of the rents of the property. Where a mortgage is in other respects usufructuary the insertion of a personal covenant cannot alter the character of the mortgage (*k*). Every mortgage contains within itself a personal liability to repay the amount advanced. Unless there is anything to the contrary, there is an implied promise to pay, presumed in law from the fact of the acceptance of the loan (*l*).

S. 58

Time for repayment.—The definition of usufructuary mortgage does not fix a time for payment. It is open to the mortgagor to pay off the mortgage or not as he pleases (*m*). When a definite period is fixed, the instrument cannot be regarded as strictly falling within the definition of clause (d) of section 58, because there is no stipulation in terms, that the mortgagee is put in possession until payment of the mortgage-money. Such a mortgage would be anomalous (*n*). By deed dated 2nd November 1893, the mortgagee was to take possession of certain land for 10 years and appropriate the income in liquidation of a debt of Rs. 240 and on the determination of the said period his right to the land was to cease. Before the expiration of 10 years the plaintiff brought a suit for possession and redemption, alleging that the transaction was a mortgage. It was held that the plaintiff was entitled to redeem and that though the definition of usufructuary mortgage made no mention of any fixed term, the nature of the contract was not altered by the fact that the calculation was made beforehand of the period for which the rents and profits would be sufficient to pay both principal and interest. There was no apparent reason why such a contract should not, therefore, come within the category of anomalous mortgages (*o*).

Possession and dispossession.—As regards possession, it was decided in an old Calcutta case that it was unnecessary that possession should be delivered at the time of the mortgage and that the mortgagee could sue for possession (*p*). The Bombay High Court adopted a similar view (*q*). But a Full Bench of the Madras High Court took a contrary view (*r*). In view of this divergence of opinion the section was amended by the introduction of the words "or expressly or by implication binds himself to deliver possession." The effect of the amendment is that it is not necessary that possession should be given at the moment of the mortgage and if there is a covenant to deliver possession expressly or impliedly, the requisites as to possession are sufficiently complied with. It is of the essence of a usufructuary mortgage, that the mortgagee is authorized to retain possession of the mortgaged property until payment of the mortgage-money (*s*). The requirements of law are satisfied if the mortgagor delivers such possession as the property is capable of: actual physical delivery is not necessary (*t*). On dispossession his remedy lies under section 68 of the Transfer of Property Act. If possession be not given to the mortgagee from the commencement, his remedy is to sue for it under his contract, or sue for the money under section 68 of the Transfer of Property Act (*u*).

(*k*) *Krishna v. Hari* (1908) 10 Bom. L. R. 615.

(*l*) *Chhathi Lal v. Bindeshwari* (1929) 8 Pat. 16; *Parbati Charan v. Gobinda Chandra* (1906) 4 C. L. J. 246; *Ethel v. Clara* (1906) 4 C. L. J. 510; *Ram Narayana Singh v. Adhindra Nath Mukherji* (1917) 44 Cal. 388, 44 I. A. 87; *Chatu v. Kunjan* (1889) 12 Mad. 109.

(*m*) *Chathu v. Kunjan* (1889) 12 Mad. 109.

(*n*) *Tukaram v. Ramchand* (1902) 26 Bom. 252; *Visavalinga v. Palaniappa* (1898) 21 Mad. 1; *Hikamatulla Khan v. Imam Ali* (1890) 12 All. 203.

(*o*) *Tukaram v. Ramchand* (1902) 26 Bom. 252.

(*p*) *Ishan Chandra v. Sujun Bibi* (1871) 7 Beng. L. R. 14.

(*q*) *Motiram v. Vitai* (1889) 13 Bom. 90.

(*r*) *Subbamma v. Narayya* (1918) 41 Mad. 259.

(*s*) *Chhathi Lal v. Bindeshwari* (1929) 8 Pat. 16; *Lalai Ram v. Anant Ram* (1892) A. W. N. 66.

(*t*) *Ram Khilawan v. Ghulam Husan*, A. I. R. (1933) Oudh 35.

(*u*) *Govindrao v. Jivanji* (1900) 2 Bom. L. R. 201.

S. 58

The mere fact that possession is not delivered, cannot alter the character of the transaction (v). On being deprived of his possession by a third party the mortgagee's only right is to sue to recover possession (w). Where the mortgagor failed to give possession to the mortgagee, it was held that the mortgagee was entitled to a decree for money, whether his claim was regarded as one for compensation in damages, for breach of contract or for money lent or for money had and received for the plaintiff's use (x). When dispossessed of land given in lieu of interest by a co-sharer of the mortgagor, who obtained the same on partition, section 99 of the Estates Partition Act is no bar to suing for the mortgage-money (y). On the other hand, a usufructuary mortgagee is not bound to sue for possession. If he is disturbed in his possession by the mortgagor or those claiming against him, he is entitled to sue for the money (z). When he is kept out of possession by the mortgagor he is entitled to recover the rents and profits received by the mortgagor during that period (a). The mortgagee is entitled to remain in possession till the debt is satisfied from the usufruct and it is not necessary for him to sue for the amount due to him (b). Where by diluvion, a usufructuary mortgagee is deprived of land over which he holds a usufructuary lease, he can call upon the lessor for the unpaid balance of the lease (c). A stipulation that until delivery of possession the mortgagor shall pay interest at the rate of 2 per cent. on the mortgage-money and that until payment of the principal Rs. 5,600 with interest to the very last pie, the mortgagee shall continue in possession, was held to entitle the mortgagee to redeem on payment of the principal alone, for the mortgagee after possession took the rents and profits in lieu of interest (d). Delivery of possession with a power to recover rents in discharge of the debt or interest of the debt is not the only requisite of a usufructuary mortgage. It is the contents of the agreement and the jural relation constituted by it that determine the nature of the transaction (e).

Code of Civil Procedure, O. 2, r. 2.—In 1879 a mortgage was executed providing for a term of four years and that the mortgagee should have possession and appropriate the profits in lieu of interest, if any, due. Possession not having been given, the mortgagee brought a suit in 1882 and obtained a decree which was satisfied by a sale of the property belonging to the judgment-debtor. In 1886 the mortgagee filed a fresh suit for principal with balance of interest. It was held that the suit was barred under section 43 of the Civil Procedure Code as the cause of action accrued to the mortgagee when possession was refused, so that he ought to have sued for the principal in 1882 (f).

No attachable debt.—In a purely usufructuary mortgage the mortgagee has no right to demand the debt; this is clear from section 62 of the Act. The mortgagee has a right to the property only, which is in the nature of immoveable property under the General Clauses Act, IX of 1897. Hence there can be no attachment of the debt so that there is no debt payable by the mortgagor. The point becomes important when an attachment has to be levied by a creditor of the mortgagee.

- (v) *Khunni Lal v. Madan Mohan* (1909) 31 All. 318; *Modun Mohun v. Ashad Ally* (1884) 10 Cal. 68; *Ishan Chandra v. Sujan Bibi* (1871) 7 Beng. L. R. 14.
 (w) *Gokul Shrimal* (1904) 6 Bom. L. R. 288.
 (x) *Sheo Narayan v. Jai Gobind* (1882) 4 All. 281; *Mahesh Singh v. Chouharja Singh* (1882) 4 All. 245.
 (y) *Talik Singh v. Jalal Singh* (1910) 11 C. L. J. 136; *Ramnandan Parbat v. Deni Sahi*, A. I. R. (1924) Pat. 91.
 (z) *Lalji Mal v. Mohan Lal* (1881) A. W. N. 71.

- (a) *Govindrao v. Jivanji* (1900) 2 Bom. L. R. 201.
 (b) *Sahikh Fyezoolah v. Syed Kazim Hoosein* (1870) 14 W. R. 29.
 (c) *Sheo Gulam Singh v. Roy Dinker Dyal* (1874) 21 W. R. 226.
 (d) *Parlab Bahadur Singh v. Gajadhar Bakhsh* (1902) 24 All. 521, 29 I. A. 148.
 (e) *Subhabhat v. Vasudev Bhat* (1882) 6 Bom. 674; *Ram Khilawan v. Ghulam Husan*, A. I. R. (1933) Oudh 35.
 (f) *Hikmatulla Khan v. Imam Ali* (1890) 12 All. 203.

The procedure is by attachment under O.21, r. 54 of the Code of Civil Procedure of the interest in immoveable property and the sale in accordance with the provisions of the Code and not by attachment under O.21, r. 46 (g).

Enactments regulating interest.—Madras Regulation, XXXIV of 1802, was enacted to regulate interest and check usury. Section 8 applied to usufructuary mortgages. This section was similar in terms to section 10 of the Bengal Regulation, XV of 1793, the principal difference being that the latter Regulation fixed the 28th of March 1780 as the date after which usufructuary mortgages were to be governed by the Regulation. The intention of both the Regulations was to limit the interest on money and to prevent the usufructuary mortgagee from indirectly securing a higher rate of interest than that allowed, namely, 12 per cent per annum, by sections 9 and 10. In the case of *Shah Mukhun Lall v. Baboo Sree Kishen Singh* (h), the Judicial Committee explained the Bengal enactment. Act XXVIII of 1855 repealed section 8 of the Madras Regulation, Act XXXIV of 1802, the rest of which was repealed by Madras Act II of 1869. The Bengal Regulations were also repealed by Act XXVIII of 1855. The effect of Act XXVIII of 1855 was, that where in a mortgage it was agreed between the parties that the usufruct should be allowed in lieu of interest it was made binding upon the parties. But Regulation XXXIV of 1802 still applies to usufructuary mortgages executed before the passing of Act XXVIII of 1855 (i). A mortgage of 1840 was held to fall within the purview of Regulation XXXIV of 1802 (j). To an *iladarwara* mortgage, the Regulation was held not to apply as it secured to the mortgagee the use and occupation of the land for a long term and amounted to a lease of the property for the term agreed upon (k). In a mortgage of what was called the *malikana* interest of certain talukdars in which the parties agreed that a sum of Rs. 565 should be allowed for expenses without an account, the Privy Council considered that Regulation XXXIV of 1802 did not apply so as to allow the mortgagor to claim accounts in a redemption suit (l). Sections 9 and 10 of Regulation XXXIV of 1803 fixed the rate of interest to be allowed to mortgagees as not to exceed 12 per cent. per annum and that no matter whether the contract of the parties fixed a larger rate of interest, the law would not recognize any contract of payment of a rate higher than 12 per cent. per annum. These Regulations were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882, it being provided by section 2 of the latter Act, that "the rights and liabilities arising out of legal relation constituted before this Act comes into force" shall be saved (m).

"Zarpeshgi" whether a mortgage or lease.—The usufructuary mortgagee can lease the property to the mortgagor or to a third party (n). A transaction may combine the features partly of a lease and partly of a mortgage, such as *zarpeshgi* lease in Northern India or a *kanom* in Malabar. The question whether a transaction was intended to be a lease or mortgage depended upon the object for which the tenure was created (o). The test whether *zarpeshgis* are mortgages or leases is whether there is a secured debt and a right of redemption. In a *zarpeshgi* lease

(g) *Subraya v. Subramania*, A. I. R. (1928) Mad. 648; *Ramasami v. Srinivasa* (1916) 39 Mad. 389; *Manilal Ranchod v. Molibhai Hemabhai* (1911) 35 Bom. 288.
(h) (1869) 12 M. I. A. 190.
(i) *Perlathail Subba Rau v. Mankude Narayana* (1881) 4 Mad. 113.
(j) *Tippayya Holla v. Venkata* (1883) 6 Mad. 74.
(k) *Perlathail Subba Rau v. Mankude Narayana* (1881) 4 Mad. 113.

(l) *Badri Prasad v. Murlidhar* (1882) 2 All. 593, 7 I. A. 51.
(m) *Samar Ali v. Karim-ul-lah* (1886) 8 All. 402.
(n) *Karamat Ali Khan v. Ganeshi Lal* (1927) 49 All. 658.
(o) *Meenakshisundari v. Rathnasami* (1918) 41 Mad. 959. Note.—In this case specific performance of an agreement to lend money is discussed.

S. 58

there is an advance to the lessor and the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land (*p*). There is no question of redemption upon paying off the advance. At the expiration of the term the lessor may re-enter as on the determination of any other lease. The re-entry does not depend upon the repayment of the advance, nor can the property be held after the termination of the lease to secure repayment as there is nothing to repay. In substance the transaction is one in which rent is paid in a lump sum in advance, instead of by instalments during the term. Where, however, the interest created in the lessee continues after the expiration of the term, until the advance, which is essentially a loan and not an advance of rent, is repaid, the transaction has the characteristics of a mortgage. It is the mortgage of a leasehold interest and can be redeemed by the mortgagor upon repayment of the loan with interest, if any is due upon the termination of the lease, or at any time thereafter within the limitation period, just as in the case of any other mortgage, the leasehold interest being held as security for repayment (*q*). Plaintiffs had lent money to J. and B. L. on a *zarpeshgi* mortgage of a share of certain Moryahs. J. and B. sold theirs to K. and T. who ousted the plaintiff from the property. A decree against the plaintiff when the plaintiff sought a money decree, was set aside, particularly as there was nothing in the lease which made the property liable to be sold (*r*). A *zarpeshgi* lease is not a mere contract for the cultivation of the land at a rent, but is intended as a security to the tenant for the sum advanced and interest thereon. The tenant's possession is not of a cultivator but of a creditor operating repayment of the debt due to him by means of the security (*s*). In a *zarpeshgi* deed, which is in essence a lease, a period is fixed and there is a stipulation that the mortgagee shall retain possession thereof for the term of the *zarpeshgi* (*t*). A landlord cannot sue tenants for the rent of the whole holding and at the same time sue the *zarpeshgidar* also for the same, when that *zarpeshgidar* is in occupation of only a small portion of the holding (*u*). The question whether the lease and the mortgage are distinct transactions or one and the same transaction is discussed in the undermentioned cases (*v*).

Usufructuary mortgagee is not a proprietor.—It was held by a Full Bench of the Allahabad High Court, two of the Judges dissenting, that a person who creates a usufructuary mortgage of zemindari property becomes an ex-proprietary or occupancy tenant of the ser-land under section 7 of the N. W. P. Rent Act, XII of 1881. The Chief Justice in that case said that a usufructuary mortgagee is for the time being the proprietor of the property inasmuch as he is entitled to exclusive possession at the time; but Mahmood, J., expressed the view that the right of usufructuary mortgagee was not one of proprietorship and that having regard to section 58 of the Transfer of Property Act, the execution of a usufructuary mortgage does not amount to a transfer of the proprietary right (*w*). The latter view is correct and,

- (*p*) *Bengal Indigo Co. v. Raghibar Das* (1807) 24 Cal. 272, 23 I. A. 158; *Mahamad Muse v. Bagas Amanji* (1908) 32 Bom. 569; *Tukaram v. Ramchand* (1902) 26 Bom. 252; *Chennapatnam v. Tadakamalla* (1904) 27 Mad. 86.
 (*q*) *Maharaja Kesho Prasad Singh v. Chandrika Prasad Singh* (1923) 2 Pat. 217; *Hussain Ali Shah v. Sardar Ali Shah*, A. I. R. (1933) Lah. 786; *Gopal v. Desai* (1882) 6 Bom. 674; *Basant Lal v. Tapeshri* (1881) 3 All. 1.
 (*r*) *Mt. Takimossee Kooer v. Mohesh Singh* (1873) 21 W. R. 37.
 (*s*) *Bengal Indigo Co. v. Raghubar Das* (1896) 24 Cal. 272, 23 I. A. 158; *Venkateshwara*

- v. Kesava* (1879) 2 Mad. 187.
 (*t*) *Chhathi Lal v. Bindeshwari* (1929) 8 Pat. 16.
 (*u*) *Mohant Ram Das v. Thakur Singh* (1905) 1 C. L. J. 136.
 (*v*) *Abdul Rahim v. Raghunath Sukul*, A. I. R. (1931) Pat. 22; *Chimanlal v. Bahadur* (1901) 23 All. 338; *Uttam Chandra v. Raikrishna Dalal* (1920) 47 Cal. 377; *Khuda Baksh v. Alimunnissa* (1904) 27 All. 313; *Asa Ram v. Kishan Chand*, A. I. R. (1930) Lah. 386.
 (*w*) *Indar Sen v. Raubat Singh* (1885) 7 All. 553; *Bhugwan Singh v. Murli Singh* (1879) 1 All. 459, dissented from.

according to the definition, possession is delivered to the mortgagee and he is entitled to appropriate the rents and profits, while the residuary rights of ownership such as power of sale and other rights, remain unimpaired.

Usufructuary mortgagee planting trees.—The planting of trees by a usufructuary mortgagee is not an improvement of such a nature as to entitle him to claim compensation, but he has a right to take away the trees and the mortgagor cannot benefit by the trees planted by the mortgagee (x).

Redemption suit.—A suit for redemption would be under Order 34, rules 7 and 8.

Remedies of the usufructuary mortgagee.—Under section 67 such a mortgagee cannot as such sue either for foreclosure or for sale (y). But where in a usufructuary mortgage, a lease of the mortgaged property was granted by the mortgagee to the members of the mortgagor's family, who fell into arrears with regard to rents for which there was a charge created in the property, it was held that he had a right to enforce the charge regardless of time and mode of redemption (z).

Limitation.—A suit to redeem a usufructuary mortgage is governed by article 148 of the Limitation Act (a). This was a mortgage of 1842. The period of redemption begins when the right to recover possession arises, although in the mortgage deed it is specified that the mortgagor shall be entitled to redeem "within" a stated number of years, for the right to redeem and the right to foreclose are co-extensive (b). There is no foreclosure or sale in a usufructuary mortgage, but when the mortgagee has not obtained possession, a suit to recover the loan by sale would be governed by article 132 of the Limitation Act (c).

"Mutavali."—Under Shiah Law a *mutavali* may execute a usufructuary mortgage of *wakf* property with the Court's sanction. Such a sanction may be obtained after the transaction and will have a retrospective effect (d).

Section 58 (e): English Mortgage.

A transaction is an English mortgage where:—

(a) the mortgagor binds himself to repay the mortgage-money on a certain date, and

(b) transfers the mortgaged property absolutely to the mortgagee

Subject to proviso:—

(a) that the mortgagee will retransfer it to the mortgagor

(b) upon payment of the mortgage-money as agreed.

Form of an English mortgage.—This form of mortgage prevails in Presidency towns only. The component parts of an English mortgage are: (1) Date, (2) names of the parties, (3) Recitals including therein seisin and agreement for a loan, witnessing clauses, one containing a personal covenant to pay on a certain date with interest as stated, and in default continuance thereof till repayment, the other a grant of the property described to the lender, after which follow the estate clause and the *habendum*. (4) Next comes the proviso for redemption including a stipulation to give three months' notice or three months' interest on failure to pay as

(x) *Raghunandan Rai v. Raghunandan Pande* (1921) 43 All. 638.
(y) *Luchmeshwar v. Dookh Mochan* (1897) 24 Cal. 677; *Umda v. Umrao* (1889) 11 All. 367; *Chalhu v. Kunjan* (1889) 12 Mad. 109; *Ramayya v. Guruva* (1891) 14 Mad. 232; *Venkalasami v. Subramanya* (1888) 11 Mad.

88, dissented from.
(z) *Damodara v. Chandappa* (1933) 56 Mad. 892.
(a) *Fatimulnissa Begum v. Sundar Dass* (1900) 27 Cal. 1004.
(b) *Vadji v. Vadju* (1881) 5 Bom. 22.
(c) *Ram Chandra v. Modhu* (1898) 21 Mad. 326.
(d) *Afzal Husain v. Chhedi Lal* (1935) 57 All. 727.

S. 58 agreed, to which is added a clause for capitalisation. (5) Then the insurance clause with an additional stipulation as to reinstatement, (6) a right to exercise powers vested under section 67, (7) the usual power of sale by private treaty or public auction under section 69, (8) followed by the usual four absolute covenants for title and for possession and quiet enjoyment, freedom from encumbrance and further assurance, (9) the *testimonium*, (10) attestation clause, and (11) the receipt clause. These are the principal parts of a mortgage, to which may be added other covenants and conditions which may be agreed upon between the parties. It will be seen that in every English mortgage two elements are essential, a covenant to repay and a transfer of property.

Absolutely.—The use of this term is not easy to explain and the necessity for its insertion in the definition of an English mortgage is not readily understood for two reasons. First, it is inconsistent with the definition of a mortgage in section 58 which is defined as a transfer of an interest. Secondly, a transfer cannot be absolute if it is subject to a re-transfer. The nearest approach to the explanation is, that the word appears in the section to conform to the power of sale in section 69, sub-section (3) in order not to embarrass the power of a mortgagee exercising his power of sale and to protect the purchaser as provided in that sub-section, for unless the transfer were absolute, a sale by the mortgagee without the intervention of the Court would not extinguish the equity of redemption and thus the mortgagee would not be able to transfer to the purchaser an absolute estate freed and discharged from the mortgage debt. The word drew the attention of the Calcutta High Court on more than one occasion (e) but was left undiscussed.

Personal covenant.—Being the essence of an English mortgage, the covenant is always expressed. Its omission will render the mortgagor liable by implication (f). It may be observed that clause (a) of section 68 is the same as the opening words of section 58 (e).

Remedy of an English mortgagee.—Prior to the Amending Act, 20 of 1929, he could foreclose or sell within 60 years. He is deprived of his former remedy by the Amending Act. Being left with the remedy by sale only, the question whether section 147 will apply, will have to be determined in view of the observations of the Judicial Committee, that that section only applies to mortgages where the remedy was for foreclosure or sale and not for foreclosure or for sale (g).

Section 58 (f): Mortgage by Deposit of Title-deeds.

Amendment.—Clause (f) which appeared before Act 20 of 1929 as an exception to section 59, has been dropped from that section and with verbal modification, now forms part of section 58.

Equitable mortgage.—Prior to the Amending Act, 20 of 1929, equitable mortgage was not defined by the Transfer of Property Act and the proviso to section 59 merely stated how an equitable mortgage could be created. Now we have a definition. Being a mortgage, it amounts to a transfer of a right or interest in specific immoveable property. There is no covenant to retransfer the property. It can be effected by a debtor depositing with his creditor the title-deeds of his property as security for the advance made to him or already due to him or for future advances. In England the law of equitable mortgages rested on the doctrine of part performance.

(e) *Falakrishna v. Jagannath* (1932) 59 Cal. 1314, 1330; *Bengal National Bank, Ltd. v. Janaki Nath Roy* (1927) 54 Cal. 813.

(f) *Pall v. Gregory* (1925) 52 Cal. 828.

(g) *Vasudeva v. Srinivasa* (1907) 30 Mad. 426, 34 I. A. 186.

Forms of equitable mortgages.—There are several ways of effecting this mortgage, the most common and the simplest way being by delivery of the deeds to the debtor or his agent (*h*). Often in practice a promissory note is taken from the debtor accompanied with the deposit and the creditor on the following day sending to the debtor a list of the deeds deposited (*i*). A third method is for the solicitor to create evidence of the deposit by recording what takes place, when the promissory note is passed and the deeds handed over. Yet another form is by a memorandum (*j*), in which case, care should be taken as to registration.

Deposit of deeds accompanied by a memorandum.—When the title-deeds are deposited and a writing accompanies them stating the purpose of the deposit, then the writing is the contract between the parties, and for the terms between the parties the writing must be looked at (*k*). Parol evidence will not be allowed to be given to contradict the written instrument of a contemporaneous agreement (*l*), although parol evidence of a distinct subsequent agreement may be given (*m*). When the deeds did not agree with the memorandum and it did not appear whether any others were deposited on the occasion of the loan, it was held that there was a good lien on the title-deeds (*n*). Where a conveyance of two properties was deposited and by the memorandum only one of them was pledged as security for a specific sum advanced and for general balance, no lien could be claimed on the other (*o*). When deeds relating to freehold and leasehold were deposited and the memorandum related to the latter, the mortgagee was held entitled to a sale of both (*p*). The onus lay on the mortgagor when memorandum was signed but not dated and the mortgagor sought to recover the deeds and to treat the custody of the creditor as that of a bailee (*q*). A memorandum accompanying the deposit to secure a specific sum may be extended as a security beyond that sum by a subsequent verbal agreement (*r*). The memorandum need not contain a description of the property (*s*) or the date (*t*).

Deposit of title-deeds without memorandum.—The effect of a deposit as between debtor and creditor raises a presumption of an equitable mortgage, so that the burden of rebutting that presumption is upon the debtor (*u*). No such presumption will be raised where a legal mortgagee is possessed of documents other than those relating to the property mortgaged to him (*v*). It has long been settled that a mere deposit of title-deeds with intent to create a security thereon upon an advance of money without a word passing, gives an equitable lien (*w*). It is sufficient if it can be shewn by satisfactory testimony that the object and intent of the deposit was the security of money (*x*) but as against a stranger this can only be so, where

- (*h*) *Russell v. Russell* (1783) 1 Bro. C. C. 269, 28 E. R. 1121.
- (*i*) *Ex-parte Langston* (1810) 17 Ves. 227, 34 E. R. 88; *Kalidas v. Jugalkishna* (1935) 62 Cal. 998.
- (*j*) *Ex-parte Kensington* (1813) 2 Ves. & B. 79, 35 E. R. 249.
- (*k*) *Shaw v. Foster* (1872) 5 H. L. 321; *Wylde v. Radford* (1863) 33 L. J. Ch. 51.
- (*l*) *Ex-parte, Coombe* (1810) 17 Ves. 369, 34 E. R. 142; *Pranjivandas v. Chan Ma Phee* (1916) 43 Cal. 895, 43 I. A. 122; *Choonilal v. Vithaldas* (1922) 24 Bom. L. R. 502.
- (*m*) *Ede v. Knowles* (1843) 2 Y. & C. Ch. Cas. 172, 63 E. R. 76, Indian Evidence Act, 1872, sec. 92, proviso (4).
- (*n*) *Re. Moore, ex-parte, Powell* (1842) 6 Jur. 490.
- (*o*) *Wylde v. Radford* (1863) 33 L. J. Ch. 51.
- (*p*) *Re. Evans, ex-parte, Robinson* (1832) 1 Deac. & Ch. 119 et. of R.

- (*q*) *Moxon v. Burgess* (1856) 28 L. T. O. S. 58.
- (*r*) *Re. Burkill, ex-parte, Nettleship* (1841) 2 Mont. D. & De. G. 124; *Hames v. Rice* (1854) 24 L. T. O. S. 57.
- (*s*) *Jared v. Clements* (1902) 2 Ch. 399.
- (*t*) *Esberger & Son, Ltd. v. Capital and Counties Bank* (1913) 2 Ch. 366; *DeLisle v. Union Bank of Scotland* (1914) 1 Ch. 22.
- (*u*) *Burgess v. Moxon* (1856) 2 Jur. (N. S.) 1059; *Ex-parte Mountfort* (1808) 14 Ves. 606, 33 E. R. 653.
- (*v*) *Wardle v. Oakley* (1864) 36 Beav. 27, 55 E. R. 1066.
- (*w*) *Shaw v. Foster* (1872) L. R. 5 H. L. 321; *McMahon v. McMahon* (1886) 55 L. T. 763; *Bank of New South Wales v. O'Connor* (1889) 14 App. Cas. 273.
- (*x*) *Casberd v. A. G.* (1819) 6 Price 411, 146 E. R. 850; *Maugham v. Ridley* (1863) 8 L. T. 309.

S. 58 possession is not otherwise accountable (y). Proof must be adduced as to how possession was acquired and the mere production of title-deeds without any explanation, does not constitute an equitable mortgage (z). The loan and deposit must be possessed (a). There must also be proof of the time when both the loan and deposit were made (b). An existing debt or contemporaneous advance coupled with deposit is evidence (c).

Requisites of an equitable mortgage.—

- (1) Delivery must be by a debtor or his agent.
- (2) Delivery must be in the towns mentioned in the Act.
- (3) Delivery must be to a creditor or his agent.
- (4) Delivery of documents of title to immoveable property.
- (5) Delivery must be with intent to create a security thereon.

Delivery by whom.—In section 58 (a) the transferor is called the mortgagor, which term is used in the subsequent sub-clauses, whereas in clause (f) the term used is "a person," for in a security of this nature, there is no transfer. Again, the words "or agent" are not used, as in the latter part, where they are used after the word "creditor." However, a deposit may be made by a debtor or an agent duly authorized for that purpose.

Where debtor is trustee.—A deposit by a trustee for money due to certain trust estates not known to the *cestui que trust* is valid (d).

Deposit of deeds by client with a solicitor.—A solicitor can take a deposit of title-deeds of his client as security for his costs already incurred, but the Court will order the deeds to be delivered up, if the client pays into Court a sum sufficient to cover the solicitor's costs (e). If a solicitor claims as equitable mortgagee, he must give notice of his claim to those interested in the estate (f). This is, however, independent of the lien which he has and his right to refuse to deliver them up (g).

Deposit by lessee.—Deposit of title-deeds by a lessee is not a breach of covenant against assignment (h), and the mortgagee cannot be compelled to take an assignment of the term or be made liable upon the covenants of the lease (i).

Deposit by a limited owner.—If a limited owner were to deposit the title-deeds, the security will extend only to the interest of the depositor but with the assent of the remainderman he may charge beyond his interest (j). A tenant for life is entitled to the possession of the title-deeds, and may deposit the title-deeds as apparent owner (k). An executor may deposit the title-deeds without his co-executor joining, if the moneys are required for the purpose of administering the estate (l). If a person has no interest in the deeds deposited with him, he cannot confer an interest in the property comprised therein by delivering them to a third party by

- (y) *Boxon v. Williams* (1829) 3 Y. & J. 150, 148 E. R. 1131.
 (z) *Chapman v. Chapman* (1851) 13 Beav. 308, 51 E. R. 119; *McMahon v. McMahon* (1886) 55 L. T. 783.
 (a) *Heng Moh & Co. v. Lim Saw Yean* (1923) 1 Rang. 545 P. C.
 (b) *Kebell v. Philpot* (1837) 7 L. J. Ch. 237.
 (c) *The Himalaya Bank, Ltd. v. Quarry* (1895) 17 All. 252.
 (d) *New Prance and Garrard's Trustee v. Hunting* (1897) 2 Q. B. 19; *Hermoux v. Harbord* (1898) 14 T. L. R. 243; *Taylor v. London and County Banking Co., London and County Banking v. Nixon* (1901) 2 Ch. 231; *Re. Pidcock, Penny v. Pidcock* (1907) 51 So. Jo. 514.
 (e) *Mills v. Finlay* (1839) 1 Beav. 560, 40 E. R.

1058.
 (f) *Boxon v. Williams* (1889) 3 Y. & J. 190 148 E. R. 1131.
 (g) *Ex-parte Whitebread* (1812) 19 Ves. 209, 34 E. R. 496; *Heath v. Crealock* (1874) 10 Ch. 22; *Waldy v. Gray* (1875) 20 Eq. 238.
 (h) *Bowser v. Colby* (1841) 1 Hare. 109, 66 E. R. 969; *Davidson*, *Precedents in Conveyancing*, 4th Ed., Vol. II, Part I, p. 110.
 (i) *Moore v. Gray* (1848) 2 Ph. 717, 41 E. R. 1120; *Cox v. Bishop* (1857) 26 Ch. 389.
 (j) *Williams v. Medlicott* (1819) 6 Pri. 495, 146 E. R. 875.
 (k) *Wallwyn v. Lee* (1803) 9 Ves., 24, 32 E. R. 509, but see *Ind Coope & Co. v. Emerson* (1887) 12 A. C. 300.
 (l) *Ex-parte Sheffield Union Banking Co. Re. Carter* (1865) 13 L. T. 477.

way of security or otherwise (*m*). Where a trustee deposits the trust deeds upon which the trust is apparent with his bankers, the trust is prior to the lien, but the *cestui que trust* is preferred, even if the deposit has no notice of the trusts (*n*). If the deeds of one client are deposited with another client fraudulently by a solicitor, the onus is on the mortgagee to prove that the solicitor was the agent of the mortgagor (*o*); and where a solicitor permits his client to deposit deeds he cannot set up a first mortgage of which he is an assignee (*p*). If the debtor is allowed to retain the deeds, the deposits would be ineffectual unless he gives a memorandum in writing to the creditor that he holds the deeds as security for the creditors for the debt (*q*).

Tenants in common.—A tenant in common in possession of title-deeds could deposit them to secure his own debt with the consent of the co-owner though he would be liable in damages for costs incurred by the co-owner in obtaining certified copies or inspection, should the latter require them for production to his purchaser or mortgagee. The creditor should not be advised to rely on a deposit of certified copies when the originals are in existence (*r*).

Extent.—As originally framed, equitable mortgages were permitted by the Act in the towns of Calcutta, Bombay, Madras, Karachi and Rangoon. By an Amending Act (*s*) Moulmein, Bassein and Akyab were added and by a further Amending Act (*t*) the word "and" following the town of Akyab was omitted and the words "in any other town which the Governor-General in Council may by notification in the *Gazette of India* specify in this behalf" were added. For notifying Mandalay, see *Gazette of India*, 1915, Part I, p. 1906, the towns of Bandra, Kurla and Ghatkoper Kirol in Bombay Suburban District, see *ibid*, 1924, Part I, p. 1064, Chittagong, see *ibid*, Part I, p. 1260. It may also be created in the Punjab (*u*). A valid equitable mortgage could be created by depositing in these towns documents relating to property situate outside them but not *vice versa*. And so where title-deeds were delivered to an attorney's assistant outside Calcutta to be delivered to the solicitor in Calcutta who acted for both the debtor and the creditor, with an authority by the debtor to deliver them to the creditor, the transaction did not amount to a valid mortgage by deposit of title-deeds (*v*). The other High Courts (*w*) have taken the same view.

Towns mentioned in the Act.—It has been held by the High Courts of Calcutta (*x*) and Allahabad (*y*) that in the case of deposit of title-deeds actually made in the towns mentioned in the Act, the mortgage can be effected irrespective of the situation of the property to which the title-deeds refer. The same view is held in Bombay (*z*). Even where the property is in a foreign jurisdiction, provided the transaction is effected in one of the towns mentioned, it is valid (*a*). The Transfer of Property

- (*m*) *Jackson v. Butler* (1742) 2 Atk. 306, 26 E. R. 587; see *Bell v. Taylor* (1836) 8 Sim. 216, 59 E. R. 87.
 (*n*) *Stackhouse v. Jersey* (1861) 1 John & H. 721, 70 E. R. 933.
 (*o*) *Wall v. Cockerall* (1863) 10 H. L. C., 229; *Ogilvie v. Jefferson* (1860) 2 Giff. 353, 66 E. R. 147.
 (*p*) *Spackman v. Foster* (1883) 31 W. R. 348.
 (*q*) *Baynard v. Wooley* (1855) 20 Beav. 583, 52 E. R. 729.
 (*r*) *Elizabeth May v. Bhupendra Nath* (1928) 7 Pat. 520.
 (*s*) Act VI of 1904, sec. 4.
 (*t*) Act XI of 1915.
 (*u*) *Moti Ram v. Bharat National Bank, Ltd.*, A. I. R. (1921) Lah. 253.
 (*v*) *Surajmull Shroff v. Gopeeram*, A. I. R. (1932)

- Cal. 823.
 (*w*) *Basant Lal v. Commissioner of Income Tax*, A. I. R. (1932) All. 451; *Konchadi v. Shiva Rao* (1905) 28 Mad. 54; *Darbari Lal v. Khetra Chandra*, A. I. R. (1927) Pat. 41.
 (*x*) *Gokul Dass v. Eastern Mortgage and Agency Co.* (1906) 33 Cal. 410.
 (*y*) *Miller v. Babu Madho Das* (1897) 19 All. 76, 23 I. A. 106; *Madho Das v. Ram Kishen* (1892) 14 All. 238.
 (*z*) *Behram Rashid v. Sorabji Rustomji* (1914) 38 Bom. 376.
 (*a*) *Papiiah Naidu v. Raja of Ramnad* (1932) 59 Cal. 439; (property at Bangalore Mysore State); *Central Bank of India v. Nusservanji* (1933) 57 Bom. 234 (property in Baroda).

S. 58 Act is to be construed irrespective of the fact whether the property is inside or outside British India or whether the property is situate in a province to which the Act applies or not (b); or whether the property is situate partly within and partly outside the limits of the towns mentioned (c). The place where a contract of mortgage by deposit is made, not the situation of the land, is the test of validity.

Deposit of title-deeds outside towns mentioned.—Outside the towns specified in the Act, it is not competent to create such a mortgage (d).

Mortgage by deposit before the passing of Act IV of 1882.—Before the Act came into force, there was no difference between the law in the mofussil and that prevalent in the Presidency towns as to the validity of a mortgage created by deposit of title-deeds with a creditor with intent to secure a debt (e).

Deposit with whom to be made.—A good security may be created by a debtor depositing with his creditor the title-deeds of his property, freehold or leasehold (f). A deposit of title-deeds as a security is an equitable mortgage (g). The title-deeds must be deposited with a creditor or his agent and no equitable mortgage is created by deposit by a debtor with his wife (h), or delivery to an attorney to prepare a legal mortgage (i). A trustee advanced trust moneys with certain other moneys to himself and executed a declaration of trust of so much of the mortgage debt as represented the trust money. Thereafter he deposited the mortgage deed with his bankers for moneys advanced to him and absconded. It was held that in the absence of negligence on the part of the *cestui que trust*, the deposit passed no interest in the trust fund to the bankers (j).

Where debtor is solicitor and in fiduciary position.—Where A and B, a solicitor, were executors and the latter, to secure moneys due to the trust estate, deposited deeds in a box which remained in his possession but on his death the deeds were not found in the box and could not be identified and the surviving executor accepted other deeds as security from the legal representative, it was held that a general lien of A, if any, was waived by accepting the particular security and the general creditors of B were bound by the arrangement between A and B's legal representative (k). Moneys were deposited for investment with a solicitor who died without investing and after his death there was found in his office safe a memorandum dated a fortnight before his death, the contents of which were not known to the client, whereby he declared himself a trustee of certain leaseholds then in mortgage to himself and of a bill which he had endorsed to the client to recover repayment of the sum. In a creditor's action it was held that even if the solicitor executed the memorandum with knowledge of his insolvency, still the client was entitled to the benefit of the security against the other creditors (l).

(b) *Central Bank of India v. Nusserwanji* (1933) 57 Bom. 234; *Imperial Bank of India v. U Rai Gyaw Thu & Co., Ltd.* (1923) 1 Rang. 637, 50 I. A. 283.

(c) *Srinath Roy v. Godadar Das* (1897) 24 Cal. 348.

(d) *Surajmull Shroff v. Gopeeram*, A. I. R. (1932) Cal. 823; *Basant Lal v. Commissioner of Income Tax*, A. I. R. (1932) All. 451; *Konchadi v. Shiva Rao* (1905) 28 Mad. 54; *Darbari Lal v. Khelra Chandra*, A. I. R. (1927) Pat. 41.

(e) *Varden v. Luckpathy* (1862), 9 M. I. A. 303.

(f) *Russel v. Russel* (1713) 1 Bro. c. c. 269.

(g) *Hankey v. Vernon* (1788) 2 Cox. Eq. Cas. 12, 30 E. R. 6; *Sam v. Lallah* (1862) 6 L. T. 767 P. C.; *Dayal Jairaj v. Jivraj Ratansey* (1875) 1 Bom. 237.

(h) *Ex-parte Coming* (1803) 9 Ves. 115, 32 E. R. 545; *Norris v. Wilkinson* (1806) 12 Ves.

192, 33 E. R. 73.

(i) *Ex-parte Bulleel* (1790) 2 Cox. Eq. Cas. 243, 30 E. R. 113.

(j) *Stackhouse v. Jersey* (1861) 30 L. J. Ch. 421, 70 E. R. 933; *Newton v. Newton* (1868) L. R. 6 Eq. 135; *Isaac v. Worstercroft* (1892) 67 L. T. 351.

(k) *Mason v. Morley* (1865) 34 Beav. 471, 55 E. R. 717.

(l) *Middleton v. Pollock, ex-parte Elliott* (1876) 2 Ch. D. 104; *New Prance and Garrard's Trustee v. Hunting* (1897) 2 Q. B. 19; *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon* (1901) 2 Ch. 231; *Re. Pidcock, Penny v. Pidcock* (1907) 51 Sol. Jo. 14; *Radcliffe v. Abbey Road and St. John's Word Permanent Building Society* (1918) 87 L. J. Ch. 557.

What title-deeds should be deposited.—It is not necessary in order to create an equitable mortgage that all the title-deeds should be deposited. If the deeds are material evidence of title and are proved to have been deposited with intention of creating a mortgage, it is sufficient (*m*); nor is it necessary that the deeds deposited should shew a good title in the depositor (*n*). The mere deposit of a deed which shews no title in the depositor, who keeps back the others shewing his title, does not create an equitable mortgage (*o*). A mortgage deed is not a title-deed of the mortgagor (*p*). A lease is sufficient to found a mortgage by deposit of title-deeds though it had expired on the date of the mortgage (*q*). There the lessee continued in possession and the lessor accepted the rent and the lease was renewed by the lessor. When some title-deeds are deposited with one creditor and the last deed with another, each creditor may have a good security (*r*) unless there be evidence of a contrary intention. A bankrupt agreed with A to execute a mortgage of certain premises for the security of a debt and he sent, in order that A might prepare the mortgage, all the title-deeds except the immediate conveyance to him, the bankrupt being also indebted to B, took that conveyance and deposited it with him as security for his debt, at the same time promising to send the remainder of the title-deeds. Held that A and B had not either separately or collectively an equitable mortgage upon the premises (*s*). Where a solicitor deposited title-deeds as security and afterwards removed them fraudulently and they could not be identified, it was held that the clients had a lien on all the title-deeds for their debt (*t*). If the writing accompanying the deposit refers to one set of deeds and another set is deposited, the security will attach to the deeds deposited (*u*). If the memorandum specifies certain securities and others are afterwards found deposited, the security will attach to all the deeds deposited (*v*). Where the principal conveyance was deposited it was held sufficient (*w*). But where a solicitor deposited his title-deeds with his client, omitting the conveyance to himself, and deposited the latter with his bankers as security, the client was held to have priority over the bankers (*x*). Where a bankrupt deposited his attested copy of a lease of some coal mines, wherein he was jointly interested with five others, the Court refused to order a sale and declare a party an equitable mortgagee until the partnership accounts had been taken (*y*). Where a debtor deposited with the creditor a receipt for the purchase-money with the plan of the property attached, no conveyance having been made and the debtor not having any deeds, it was held that it created an equitable mortgage (*z*); even a plan only has been held sufficient (*a*). There is no distinction between legal and equitable estate in this country (*b*).

- (*m*) *Lacon v. Allen* (1856) 3 Drew. 579, 61 E. R. 1024; *Bhupendra Nath Basu v. Mussamat Wajihunnissa Begum* (1917) 2 Pat. L. J. 293; *Surendramohan v. Mahendranath* (1932) 59 Cal. 781; *Elizabeth May v. Bhupendranath* (1928) 7 Pat. 520; *V. E. A. R. M. Chettyar Firm v. A. K. R. M. K. Chettyar Firm*, A. I. R. (1929) Rang. 65; *Ralli Brothers v. Punjab National Bank*, A. I. R. (1930) Lah. 920.
- (*n*) *Ex-parte Wetherell* (1805) 11 Ves. 398, 23 E. R. 1141; *Re. Ravenscroft, ex-parte Arkwright* (1843) 3 Mont. D. & De. G. 129; *Lacon v. Allen* (1856) 3 Drew. 579, 61 E. R. 1024; *Roberts v. Croft* (1857) 24 Beav. 223, 53 E. R. 343; *Stackhouse v. Jersey* (1861) 1 John. & H. 721, 70 E. R. 933; *Thorpe v. Holdsworth* (1868) L. R. 7 Eq. 139; *Re. Roche's Estate* (1890) 25 L. R. Ir. 58; *Taylor v. Russell* (1891) 1 Ch. 8.
- (*o*) *Venkataramayya v. Narsinga Row* (1911) 21 M. L. J. 454.
- (*p*) *Nageswara v. Srinivasa*, A. I. R. (1926)

- Mad. 743.
- (*q*) *Villa v. Petley*, A. I. R. (1934) Rang. 51.
- (*r*) *Roberts v. Croft* (1857) 24 Beav. 223, 53 E. R. 343.
- (*s*) *Re. Price, ex-parte, Pearce v. Prothero* (1820) 1 Buck 525.
- (*t*) *Mason v. Morley* (1865) 34 Beav. 475, 55 E. R. 717.
- (*u*) *Ex-parte, Powell, In re Moore* (1842) 6 Jur. 490.
- (*v*) *Ferris v. Mullins* (1854) 2 Sm. & G. 378, 65 E. R. 444.
- (*w*) *Re. Potter, ex-parte Chippendale* (1835) 1 Deac. 67.
- (*x*) *Roberts v. Croft* (1857) 24 Beav. 223, 53 E. R. 343.
- (*y*) *Re. Bonow, ex-parte Broadbent* (1834) 2 Deac. & Ch. 3.
- (*z*) *Goodwin v. Waghorn* (1835) 4 L. J. Ch. 172.
- (*a*) *Simmons v. Montague* (1909) 1 I. R. 87.
- (*b*) *Webb v. Macpherson* (1903) 31 Cal. 57, 30 I. A. 238; *Imperial Bank of India v. U Rai Gyan Thu & Co., Ltd.* (1923) 51 Cal. 86, 50 I. A. 283.

S. 58

Deposit of deeds which do not relate to the property.—The deposit of deeds could not create an equitable mortgage on property to which they do not relate (c).

Deposit of title-deeds by mistake.—Where a debtor to secure an advance on the mortgage of his freehold, deposits, at the same time, the title-deeds of his leasehold, the creditor has no lien on the leasehold. The accidental delivery of a box of deeds to a creditor would not constitute him an equitable mortgagee, though the debtor would have to rebut the presumption (d).

Deposit for a special purpose.—The delivery of title-deeds to an attorney for the express purpose of preparing a legal mortgage does not create an equitable mortgage (e). In such cases the documents are delivered merely with a view to pledge them when the legal mortgage is prepared and it raises no inference of a present security being created thereon. It is otherwise, however, when they are delivered with the immediate intention of creating a security thereon, though the parties may have agreed to create a legal mortgage (f). Where, in order to prevent immediate proceedings, the debtor deposited the title-deeds with his creditor's attorneys to prepare a mortgage of the property, an equitable mortgage was held to have been created (g). Similarly, where the deposit is made to secure an existing debt, though it be to prepare a legal mortgage (h).

Delivery for special purpose.—Certain executors and trustees agreed to give one of the residuary legatees a legal mortgage of a part of the testator's real estate as security for his share and to deliver the title-deeds to his agents for the purpose of having the mortgage prepared; this gave the legatee an equitable lien on the property as against the executors, though not as against the other residuary legatees (i). Where title-deeds were left with an attorney of the creditor for the purpose of preparing a legal mortgage for moneys previously advanced, an equitable mortgage was held to have been created (j). The charge is restricted to the special purpose in the memorandum accompanying the deposit, and the conditions therein must be complied with (k). The purpose may be enlarged by a subsequent agreement in writing or by parol without an actual redelivery, though such an agreement will not be presumed (l).

Delivery must be with intent to create a security.—This is one of the essential elements of a mortgage by deposit of title-deeds. For unless the deposit of title-deeds effects a transfer of interest in a specific immoveable property for the purpose of securing payment of money advanced or to be advanced, it is absolutely nothing at all (m). Intention is necessary to create an equitable mortgage (n). The rule is, no intention, no security (o). There is no presumption of an equitable mortgage by deposit of title-deeds from the mere possession of title-deeds coupled with the existence of a debt (p). A plaintiff cannot claim to be an equitable mortgagee

(c) *Oakes v. Bear* (1845) 5 L. T. O. S. 345; *Jones v. Williams* (1897) 24 Beav. 47; *Venkataramayya v. Narsinga Row* (1911) 21 M. L. J. 454; *Nageswara v. Srinivasa*, A. I. R. (1934) Mad. 743.

(d) *Wardle v. Oakley* (1864) 36 Beav. 27, 55 E. R. 1066.

(e) *Norris v. Wilkinson* (1806) 12 Ves. 192, 33 E. R. 73; *Casberd v. A. G.* (1819) 6 Price 411, 146 E. R. 850; *Lloyd v. Atwood* (1859) 3 De. G. & J. 614, 44 E. R. 1405.

(f) *Edge v. Worthington* (1786) 1 Cox. Eq. Cas. 211, 29 E. R. 1132; *Ex-parte Bruce* (1813) 1 Rose 374.

(g) *Keys v. Williams* (1838) 3 Y. & C. Ex. 55, 160 E. R. 612.

(h) *Dayal Jairaj v. Jivraj Ratanji* (1877) 1 Bom.

237.

(i) *Hockley v. Bantock* (1826) 1 Russ. 141, 38 E. R. 55.

(j) *Keys v. Williams* (1838) 3 Y. & C. Ex. 55, 160 E. R. 612.

(k) *Wylde v. Radford* (1863) 9 Jur. N. S. 1169.

(l) *Ex-parte Kensington* (1813) 2 Ves. & B. 79, 35 E. R. 249.

(m) *Imperial Bank of India v. U Rai. Gyaw Thu & Co.* (1924) 51 Cal. 86, 50 I. A. 283.

(n) *Nageswara v. Srinivasa*, A. I. R. (1926) Mad. 743.

(o) *Heng Moh v. Lim Saw* (1923) 1 Rang. 545 P. C.; *V. E. A. R. M. Chettyar Firm v. A. K. R. M. K. Chettyar Firm*, A. I. R. (1929) Rang. 65.

(p) *Jethibai v. Pullibai* (1912) 14 Bom. L. R. 1020

when at the time the deeds are deposited, there is no antecedent or existing debt nor any oral agreement made that the title-deeds should stand as security for future advances, nor was any advance in fact made (q). Where there is an agreement to give a mortgage and title-deeds are delivered to the creditor's solicitor to prepare a legal mortgage, the intent to create an immediate security will be presumed and the delivery will be construed as an equitable mortgage though the agreement be not in writing (r). It has been held in cases (s) which may be regarded as obsolete that such a delivery must be clearly shewn to be made with the intention of immediately securing an existing debt or a present advance and not merely for the purpose of having a legal mortgage prepared to secure such debt or advance. By the deeds being deposited with the debtor's solicitors for preparing a mortgage and handing over the same to the creditor, an equitable mortgage is created, and the solicitor is constituted a trustee for the creditor (t). A deposit of title-deeds with written authority to sell given to a bank, and to apply the proceeds towards payment, creates an equitable lien though the deposit when made was *ultra vires* the bank (u).

A direction to hold or hand over the deeds as security is enough. One of two executors and trustees who had possession of title-deeds of an estate of which the testator and debtor to his estate had been tenants in common, requested the debtor to allow the executor to retain the title-deeds as security for the debt. The debtor by writing allowed the executor to retain the deeds. It was held that a good equitable mortgage for the debt was created (v). B being entitled to three properties, the title-deeds of one of which were held by his bankers as security, deposited the title-deeds of the other two with C as security for a debt and he gave him an order to the bankers written by himself, but not signed, to deliver the deeds of the third, when the lien had been satisfied. It was held that this gave C a valid equitable mortgage in the property mortgaged to the bankers (w). An agreement to mortgage, with the subsequent delivery of the title-deeds, will amount in equity to a mortgage and will be effectual from the time of the agreement (x). A parol agreement to deposit a lease when granted as security for the sum advanced, does not constitute an equitable mortgage (y). There must be some actual deposit to constitute an equitable mortgage. An order on a third party to deposit a lease when executed is not sufficient (z). A letter written by the debtor referring to a promissory note and deposit of title-deeds as collateral security, is merely evidence and not a contract of mortgage (a). When a legal mortgage fails for want of attestation or registration, the mortgagee cannot rely upon it as creating an equitable mortgage (b).

Nature of security.—As observed by the Privy Council, the concluding words of the section use the word "mortgage" to denote the security effected by delivery of documents of title (c).

(q) *Jaitha Bhima v. Haji Abdul* (1886) 10 Bom. 634.

(r) *Ex-parte Wright* (1812) 19 Ves. 258, 34 E. R. 513; *Keys v. Williams* (1838) 3 Y. & C. Ex. 55, 160 E. R. 612; *Norris v. Wilkinson* (1806) 12 Ves. 192, 33 E. R. 73, *Ex-parte Bulleel* (1700) 2 Cox. 243, 30 E. R. 113.

(s) *Norris v. Wilkinson* (1806) 12 Ves. 192, 33 E. R. 73; *ex-parte Bulleel*, (1700) 2 Cox, 243, 30 E. R. 113.

(t) *Lloyd v. Atwood* (1859) 3 De. G. & J. 614, 44 E. R. 1405.

(u) *Ibrahim Azim v. Cruickshank* (1871) 7 Beng. L. R. 653.

(v) *Fenwick v. Potts* (1856) 8 De. G. M. & G. 506,

44 E. R. 485.

(w) *Daw v. Terrel* (1863) 33 Beav. 218, 55 E. R. 351.

(x) *Edge v. Worthington* (1786) 1 Cox Eq. Cas. 211, 29 E. R. 1133.

(y) *Re. Beavan ex-parte Coombe* (1819) 4 Mad. 249, 56 E. R. 698.

(z) *Re. Collins ex-parte Perry* (1843) 3 Mont. D. & De. G. 252 ct. of R.

(a) *Oo Nong v. Moug Hloone Oo* (1888) 13 Cal. 322.

(b) *Jaitha Bhima v. Haji Abdul* (1886) 10 Bom. 634.

(c) *Imperial Bank of India v. U. Rai Gyaw Thu & Co.* (1924) 51 Cal. 86, 50 I. A. 283, 293.

S. 58

Extent of security created : Past advances.—When deeds are deposited to obtain credit, they will not secure moneys previously advanced (*d*), unless the intention is apparent from the transaction between the parties (*e*), which if the debtor denies the creditor must strictly prove (*f*). The expression “may advance” in the memorandum accompanying the deposit does not prevent the deposit being a security for past advances (*g*). Where a policy of insurance was deposited with a solicitor to secure costs without a memorandum and subsequently an equitable mortgage was executed assigning the policy as security for advances made and to be made without mentioning costs, it was held that the deposit for costs merged in the subsequent mortgage and after repayment of the loans the solicitor had no lien on the proceeds of the policy (*h*). A deposit may be made to secure a general advance (*i*).

Whether deposit covers future advances.—Equitable mortgage by deposit of deeds will be available for subsequent advances if such was the intention of the parties, and although the deposit may be accompanied by memorandum, parol evidence of an agreement that it should be extended to subsequent advances will be admitted (*j*). The evidence can be gathered either from the written memorandum or other circumstances as to the intention of the parties at the time of making the advances (*k*). Where a debtor deposited his title-deeds with his creditor until such time as his account should not exceed £100, at which time they were to be restored to him, and the debtor died indebted to the creditor in £274, it was held that the creditor's lien extended to the whole £274 and not merely for the excess over £100 (*l*). In another case an equitable mortgage was held to cover further advances if such was the agreement when the first advance was made, or if it could be proved that a subsequent advance was made on an agreement, expressed or implied, that the deeds were to remain as securities for such subsequent advance (*m*).

Hindu and Mahomedan Law.—A lien created by a verbal contract and deposit of title-deeds by a Hindu in favour of a Hindu in Bombay was held valid (*n*). Under Mahomedan Law a deposit as security in respect of a contingent loss would be in the nature of a trust, not a power (*o*). Where title-deeds are already in possession of the mortgagee they could be held to secure future advances, the fact of previous possession being treated as constructive delivery (*p*).

What property is charged.—Equitable mortgage can only be by deposit of title-deeds of immoveable property. It covers the whole property comprised in the deeds (*q*) and includes all interest of the debtor, both existing at the time of the deposit as well as after-acquired (*r*), as it is well established that a deposit of deeds without either writing or word of mouth will create in equity a charge upon

(*d*) *Perkins v. Bradley* (1842) 1 Hare. 219, 66 E.R. 1013; *Fuller v. Bennett* (1843) 2 Hare. 394, 67 E. R. 162.
 (*e*) *Re. New ex-parte Farley, Lavender & Owen* (1841) 1 Mont. D. & G. 683.
 (*f*) *Re. Cowderoy ex-parte Martin* (1835) 4 Deac. & Ch. 457.
 (*g*) *Re. Hildyard ex-parte Smith* (1842) 2 Mont. D. & De. G. 610, Ct. of R.
 (*h*) *Vaughan v. Vanderstegen, Re. Annesley* (1854) 2 Drew. 289, 61 E. R. 730.
 (*i*) *Marcar v. Sigg* (1880) 2 Mad. 239.
 (*j*) *Ex-parte Langston* (1810) 17 Ves. 227, 34 E. R. 88; *Ex-parte Kensington* (1813) 2 Ves. & B. 79, 35 E. R. 249; *James v. Rice* (1854) 5 De. G. M. & G. 461, 43 E. R. 949; *West v. Reid* (1843) 2 Hare 249, 67 E. R. 104; *Girendro Coomar v. Kumud Kumari* (1898) 25 Cal. 611; *Himalaya Bank, Ltd. v. Quarry*. (1895) 17 All. 252.

(*k*) *Re. Morgan ex-parte Sanders* (1834) 3 L. J. Bey. 92.
 (*l*) *Ashton v. Dalton* (1846) 2 Coll. 565, 63 E. R. 863.
 (*m*) *Girandero Kumar v. Kumud Kumari* (1898) 25 Cal. 611.
 (*n*) *Jivandas v. Framjee* (1870) 7 Bom. H. C. 45.
 (*o*) *Varden Seth Sam v. Luckpatty Royjee* (1862) 9 M. I. A. 303.
 (*p*) *V. M. R. V. Chettyar Firm v. Asha Bibi*, A. I. R. (1929) Rang. 107; *Girendro Coomar v. Kumud Kumari* (1898) 28 Cal. 611.
 (*q*) *Richards v. Borrett* (1800) 3 Esp. 102, 170 E. R. 553; *Mellush v. Brown* (1890) 45 Ch. D. 225; *Pranjiwandas Mehta v. Chan Ma Phee* (1916) 43 I. A. 122.
 (*r*) *Re. Baker, ex-parte Bisdee* (1840) 1 Mont. D. & De. G. 333; *Re. Roche's Estate* (1890) 25 L. R. Ir. 58, 284 C. A.

the property to which the document relates to the extent of the interest of the person who makes the deposit (s), including therein all incidental rights such as good-will in connection with the premises (t). If it is, however, intended that part only of the property comprised in the deeds was intended as security, it must be proved (u), and where the terms of the contract are specified in the memorandum they cannot be varied by parol (v).

Part of securities mentioned in the memorandum found.—The surety of a banking company had a credit account with the bank to the extent of £3,000 secured by a memorandum, specifying certain securities deposited by way of equitable mortgage. On his dying a debtor to the bank in £4,000, there was found in his office in the banking house the securities mentioned in the memorandum with others tied in a bundle and endorsed and labelled as securities. There being evidence that he had stated that the bank was secured in £5,000, it was held that the bank was equitable mortgagee of all the securities, though only part of the securities mentioned in the memorandum were found, the others having been appropriated (w).

Equitable mortgagee's duty to examine the deeds.—It is not negligence on the part of a mortgagee to accept the debtor's statement that the title-deeds handed to him are all that belong to the property and are necessary. Where the Court is satisfied of the good faith of the person who has got a prior equitable charge and is satisfied that there has been a positive statement whereby he honestly believed that he had got the necessary deeds, then he is not bound to examine the deeds and is not bound by constructive notice of this actual contract or of any deficiencies which by examination he might have discovered in them (x).

Parting with or loss of deeds.—Where an equitable mortgagee delivers the title-deeds in order to effect a sale, his lien is not lost thereby (y), nor by a creditor's solicitor wrongfully abstracting the title-deeds (z). Secondary evidence of the deposit may be adduced when the creditor is unable to produce the deeds or any memorandum of proof that the deeds have been lost (a).

Recovery of title-deeds.—A suit for such a purpose would be a suit for redemption, not a suit in detinue.

Priority.—It has been observed that here there is no distinction between legal and equitable mortgages, as in English Law, where a legal mortgage will always prevail against the equitable, unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights (b). This is rendered clear by the Transfer of Property (Amendment) Supplementary Act, 21 of 1929, which has introduced in the Registration Act a proviso to section 48, whereby a mortgage by deposit of title-deeds takes effect against any mortgage deed subsequently executed and which relates to the same property. Even before

(s) *Bank of New South Wales v. O'Connor* (1889) 14 A. C. 273.

(t) *Chissum v. Dewes* (1828) 5 Russ. 29, 38 E. R. 938; *King v. Midland Railway* (1868) 17 W. R. 113; *Pile v. Pile, ex-parte Lambton* (1876) 3 Ch. D. 36.

(u) *Wylde v. Radford* (1863) 9 Jur. N. S. 1169; *Ex-parte Leathes* (1833) 3 Deac. & Ch. 112; *Pranjivandas Mehta v. Chan Ma Phee* (1916) 43 I. A. 122.

(v) *Pranjivandas Mehta v. Chan Ma Phee* (1916) 43 I. A. 122.

(w) *Ferris v. Mullins* (1854) 2 Sim. & G. 378, 65 E. R. 444.

(x) *Dixon v. Muckleston* (1872) 2 Ch. App. 155; *Taylor v. Bundle* (1891) 1 Ch. 8; *Garnham v. Skipper* (1885) 53 L. T. 940; *Re. McMahon, McMahon v. McMahon* (1886) 55 L. T. 763.

(y) *Ex-parte Morgan* (1806) 12 Ves. 6, 33 E. R. 3; *Re. Tyrie ex-parte Morris* (1866) 14 L. T. 606.

(z) *Mason v. Morley* (No. 1) (1865) 34 Beav. 471, 55 E. R. 717.

(a) *Baskett v. Skeel* (1863) 9 L. T. 52.

(b) *Imperial Bank of India v. U Rai Gyaw Thu & Co.* (1924) 51 Cal. 86, 51 I. A. 283, 289.

S. 58 the amendment, the Calcutta High Court took the same view (c). In this connection the case below (d) shews that such a mortgagee is not always protected. Negligence may affect a subsequent purchaser or mortgagee but if he obtains a reasonable account for their non-production, the mortgagee will lose his priority and so also if the mortgagor obtains the deeds or the last deed on a pretext from the mortgagee and creates an encumbrance. This is a useful form of security owing to its inexpensive nature, yet it carries with it its own defect, namely, in not being absolutely secure.

Personal covenant.—In section 58 various classes of mortgages are described which distinguish in turn simple mortgages, mortgages by conditional sale, usufructuary mortgages and English mortgages, in three of which there is a personal covenant to pay. But a mortgage by deposit of title-deeds does not contain a personal covenant to pay. But in these transactions it is usual to take with the deposit of title-deeds a promissory note for the amount of the loan, with a view to enable the mortgagee to take a personal decree against the mortgagor. And it is for this reason that within three years the promissory note is renewed to save limitation, even though the loan be allowed to continue.

Registration of mortgage by deposit of title-deeds.—Section 59 of the Transfer of Property Act, 1882, expressly excludes a mortgage by deposit of title-deeds from registration. Speaking generally, no equitable mortgage is even created by a writing. It is of the very essence of the equitable mortgage that it comes into being without any writing by the mere conjunction of certain facts. It needs no contemporaneous writing for its complete effect and consequences, and rightly and logically viewed, the writing can never be put higher than proof of the intention of the parties. These writings have raised nice questions which have been discussed in the various High Courts as to whether they in themselves create a mortgage or are merely subsequent records of it or anticipatory statements leading up to it. In the former case they need registration, in the latter not. The rule applies to sub-mortgages equally as to mortgages by deposit of title-deeds. In a case where the defendant sent the deeds with the following letter to the plaintiff's attorneys: "I have the pleasure of handing to you the title-deeds of a house, 56, Lower Circular Road, as a collateral security for Rs. 20,000 which falls due this day. Please accept them from my manager," it was held that the letter needed registration as being a document which created an interest in land (e). And where the defendant deposited with the plaintiff in Bombay title-deeds of his property situate at Nasik and borrowed a sum from the plaintiff, executing at the same time in favour of the plaintiff a writing setting forth the clear intention of the defendant that the deposit should be security for the loan and binding the defendant to execute on demand a proper legal mortgage of the property covered by the title-deeds deposited, it was held that the deed required registration (f). So also where the defendant borrowed in Bombay a sum of money from the plaintiff by deposit of title-deeds of his property situate outside Bombay. The transaction, which was evidenced by a writing which recited the loan and the deposit, stipulated that the defendant would execute a *pucca* document in respect of the same when called upon to do so—it was held that the document required registration (g). In a Calcutta case the defendant on the 25th of February 1914 executed a promissory note for Rs. 1,500 in respect

(c) *Gokul Dass v. Eastern Mortgage and Agency Co.* (1905) 33 Cal. 410; *Coggan v. Pcgose* (1884) 11 Cal. 158.
 (d) *Oliver v. Hinton* (1899) 2 Ch. 264.
 (e) *Dwarkanath Miller v. S. M. Sarat Kumari*

(1871) 7 Beng. L. R. 55.
 (f) *Behram Rashid v. Sorabji Rustomji* (1914) 38 Bom. 372.
 (g) *Choonilal v. Vitthaladas* (1922) 24 Bom. L. R. 502.

of a fresh advance in plaintiff's favour and on the same day passed a letter in these terms, "for the payment of the sum of Rs. 1,500 with interest I have borrowed from you on promissory note of date I hereby put on record that the title-deeds *re.* my premises already deposited with you shall be held by you as collateral security." The amount of Rs. 1,500 was paid to the defendant after passing of the promissory note and the passing of the letter. It was held that there was no completed contract before the latter was passed, which in the circumstances of the case constituted a mortgage contract and was inadmissible for want of registration (*h*). On the other hand, where the equitable mortgage is complete without the memorandum and the memorandum is not a writing which the parties had made as the evidence of their mortgage but only a writing which was evidence of the fact from which the contract was to be inferred, it was held not to require registration. Where title-deeds were deposited with the plaintiff in the morning as security for repayment of Rs. 1,200 lent him by the plaintiff at the time when deposit was made and on the evening of the same day the defendant by way of further security gave to the plaintiff a promissory note for the amount of the loan and endorsed thereon the following memorandum "for the repayment of the loan of Rs. 1,200 and the interest due thereon of the within-note of hand I hereby deposit with the plaintiff as collateral security by way of equitable mortgage the title-deeds of my property," it was held that the memorandum did not require registration (*i*). In another case, A and B executed a joint and several promissory note in favour of the plaintiff. On the same day A deposited with the plaintiff the title-deeds of his property as collateral security and received conjointly with B as part of the consideration money for the promissory note the sum of Rs. 2,000. Shortly afterwards A addressed a letter to the plaintiff to this effect: "As collateral security for the due payment of Rs. 2,000 secured by a promissory note of even date I herewith hand you the title-deeds of my property." It was held that the letter itself was not a contract for mortgage and did not require registration, as an equitable mortgage had been completed upon deposit of title-deeds (*j*).

In another case, R. executed mortgages in favour of D. some time before June 1893. On the 3rd of June 1893 D. deposited these mortgage deeds with G.'s agent at Calcutta as security for his debt to G. On the 19th of June 1893 D. wrote a letter to G.'s agent which after reciting the amount of the debt contained, amongst others, the following clause: "That I shall pay him one-fourth of Rs. 70,000 within a fortnight, one-fourth by promissory note payable six months from the date and the remaining half by a promissory note payable within a year. In the meantime and until payment of the claim in full, you will hold as agent for him the mortgage deeds which are already made over to you as such agent as security as for the due payment of the said debt, not to be parted with by you without mutual consent of myself and G. or under an order of the Court." It was held that the mortgage was concluded on the date when the deeds were deposited with G.'s agent at Calcutta and that a valid equitable sub-mortgage was created in favour of G. on that day (*k*). Where the expressions used in the letter "or memorandum" accompanying a deposit of title-deeds were "I have borrowed," "I have kept the undermentioned documents of title as security for the said loan" and "I further assure you that the properties of which the title-deeds are kept herewith, are free from all encumbrances," it was held that the letter (or memorandum) was the record of an entirely

(h) *Bhairab Chandra Bose v. Anath Nath Dā*
(1920) 24 C. W. N. 599.
Kedernath Dutt v. Shamloll Khetry (1873)
11 Beng. L. R. 405.

(j) *Oo Nong v. Moun Hoon Oo* (1886) 13 Cal.
322.
(k) *Gokal Dass v. Eastern Mortgage and Agency*
Co. (1906) 33 Cal. 410.

S. 58 completed transaction and so required no registration (*l*). And so a letter or memorandum stating "as agreed upon in person I have delivered to you the under-mentioned documents as security" does not require registration (*m*); but if it must be regarded as constituting the bargain between the parties, it needs registration (*n*). On the 25th May 1923 a debtor passed a promissory note. This was followed on the following day, 26th May, by an agreement to deposit the title-deeds and on the 27th May, the title-deeds were sent with a letter referring to the agreement and then followed a reference to the schedule annexed to the letter. The documents taken together were held to constitute a mortgage which required registration (*o*). The plaintiff executed a mortgage by deposit of title-deeds and a promissory note to the defendant and agreed that the defendant should pay off the mortgagee and recover the title-deeds from him and retain them with himself as additional security. The terms were embodied in two documents and it was held that they required registration (*p*).

No memorandum relating to deposit of title-deeds can be within the meaning of section 17 of the Registration Act, unless it embodies all the particulars of the transaction, of which the deposit forms part, and unless, on its face, it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties (*q*). The above cases illustrate that where the document or documents constitute the bargain between the parties, registration is necessary (*r*). But when it merely records a completed transaction between the parties, registration is not necessary (*s*).

Equitable sub-mortgage by deposit.—A transfer of an equitable mortgage by deposit of deeds is effected by delivery of the deeds to the transferee either with or without a memorandum (*t*). A legal mortgagee by deposit, or an equitable mortgagee by re-deposit, can create a sub-mortgage and in the latter case the memorandum accompanying the equitable mortgage need not be deposited (*u*). The derivative mortgagee, however, must deliver up the deeds upon the original mortgagor paying off the amount due (*v*). In India also a legal mortgagee may by

- (*l*) *Surendramohan v. Mahendranath* (1932) 59 Cal. 781.
 (*m*) *Obla Sundarachariar v. Narayana Ayyar* (1931) 54 Mad. 257, 58 I. A. 68.
 (*n*) *Shailendranath v. Hade Kaza* (1932) 59 Cal. 586.
 (*o*) *Jagannadham v. Official Assignee, Madras*, A. I. R. (1931) Mad. 124.
 (*p*) *Swami Chetty v. Ethirajulu* (1917) 40 Mad. 547.
 (*q*) *Shailendranath Palit v. Hade Kaza Mane* (1932) 59 Cal. 586.
 (*r*) *Shailendranath Palit v. Hade Kaza* (1932) 59 Cal. 586; *Subramomtan v. Lutchman* (1922) 50 Cal. 338, 50 I. A. 77; *Pranjivandas v. Chan Ma Phee* (1916) 43 Cal. 895, 43 I. A. 122; *National Bank of India, Ltd. v. R. C. Nazir & Co.* (1932) 34 Bom. L. R. 748; *Nageswara v. Srinivasa*, A. I. R. (1926) Mad. 743; *Kedarnath Dutt v. Shamloll Khetry* (1873) 11 Beng. L. R. 405; *Dwarkanath Mitter v. S. M. Sarat Kumari* (1871) 7 Beng. L. R. 55; *Behram Rashid v. Sorabji Rustomji* (1914) 38 Bom. 372; *Choonilal v. Vithaldas* (1922) 24 Bom. L. R. 502; *Bhairab Chandra Bose v. Anath Nath De* (1920) 24 C. W. N. 599.
 (*s*) *Surendramohan v. Mahendranath* (1932) 59 Cal. 781; *Obla Sundarachariar v. Nara-*

- yana Ayyar* (1931) 54 Mad. 257, 58 I. A. 68; *Vadamalai v. Subramania*, A. I. R. (1923) Mad. 262; *Bubhan Mohan Co-operative Hindusthan Bank* (1925) 29 C. W. N. 784; *Kshetranath v. Harasukdas* (1927) 31 C. W. N. 703; *Kedarnath Dutt v. Shamloll Khetry* (1873) 11 Beng. L. R. 405; *Oo Nong v. Moug Htoon Oo* (1886) 13 Cal. 322; *Gokal Dass v. Eastern Mortgage Agency Co.* (1906) 33 Cal. 410; *Krishnayya v. Ponnu-swami* (1924) 47 Mad. 398; *Ramakrishna v. Kesavalu*, A. I. R. (1927) Mad. 1145; *Nageswara v. Srinivasa*, A. I. R. (1926) Mad. 743; *Ma Sein Bye v. S. R. M. R. M. Chetty Firm*, A. I. R. (1926) Rang. 10; *S. P. K. R. M. Chetty Firm v. Administrator General, Bengal*, A. I. R. (1933) Rang. 307.
 (*t*) *Encyclopædia of Forms and Precedents*, 2nd Ed., Vol. 10, p. 52. See *Imperial Bank of India v. Bengal National Bank, Ltd.* (1932) 59 Cal. 377.
 (*u*) *Re. Hildyard, ex-parte Smith* (1842) 2 Mont. D. & De. G. 587.
 (*v*) *Mathews v. Wallwyn* (1798) 4 Ves. 31 E. R. 62; *Turner v. Smith* (1901) 1 Ch. 213; *Cheese v. Keen* (1908) 1 Ch. 245; *Delish v. Union Bank of England* (1914) 1 Ch. 22.

deposit create a sub-mortgage (*w*). Where a legal mortgagee created an equitable sub-mortgage and then a subsequent legal mortgage, the latter did not by merely obtaining a registered document acquire priority over the previous sub-mortgage created by the prior mortgagee by deposit of the mortgage deed (*x*). In a Madras case (*y*), it has been held that the endorsee for value of a negotiable instrument, the amount of which had been secured by a mortgage or by deposit of title-deeds, cannot claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage right to him. The decision proceeded on the ground that a mortgage of immoveable property was itself immoveable property, whatever the form of the mortgage, and transfer of ownership of such a right fell within section 54 of this Act requiring registration. In Rangoon a contrary view has been taken (*z*).

Payment of original mortgage by deposit of title-deeds.—Where a person pays off the original mortgage he is not entitled, as a matter of course, to claim as equitable mortgagee. He must shew that he paid his own moneys and was to stand in the position of the original mortgagee (*a*).

The remedy of the equitable mortgagee.—According to English Law, the right of a mortgagee by deposit of title-deeds with or without a memorandum is foreclosure (*b*). A decree for foreclosure in the case of an equitable mortgage ought not to omit the word "*foreclose*," but ought to contain directions that upon default the mortgage will be foreclosed, that the hereditaments will be discharged from all equity of redemption and that a conveyance must be executed (*c*). An equitable mortgagee by deposit of title-deeds accompanied by agreement to execute a legal mortgage is entitled to either sale or foreclosure (*d*). The result of the English decisions as to the remedy of an equitable mortgagee in the case of a mortgage by deposit of title-deeds accompanied by a written memorandum is sale or foreclosure, but when there is no memorandum, foreclosure only. In India the remedy of an equitable mortgagee was different, according to the different High Courts. According to the Bombay High Court, equitable mortgagee had a right to sue for foreclosure or sale (*e*). In Calcutta the practice had been to decree a sale (*f*). The doubt has been set at rest by section 96 applying the provisions of a single mortgage to an equitable mortgage and by the insertion of rule 15 in Order 34 of the Code of Civil Procedure, 1908, by section 7 of Act 21 of 1929. Hence in India the only remedy is by sale.

Receiver.—A receiver may be appointed at the instance of a mortgagee by deposit of title-deeds (*g*). A mortgage by such a receiver under an order of the Court for the preservation of the estate, takes precedence over all other encumbrances (*h*).

- w*) *Gokul Dass v. Eastern Mortgage and Agency Co., Ltd.* (1905) 33 Cal. 410.
x) *Gokul Dass v. Eastern Mortgage and Agency Co., Ltd.* (1905) 33 Cal. 410.
y) *Elumalai v. Balakrishna* (1921) 44 Mad. 965; but see *Perumal Ammal v. Perumal Naicker*, (1921) 44 Mad. 196.
z) *Villa v. Pelley*, A. I. R. (1934) Rang. 51.
a) *Pandoorang v. Balkrishen* (1838) 2 M. I. A. 60.
b) *Backhouse v. Charlton* (1878) 8 Ch. D. 444; *York Union Banking Co. v. Artley* (1879) 11 Ch. D. 205; *Harrold v. Plenty* (1901) 2 Ch. D. 314.
c) *Lees v. Fisher* (1882) 22 Ch. D. 283.
d) *York Union Banking Co. v. Artley* (1879)

- 11 Ch. D. 205.
e) *Maneckji v. Rustomji* (1890) 14 Bom. 269; *Khushal v. Poonamchand* (1898) 22 Bom. 164.
f) *Shreemath Roy v. Godadhur* (1897) 24 Cal. 348; *Oo Nong v. Moung Htoon* (1888) 13 Cal. 322.
g) *Bodger v. Bodger* (1862) 11 W. R. 160; *Aberdeen v. Chilly* (1839) 3 Y. & C. Ex. 379, 160 E. R. 749; *Girdhari Lal v. Dharendra Kristo* (1907) 34 Cal. 427; *Venkata Kumara v. Gokuldoss* (1931) 54 Mad. 565.
h) *Girdhari Lal v. Dharendra Kristo* (1907) 34 Cal. 427.

S. 58

Release.—When a registered memorandum accompanies an equitable mortgage the mortgagor should, on repayment, obtain a registered release.

Redemption of an equitable mortgage.—The provisions of Order 34 relating to a simple mortgage apply to a mortgage by deposit of title-deeds (i).

Limitation.—A suit to recover advances secured by a deposit of title-deeds is governed by article 132 of the Indian Limitation Act as amended by Act 21 of 1929 which prescribes a period of 12 years from the date the money sued for becomes due. Where a promissory note accompanies the deposit, the 12 years run not from the date of the note payable on demand, but from the date the actual demand is made (j). A suit to redeem would be governed by article 148 of the Limitation Act, 1908.

Indian Companies Act, VII of 1913.—Under section 109 it is necessary to file with the Registrar particulars of mortgage by deposit of title-deeds whether or not it is accompanied by a memorandum of deposit (k).

Stamp duty.—On an equitable mortgage, where the amount is repayable on demand or after more than three months from date of instrument, duty would be according to article 6 of the Stamp Act, 1899. If the loan or debt is repayable not more than three months from the date of the instrument, article 13 (h) would apply.

The Indian Companies Act, VII of 1930.—The provisions of section 109 of this Act apply to a mortgage by deposit of title-deeds whether or not accompanied by a memorandum of deposit (l).

Section 58 (g) : Anomalous Mortgage.

Anomalous mortgage.—Sub-section (g) originally formed part of section 98 which by the Amending Act, 20 of 1929, has been split up, with the result that the first part is sub-section (g) of section 58 and the second part is section 98. Sub-section (g) has been added to this section as dealing with the residuary class of mortgages. Prior to the amendment, the Act recognized six classes of mortgages, viz., (1) simple mortgage, (2) mortgage by conditional sale, (3) usufructuary mortgage, (4) English mortgage, (5) combination of (1) and (3), (6) combination of (2) and (3), and regarded all mortgages which did not come in any of these classes as anomalous. The rights and liabilities of the parties were determined by their contract as evidenced by the mortgage deed, and so far as such contract did not extend, local usage was made applicable. Of the six varieties above-mentioned, numbers (5) and (6) are by the Amending Act classed as anomalous mortgages and their number is legion, the most common variety being numbers (5) and (6).

"Zarpeshgi."—*Zarpeshgi* is a lease granted on a sum of money being advanced, of the nature of a usufructuary mortgage. The power of redemption expressly or impliedly is reserved to the lessor, so that it appears that the parties intend the transaction to be a mortgage (m). For form, see (n). For further elucidation, see commentaries on section 58 (d).

"Hadarawara" mortgage.—This kind of mortgage occurs in Kanara and resembles a Welsh mortgage, the mortgagee being in possession and taking the

(i) See Code of Civil Procedure, (1908) O. 34, r. 15.
(j) *Villa v. Pdley*, A. I. R. (1934) Rang. 51.
(k) *Maneklal v. Saraspore Manufacturing Co., Ltd.* (1927) 29 Bom. L. R. 253.

(l) *Maneklal v. Saraspore Manufacturing Co., Ltd.* (1927) 29 Bom. L. R. 253.
(m) *Basant Lal v. Tapesshri Rai* (1881) 3 All. 1.
(n) *Mashook Ameen v. Marem Reddy* (1875). 8 M. H. C. 31.

rents and profits in lieu of interest and paying Government revenue, the security carrying a right to redeem, but none to foreclose (o). Madras Regulation XXXIV of 1802, which applies to usufructuary mortgages executed before the passing of Act XXVIII of 1855, does not apply in the case of an *iladarawara* mortgage in South Canara, which, securing to the mortgagee the use and occupation of land for a long term, amounts to a lease of the property for the term agreed upon (p). In the case of an *iladarawara* for a long term of years, the mortgagee hopes, by careful cultivation and improvement of the soil, to make a profit, which would not represent the interest on the loan, but the return for his own industry and expenditure on the land, and for this purpose it is essentially necessary that he should have possession till the end of the term. In such a case it should not be maintained that justice would be done to the mortgagee by repaying the loan before the expiration of the term (q).

“ *Otti* ” mortgage.—An *otti*, like a *kanom*, mortgage cannot be redeemed before the lapse of twelve years from the date of its execution, unless there be an agreement to the contrary (r). An *otti*, in fact, only differs from a *kanom* in two respects. First, in the right of pre-emption which the *otti* holder possesses in case the *jenmi* wishes to sell the premises, and, secondly, in the amount secured, which is generally so large as practically to absorb in the payment of interest the rent that would otherwise have been paid to the *jenmi*, who is thus entitled to a mere peppercorn rent (s). But though after an *otti* right is granted, little or nothing is left to the *jenma* proprietor, he has still a right to redeem, and the transaction is therefore a mortgage, and not a sale. If, then, an *otti* right is a mortgage right, a *karnavan* may singly create it for proper reasons (t). The *otti* holder has not the right of pre-emption but a preferential right to make any further advances on the property. In the case of an *otti* mortgage for a term of years it is not competent to the mortgagor to redeem before the appointed time (u). Two out of three coparceners executed a document in the following terms, “ as we have received Rs. 500 you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of *arakattu otti* . . . on the condition that on the expiry of three years we should redeem the land without paying either principal or interest. You will, on the expiry of the said period, deliver possession of the said immoveable property without raising any objection.” The creditor obtained possession of only a part of the land. The mortgage was held to be anomalous as it gave the creditor no right to claim repayment but only a right to remain in possession (v).

“ *Lahan-gahan* ” mortgage.—It is an anomalous mortgage peculiar to the Central Provinces and Berars. In this form of mortgage, the only remedy given to the mortgagee is foreclosure. Such being the remedy, it follows by implication that there is no covenant of personal liability ; such a form of mortgage does contain a provision enabling the mortgagor to redeem by a given date and if by that date the mortgage is not redeemed, it is to be deemed as foreclosed. The payment of the money upon which the mortgagor is entitled to redeem, is not to be regarded as a personal contract to pay out of the mortgagor's personal estate, but it is a new contract to pay out of the hypothecated estate. Such a covenant

(o) *Mayilarayar v. Subbaraya Bhut* (1862) 1 M. H. C. 81.

(p) *Perlathail Subba Rau v. Mankude Narayana* (1881) 4 Mad 113.

(q) *Perlathail Subba Rau v. Mankude Narayana* (1881) 4 Mad. 113.

(r) *Shekhara v. Rau* (1879) 2 Mad. 193 ; *Ahmad v. Kunhamed* (1882) 10 Mad. 192 ; *Muhamud*

v. Ali Koya (1890) 14 Mad. 76.

(s) *Kumini Ama v. Pakram Kolusheri* (1862) 1 M. H. C. 261.

(t) *Edathil Itti v. Kopashon Nayar* (1862) 1 M. H. C. 122.

(u) *Keshava v. Keshava* (1879) 2 Mad. 45.

(v) *Visvalinga Pillai v. Palaniappa Chetty* (1898) 21 Mad. 1.

S. 58 would be inconsistent with the express remedy by foreclosure. In point of remedy, therefore, it stands on the same footing as a mortgage by conditional sale. A *lahan-gahan* mortgage does not come within the definition of mortgage by conditional sale in section 58 (c) of the Transfer of Property Act (w). Nevertheless, the effect is similar to that of a mortgage by conditional sale, and mortgages such as *kut-kubala* or *bai-bil-wafa*, similar in form to that of *lahan-gahan* mortgage, have been recognized by the Privy Council (x), and treated as standing on the same footing as mortgages by conditional sale. It was there pointed out that such mortgages need not contain a personal covenant for repayment of the loan. A personal covenant is not necessarily implied in every mortgage (y). A loan imports a covenant to pay (z) and in a mortgage of the nature of *lahan-gahan* it is necessarily implied that there is no covenant of personal liability, if no such covenant is expressly included in the terms of the deed (a). The mortgage instrument is termed a foreclosure mortgage. The meaning of the word "lahan" is that the mortgage is foreclosed, the right of redemption extinguished and the property in the land is transferred to the mortgagee absolutely. The etymology of the word "lahan" is unknown. A form of this mortgage is given in *Ramji v. Chinto* (b). It appears that this form of mortgage was at one time used in the Bombay Presidency also (c). The vernacular conditions run thus:—"A rupieya bara mahina nay devoo karar sar nahi dilias tu ghan milkat lan-ghan ussay," i.e., "These moneys after twelve months will be paid as agreed, if not paid the mortgaged property shall be foreclosed." The *lahan-gahan* mortgage is not automatically foreclosed, but judicial proceedings must be interposed. Without action foreclosure cannot become absolute. Moreover, in such mortgages it is open to the mortgagor to redeem even after the period agreed for redemption till foreclosure takes place, on the principle that redemption and foreclosure are co-extensive. Again, when the remedy is expressed to be foreclosure, the mere fixation of a date on which the mortgagor agrees to repay the loan does not amount to a covenant to repay within the meaning of clause (a) of section 68 of the Transfer of Property Act (d). As to the form of these mortgages, it is usually found in one of the forms described by Turner, C. J. (e). This form of Hindu mortgage under the names of *khat kabala muddatakriyan* and *ghan lahan* obtains throughout British India though its incidents vary. It is necessary that there should be delivery of possession to the mortgagee. Usually possession remains with the mortgagor until foreclosure proceedings are taken and possession obtained.

Other forms known in Malabar are *peruartham* (f), *ottikamparam*, *nirmutal* and *kaividu-otti* (g), an *ubhayapattom* (h), a *kanom* (i) which partake of the nature of a usufructuary mortgage and a lease. It may be a mortgage (j) or a lease (k).

(w) *Govind v. Jaggannath* (1916) 12 Nag. L. R. 19.
 (x) *Balkissondas v. W. F. Legge* (1900) 22 All. 149, 27 I. A. 58.
 (y) *Kalka Singh v. Paras Ram* (1895) 22 Cal. 434, 22 I. A. 68; *Balkissondas v. W. F. Legge* (1900) 22 All. 149, 27 I. A. 58; *Govind v. Jaggannath* (1916) 12 Nag. L. R. 19; *Jag Sahu v. Mt. Ram Sakhi Kuer* (1922) 1 Pat. 350; *Dattambhat v. Krishnabhat* (1910) 34 Bom. 462; *Narottamdas v. Sheo Pragash Singh* (1883) 10 Cal. 740, 11 I. A. 83; *Jalindra Nath Basu v. Peyer Deye Debi* (1916) 43 Cal. 990, 43 I. A. 108.
 (z) *Ram Narayan Singh v. Adhindra Nath* (1917) 44 Cal. 388, 44 I. A. 87.
 (a) *Haji Mahomed v. Ramappa*, A. I. R. (1928) 25 Nag. 187; *Kundanmal v. Wasudeo* (1922) 19 Nag. L. R. 67.

(b) (1864) 1 Bom. H. C. 199.
 (c) *Shankarbhai v. Kassibhai* (1872) 9 Bom. H. C. 69; *Krishnaji v. Rauji* (1872) 9 Bom. H. C. 79.
 (d) *Govind v. Jaggannath* (1916) 12 Nag. L. R. 19.
 (e) *Ramasami v. Samiyappanayakan* (1831) 4 Mad. 179, 183.
 (f) *Shekariwarma v. Mangalom* (1876) 1 Mad. 57.
 (g) *Kundu v. Impichi* (1884) 7 Mad. 442.
 (h) *Neelakandaha v. Ananthukrishna* (1906) 30 Mad. 61.
 (i) *Kanna Kurup v. Sankara Varma* (1921) 44 Mad. 344; *Kelu Nedungadi v. Krishnan* (1903) 26 Mad. 727, 728; *Kanara v. Govindan* (1882) 5 Mad. 310.
 (j) *Silapani v. Ashtamurti* (1880) 3 Mad. 382.
 (k) *Raman v. Krishna* (1883) 6 Mad. 325, 326.

To be valid it must be attested as required by section 59 of this Act (*l*) even the san-mortgage of Guzerat (*m*). The Courts, for purposes of limitation, have treated as simple mortgages, transactions in the nature of hypothetical bonds known to India under various nomenclatures—*rehn*, *kifalat* and *mustaghraq* (*n*), *arh* and *mustaghraq* (*o*), *drishtabandaka*, *adaimana-pattiram*, *taran-gahan* (*p*) *nazar-gahan* (*q*).

Simple usufructuary mortgages.—The following have been construed as simple usufructuary mortgages. A mortgage whereby after payment of revenue, interest and balance towards principal, the mortgagee was entitled to exercise all the powers of an owner (*r*),—a mortgage for three years without interest, mortgagee to sue before the period, should the property be attached (*s*). A usufructuary mortgage with a covenant to pay both principal and interest (*t*). Where possession was given to a mortgagee with a stipulation that the principal and interest at a specified rate should be repaid 11 years thereafter, and in default the mortgagor should execute a sale deed to the mortgagee, the transaction was construed as a combination of simple and usufructuary mortgage (*u*). Right to redeem on payment by a day named and on failure to pay, annually on the corresponding day of a future year (*v*). A usufructuary mortgage containing a covenant to pay on a fixed date (*w*), or in which the period is fixed (*x*). A mortgage for three years at a specified rate of interest and on failure to pay the interest yearly, the mortgagee had power to realize the mortgage-money through a Court or get a new deed charging the property, executed in lieu of interest together with a covenant to make the deficiency of interest (*y*). Where the property was mortgaged as security for principal and interest, and in default of payment the mortgagee was to take management of the land and house, and the mortgagor was to redeem upon payment, and the mortgagee was put in possession, the document was construed as a simple and usufructuary mortgage (*z*). Provision in a usufructuary mortgage that if the mortgagor failed to give possession or if the mortgagee should be dispossessed, he could recover the mortgage debt from the mortgagor on the mortgaged property (*a*). A usufructuary mortgage in which a date is fixed for repayment (*b*). A mortgage where possession was given, interest and term specified, the profits to be appropriated first in lieu of yearly interest and the balance in payment of the principal debt, the mortgagor entitled to redeem (*c*). So also where a mortgage stipulated that the mortgagee was to enjoy the property for three years and the mortgagor was to redeem without payment of principal or interest, the instrument was considered to be anomalous (*d*). Where a mortgagee was put in possession and authorized to retain for 10 years until payment of the mortgage-money out of the rents and profits (*e*).

- (*l*) *Kanna Kurup v. Sankara Varma* (1921) 44 Mad. 344.
 (*m*) *Jethabhai v. Girdhar* (1896) 20 Bom. 158; *Sobhagchand v. Bhichand* (1882) 6 Bom. 193; *Laxmichand v. Kastur* (1869) 6 Bom. H. C. 60; *Naran Purshotam v. Dolatram* (1882) 6 Bom. 538; *Sharfudin v. Govind* (1903) 27 Bom. 452.
 (*n*) *Dalip Singh v. Bahadur Ram* (1912) 34 All. 446.
 (*o*) *Kishan Lal v. Ganga Ram* (1891) 13 All. 28; *Rangasami v. Muthukumarappa* (1887) 10 Mad. 509.
 (*p*) *Datto v. Viltu* (1895) 20 Bom. 408.
 (*q*) *Onkar v. Govardhan* (1890) 14 Bom. 577.
 (*r*) *Lal Narsingh v. Mohammad Yakub Khan* (1929) 33 C. W. N. 693 P. C.
 (*s*) *Solema Bibi v. Hafex Mahammad* (1927) 54 Cal. 687.
 (*t*) *Ramarayaniengar v. Maharaja of Venkatagiri* (1927) 50 Mad. 180 P. C.
 (*u*) *Kandula v. Donga Pallaya* (1920) 43 Mad.

589.
 (*v*) *Kangaya v. Kalimuthu* (1903) 27 Mad. 526.
 (*w*) *Dattambhat v. Krishnabhat* (1910) 34 Bom. 462; *Sivakami v. Gopala* (1891) 17 Mad. 131.
 (*x*) *Jag Sahu v. Mt. Ram Sakhi* (1922) 1 Pat. 350; *Dattambhat v. Krishnabhat* (1910) 34 Bom. 462; *Pargan Pandey v. Mahtam Mahto* (1907) 6 C. L. J. 143.
 (*y*) *Jawahir Singh v. Someshwar* (1906) 28 All. 225, 33 I. A. 42.
 (*z*) *Motiram v. Vitai* (1889) 13 Bom. 90.
 (*a*) *Narpat v. Ram Saran* (1908) 30 All. 162.
 (*b*) *Jag Sahu v. Mt. Ram Sakhi* (1922) 1 Pat. 350; *Pargan Pandey v. Mahtam Mahto* (1907) 6 C. L. J. 143; *Dattambhat v. Krishnabhat* (1910) 34 Bom. 462.
 (*c*) *Hikmatulla Khan v. Imam Ali* (1890) 12 All. 203.
 (*d*) *Visvaling v. Palaniappa* (1898) 21 Mad. 1.
 (*e*) *Tukaram v. Ramchand* (1902) 26 Bom. 252.

Ss. 58-59

Simple usufructuary mortgagee's remedy.—As seen, the remedy of a simple mortgagee is sale and that of a usufructuary mortgagee neither purchase nor sale, while in the composite case, the mortgagee has been held entitled to a decree for sale (f). The same privilege is conferred when the primary security is not of a mixed character (g). Insertion of a personal covenant is no bar (h).

Remedy of anomalous mortgagee.—Foreclosure is the remedy of such a mortgagee where by the terms of his mortgage he is so entitled (i). Prior to the amendment, where a combination of simple and usufructuary mortgage was not regarded as an anomalous mortgage, the provisions of section 68 were applied on the mortgagee being deprived of his security (j).

Limitation.—Where a usufructuary mortgage contains a personal undertaking to pay, limitation applicable to a suit to be brought on the mortgage is governed by article 147 of the Limitation Act (k).

Union of usufructuary and mortgage by conditional sale.—A mortgage combining the incidents of a mortgage by conditional sale with the incidents or one of the incidents of a usufructuary mortgage, is anomalous (l). The Privy Council read together a usufructuary mortgage of 1869 and a mortgage by conditional sale of 1878 united in one hand, as giving the mortgagee a right to possession and to the mortgagor redemption, in default foreclosure (m). The remedy of a usufructuary mortgagee is that of a mortgagee by conditional sale. In the event of fusion the remedy is the same.

Redemption.—In the case of anomalous mortgages, provisions of section 60 of the Act, as to the right of redemption, do not apply when there is a contract or local usage to the contrary (n). *Muddata kriyan* is a deed of sale with a condition of repurchase (o). In Bengal it is referred to as *bandaknama* or *bhaqbandak* (p).

59. Where the principal money secured is one hundred rupees or upwards, a mortgage *other than a mortgage by deposit of title-deeds* can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid,

(f) *Jag Sahu v. Mt. Ram Sakhi* (1922) 1 Pat. 350; *Pargen Pandey v. Mahtam Mahto* (1907) 6 C. L. J. 143; *Dattambhat v. Krishnabhat* (1910) 34 Bom. 462; *Ramayya v. Guruva* (1891) 14 Mad. 232; *Sivakami v. Gopala* (1894) 17 Mad. 131; *Phul Kuar v. Murlidhar* (1880) 2 All. 527; *Jafar Hasan v. Ranjit Singh* (1899) 21 All. 4; *Narpat v. Ram Saran* (1908) 30 All. 162; *Chintaman v. Dulari* (1910) 7 A. L. J. 1087; *Fida Ali v. Ismailji* (1909) 6 Nag. L. R. 20; *Ram Khilawan v. Ghulam Husan*, A. I. R. (1933) Oudh 35.
(g) *Deputy Commissioner, Rae Bareilly v. Rampal Singh* (1885) 11 Cal. 237, 12 I. A. 1; *Jawahir Singh v. Someshwar* (1900) 28 All. 225, 33 I. A. 42; *Yashwant v. Vithal* (1897) 21 Bom. 267; *Narpat v. Ram Saran* (1908) 30 All. 162

(h) *Ramayya v. Guruva* (1891) 14 Mad. 232; *Sivakami v. Gopala* (1894) 17 Mad. 131; *Jagu Sahu v. Mt. Ram Sakhi* (1922) 1 Pat. 350.
(i) Sec. 67 (a) of the Act.
(j) *Lal Narsingh v. Mahommed Yakub* (1929) 31 Bom. L. R. 825; P. C.; *Kangayya v. Kalimuthu* (1904) 27 Mad. 526.
(k) *Udayana v. Senthivelu* (1896) 19 Mad. 411; *Sivakami v. Gopala* (1894) 17 Mad. 131.
(l) *Sita Nath v. Thakurdas* (1919) 46 Cal. 448.
(m) *Abid Husain v. Kaniz Fatima* (1924) 46 All. 269, 51 I. A. 157.
(n) *Kandula v. Donga* (1920) 43 Mad. 589.
(o) *Rajah Lakshmi v. Krishna* (1871) 7 Mad. H. C. 6.
(p) *Ishan Chandra v. Sajjan Bibi* (1871) 7 Beng. L. R. 14.

or (except in the case of a simple mortgage) by delivery of the property. S. 59

Amendments.—By Act 20 of 1929 the last paragraph dealing with mortgages by deposit of title-deeds has been added to section 58, and in consequence of the amendment the words "other than a mortgage by deposit of title-deeds" have been added to paragraph 1.

Extent of the section.—Section 59 extends to every cantonment in British India (*q*). It shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act (*r*).

Registration of a valid mortgage.—This section lays down the requisites of a valid mortgage, they being, the signature of the mortgagor on the instrument, attestation by at least two witnesses, and registration of the document in all cases, unless the sum borrowed is less than Rs. 100, in which case, the mortgage can be effected by delivery of the property by the borrower to the lender, subject to the further exception that a mortgage under Rs. 100 cannot be effected by delivery of the property, if the transaction amounts to a simple mortgage, which must always be registered. The section, however, excludes an equitable mortgage from the above formalities.

Registered.—As used with reference to documents, this means registered in British India under the law for the time being in force for the registration of documents (section 3, Transfer of Property Act, IV of 1882, and section 3 (45) General Clauses Act, X of 1897). The document must be duly registered and for that purpose the various requisites of the Registration Act carried out. It must contain a description of the property sufficient to identify the same, in order to enable the same to be accepted for registration (section 21 of the Registration Act). It must be presented for registration in the Registrar's office, within whose sub-district the whole or some portion of the property mentioned in the document is situated (section 28, Registration Act). For according to this section, if the document is presented for registration in any sub-district where no part of the property is situate, it would render the registration void. It should be presented within the period of four months from the date of its execution under section 23 of the same Act, but indulgence is given under section 25 for a further period of four months, if owing to urgent necessity or unavoidable accident any document executed in British India is not presented for registration till after four months from the date it becomes final. The proviso to section 34 of the Registration Act allows a further period of four months in addition to the period allowed by sections 23 and 25 within which to appear subject to the condition set out in the proviso (*s*).

Where the document is executed out of British India by all or any of the parties, it may be presented within four months after its arrival in British India (section 26 of the Registration Act). Where the document is executed by different parties at different times, it may be presented for registration and re-registration within four months from the date of each execution (section 24, Registration Act). Where a document has been accepted for registration from a person not duly authorized and has been registered, any person claiming under such document may within four months after becoming aware that the registration was invalid, present the same for re-registration (section 23A, Registration Act).

(*q*) Cantonment Act, XIII of 1889, sec. 32 (1).
(*r*) The Indian Registration Act, XVI of 1908.

(*s*) *Tullockchand v. Gokulbhoj* (1897) 21 Bom. 724.

S. 59

A registered document operates from the time from which it would have commenced, if no registration had been required (*t*). But where a sale deed is relied on as an act of insolvency, the three months for presenting the petition for adjudication commence from the date of registration of the deed and not from the date of its execution.

Non-registration is not destructive of the right of redemption, where in the pleadings the mortgagee admits the mortgage (*u*), or where for a period of 50 years, the transaction has not been challenged (*v*). An unregistered deed is not necessarily invalid unless both parties wanted to evade the registration laws (*w*). Where the mortgage is unregistered or owing to fraud on the Registration Law, it is invalid, the creditor can obtain relief on the personal covenant (*x*). A mortgage deed fraudulently registered in a wrong district by including land not intended to be mortgaged, is invalid (*y*). A mortgage invalid for want of registration would be admissible for a collateral purpose, as in the case of an unregistered gift, where, though the recitals could not be used as evidence of the gift, they were referred to as explaining the nature and character of possession (*z*). A mortgage not reduced to writing or registered cannot operate as a charge (*a*). A conveyance of land included one yard of land in the registration district which it was not intended to convey and there was no evidence that it belonged to the vendor. The purchaser never made any attempt to take possession of the yard of land. It was held that the inclusion was a mere device to evade the Registration Act and there was no effective conveyance as it was not in the district in which it was registered and, therefore, no title to the property passed. In determining whether the law of registration has been complied with, the intention of the parties is the criterion (*b*). The same rule would apply to a mortgage.

Turn of worship.—A usufructuary mortgage bond creating an interest in a turn of worship does not require attestation under section 59, as a turn of worship is not an interest in immoveable property (*c*).

Value for registration.—The value for registration does not include interest (*d*) as indicated by the words "the principal money secured."

Signature.—The mortgage is usually signed at the foot and in case of it extending over several pages, the signature is usually placed on the last page. The signature must be so placed as to show that the mortgagor intended to give effect to the

- (*t*) Sec. 47 Indian Registration Act; *Sarvathada v. Kurubasubbanna*, A. I. R. (1934) Mad. 637; *Muthiah v. Official Receiver*, A. I. R. (1933) Mad. 185.
- (*u*) *Govindan v. Koipunthil*, A. I. R. (1927) Mad. 92.
- (*v*) *Ram Sewak v. Sheo Naik* (1923) 45 All. 388.
- (*w*) *Govindan v. Koipunthil*, A. I. R. (1927) Mad. 92; *Venkata v. Peda Venkata*, A. I. R. (1924) Mad. 281; *Marnillapalli v. Ponnukollu*, A. I. R. (1925) Mad. 430.
- (*x*) *Rama Rao v. Vedayya* (1923) 46 Mad. 435; *Joginee Mohun v. Bhoot Nath* (1902) 29 Cal. 654; *Basant Mal v. Jawahir Singh*, A. I. R. (1925) Lah. 356; *Jaganadham Pillai v. The Official Assignee*, A. I. R. (1931) Mad. 124; *Sada Kavaur v. Tadepally* (1907) 30 Mad. 284; *Ulfatunnissa v. Hosain Khan* (1883) 9 Cal. 520; *Vani v. Bani* (1896) 20 Bom. 553.
- (*y*) *Rama Rao v. Vedayya* (1923) 46 Mad. 435; *Biswanath v. Chandra Narayan* (1921) 48 Cal. 509, 48 I. A. 127; *Harendra Lal*

- v. Haridari Debi* (1914) 41 Cal. 972, 41 I. A. 110.
- (*z*) *Varada Pillai v. Jeevarathnammal* (1920) 43 Mad. 244, 46 I. A. 285.
- (*a*) *Somasundaram v. Nachiappa*, A. I. R. (1925) Rang. 55; *Maung Tun Ya v. Maung Aung Dun*, A. I. R. (1925) Rang. 1.
- (*b*) *Inuganti v. Sobhandhuri* (1936) 63 I. A. 169; *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1914) 41 Cal. 972, 41 I. A. 110; *Biswanath Prashad v. Chandra Narayan Chowdhuri* (1921) 48 Cal. 509, 48 I. A. 127; *Collector of Gorakhpur v. Ram Sundar* (1934) 56 All. 468, 61 I. A. 286.
- (*c*) *Jati Kar v. Mukunda Deb* (1912) 39 Cal. 227.
- (*d*) *Jodh Ram v. Lajja Ram* (1913) 11 All. L. J. 729; *Laxman Rao v. Keshav* (1908) 4 Nag. L. R. 90; *Gama v. Lakanno* (1908) 4 Nag. L. R. 86; *Habibullah v. Nackchad* (1883) 5 All. 447; *Ram Doolaroy v. Tackoor* (1878) 4 Cal. 61; *Kunhi Amma v. Ahmed* (1890) 23 Mad. 105; *Sada Gopa v. Dorasanna* (1882) 5 Mad. 214.

instrument as his act or deed (e). A signature on all sheets but the last would not *prima facie* be sufficient evidence of execution (f). The execution must be by the signature of the mortgagor or by his affixing a mark thereto or signed by some other person in his presence and by his direction. The term "signature" is not defined in this Act, but since section 59 is to be read as supplemental to the Registration Act, which defines signature as including and applying to the affixing of a mark, it is clear that an illiterate mortgagor may sign a mortgage deed by affixing his mark. Signed is not defined by the Act, but according to the General Clauses Act, section 3 (52), with reference to a person, who is unable to write his name, the word "sign" shall include mark (g), a distinction not made by the present Act. The definition of the word attested in section 3 of the present Act refers to a mark being affixed to the instrument by the executant as alternative to signing, or the signature may be by some other person in the presence and by the direction of the executant. The mark cannot be placed by someone else by the direction of the executant. The mark must be affixed by the executant himself (h).

Method of signing.—So far as this formality is concerned, there is no difference between wills and deeds. So that the authorities on wills would be applicable to deeds. The mark of a testator is sufficient whether he can write or not, if intended to represent a signature, even though his name is not affixed to the mark (i). But where an illiterate person put his mark, which was described by the scribe, it was held to be duly executed (j). Signature by initials or by a stamped name is sufficient (k). In such circumstances the *onus probandi* is increased (l). Signature in an erroneous or assumed name is sufficient (m). A seal is not sufficient (n). But a seal with initials and acknowledged as his hand and seal is sufficient (o). Passing a dry pen over a written signature is not enough (p), but it may amount to an acknowledgment of his signature (q). Similarly, when a testator puts his mark to a writing in which he is wrongly named, the execution is valid (r). The signature must be physically connected with the writing (s). The signature, however, should be so placed that it shall be apparent that he intended to assent to the writing. It may be even signed by a person holding a power-of-attorney from the mortgagor, authorizing him to execute the document on his behalf (t). Hand of the executant may be guided if he is unable, owing to illness, to sign (u). The signature may be made by another person in the presence of, and by the direction of, the executant under section 3 of the Act. Where an illiterate testatrix touched the pen and handed it over to K. who made a mark and added a memorandum that that was the mark of the testatrix, and it was proved that he did so in the presence and by the direction of the testatrix, and after attestation there was a memorandum by K. that the will

(e) *In the goods of Walker* (1862) 2 Sw. & Tr. 354, 164 E. R. 1033; *Burke v. Moore* (1875) 9 I. R. Eq. 609; *In the goods of Casmore* (1869) 1 P. & D. 653.

(f) *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, 164 E. R. 1416; *Leonard v. Leonard* (1902) P. 243.

(g) *Sadananda v. Emperor* (1905) 32 Cal. 550.

(h) *Radhakrishna v. Subraya* (1917) 40 Mad. 550.

(i) *Baker v. Dening* (1838) 8 Ad. & El. 94, 112 E. R. 771; *Wilson v. Beddard* (1841) 12 Sim. 28, 59 E. R. 1041, *In the goods of Clarke* (1858) 1 Sw. & Tr. 22, 164 E. R. 611.

(j) *Govind v. Bhau Gopal* (1917) 41 Bom. 384.

(k) *In the goods of Savory* (1851) 15 Jur. 1042.

(l) *Donnelly v. Broughton* (1881) A. C. 435.

(m) *In the goods of Glover* (1847) 11 Jur. 1022; *in the goods of Redding* (1850) 2 Rob. 339,

163 E. R. 1338.

(n) *Grayson v. Atkinson* (1752) 2 Ves. Sen. 459, 28 E. R. 291; *Ellis v. Smith* (1754) 1 Ves. Jun. 11, 34 E. R. 667.

(o) *In the goods of Emerson* (1882) 9 L. R. Ir. 443.

(p) *Playne v. Scriven* (1849) 13 Jur. 712, 163 E. R. 1209.

(q) *Playne v. Scriven* (1849) 1 Rob. 772; *Lewis v. Lewis* (1908) P. L. 5.

(r) *In the goods of Douce* (1862) 2 Sw. & Tr. 593, 164 E. R. 1127.

(s) *In the goods of Horsford* (1874) 3 P. & D. 211.

(t) *Lal Bahadur v. Rameshwar*, A. I. R. (1927) Oudh 510; *Sasi Bhusan v. Chandra* (1906) 33 Cal. 861; *Deo Narain v. Kukur Bind* (1902) 24 All. 319.

(u) *Wilson v. Beddard* (1841) 12 Sim. 28.

- S. 59 was in the handwriting of K., it was held that the execution was sufficient and could not be said to be invalid because it did not contain the signature of K. himself (v).

Execution by scribe.—Where no mark, seal or thumb impression of the mortgagor appears on the mortgage deed, the scribe who executes the document for and on behalf of the mortgagor, is not competent to attest his own signature as an attesting witness (w).

Attestation in general.—The use of attestation is to protect against fraud. By the Amending Act, XXVII of 1926, the meaning of the word "attested" has been added to the Act. It is based on section 63 (c) of the Indian Succession Act, XXXIX of 1925, which in turn is based on section 9 of the Wills Act, 7 Will., 4 and 1 Vic., c. 26, and the Amending Wills Act, 15 and 16 Vic., c. 24. The authorities, therefore, on these two sections of the Wills Act and the Amending Wills Act and on the corresponding section 63 (c) of the Indian Succession Act are applicable for the purposes of this Act (x).

"To attest" is to be present and see what passes and when required, to bear witness to the facts (y). "To attest" means only to witness the execution of a deed and there is nothing to preclude the signatures of the witnesses from being affirmed for them with their consent, they being illiterate and not able to write (z). The word "attested" in section 59 of the Transfer of Property Act has the same meaning which it has in section 60 (c) of the Indian Succession Act (a). Attestation means that what is said to be attested, happened in the presence of the attesting witness (b). A signature made without any intention of attesting, is ineffective (c). Nor can it be a valid attestation if the witness subscribes his name before the document has been executed (d). An attesting witness is one who has seen the deed executed and who signs it as a witness (e). The addition of an attesting witness, even if it were subsequent to the delivery of the document, is not a material alteration, which would invalidate the document (f). The attesting witness must affix his signature as such, otherwise the attestation is not sufficient (g). A person who signs as witness to express concurrence in the transaction, is not an attesting witness (h). Attestation to a receipt clause below the signature, does not amount to an attestation of the mortgage deed (i). When the signatures of the witnesses to a mortgaged bond, who had witnessed the execution, were affixed by another person with their consent, the attestation was held valid (j). But when the deed was attested by one witness and the name of the second witness was written by the scribe in the margin, but there was no signature or mark by this second person, it was held that the attestation was not valid (k).

- (v) *Dasureddi v. Venkatasubbammal* (1934) 57 Mad. 979.
 (w) *Upendra Chandra v. Hukum Chand* (1919) 46 Cal. 522.
 (x) *Ganga Dei v. Shiam Sundar* (1904) 26 All. 69; *Ramji v. Bai Parvati* (1903) 27 Bom. 91; *Sarur Jigar v. Barada Kanta* (1910) 37 Cal. 526.
 (y) *Bryan v. White* (1850) 14 Jur. 919, 163 E. R. 1330.
 (z) *Sasi Bhusan v. Chandra Peshkar* (1906) 33 Cal. 861.
 (a) *Ramji v. Bai Parvati* (1903) 27 Bom. 91.
 (b) *Diramoyee Debi v. Bon Behari Kapur* (1902) 7 C. W. N. 160.
 (c) *In the goods of Wilson* (1866) 1 P. & D. 269;

- In the goods of Streatley* (1891) P. 172;
In the goods of Eynon (1873) 3 P. & D. 92.
 (d) *Pran Nath v. Jadu Nath* (1905) 32 Cal. 729.
 (e) *Ranu Bin v. Laxmanrao* (1909) 33 Bom. 44.
 (f) *Venkatesh v. Babasubraya* (1891) 15 Bom. 44.
 (g) *In the goods of Eynon* (1873) 29 L. T. 45.
 (h) *Sarkar Barnard & Co. v. Alak Manjary Kuari* (1924) 26 Bom. L. R. 737 P. C.
 (i) *Harkisandas v. Dwarkadas* (1935) 37 Bom. L. R. 913.
 (j) *Sasi Bhusan v. Chandra* (1906) 33 Cal. 861; *Lal Bahadur v. Rameshwar, A. I. R.* (1927) Oudh 510.
 (k) *Param Hans v. Randhir Singh* (1916) 38 All. 461.

"Attested" definition retrospective.—The definition in section 2 was introduced into the Act by Act 27 of 1926 and by the Amending Acts of 1927 (10 of 1927) and (12 of 1927) has been given a retrospective effect (*l*).

Method of attestation.—The following rules as to attestation must be observed:—

- I. The attestation must be by two witnesses at least.
- II. Each witness attesting must have either :
 - (a) Seen
 - (i) the executant sign or affix his mark or
 - (ii) some other person sign the instrument in the presence and by the direction of the executant, or
 - (b) Received from the executant a personal acknowledgment
 - (i) of his signature or mark or
 - (ii) the signature or mark of such other person.
- III. Each witness must sign in the presence of the executant.
- IV. The presence of more than one witness at a time is not necessary.
- V. No particular form of attestation is required.

I. **The attestation must be by two witnesses at least.**—The Act provides that the mortgage deed must be attested by at least two witnesses, so that, if it is unattested or attested by only one witness, the deed would be invalid and the party taking the benefit under it, would not be able to prove it. The witness must sign himself. Another person cannot sign for a witness even at his request. There is no special qualification for a witness. A minor can attest if he is capable of understanding the nature of the Act. A female can be an attesting witness. A party to a deed is not a competent witness to attest (*m*). A person interested in the money advanced, but not a party to the mortgage, can attest (*n*).

II. (a) Each witness must have either seen

- (a) the executant sign or affix his mark or
- (b) some other person sign the instrument in the presence and by the direction of the executant.

The Act requires two witnesses to attest and makes it incumbent upon each witness, either to see the executant sign or affix his mark to the instrument, which means that there must be three individuals including the executant or the person who signs the instrument on his behalf. The person making the signature is not competent as an attesting witness of its execution (*o*). The two attesting witnesses must sign their names after and not before the execution (*p*).

A mortgage is duly attested not only when there are witnesses to the actual execution, but also to the acknowledgment by the executant of his signature after execution (*q*). Where the witnesses were present in a room when a *pardanashin*

(*l*) *Yacub Khan v. Guljar Khan* (1928) 52 Bom. 219; *Veerappa v. Subramania* (1929) 52 Mad. 123; *Durgawati v. Jagannath* A. I. R. (1929) All. 680; *Abinash v. Dasarath* (1929) 56 Cal. 598; *Motilal v. Kasambhai* (1927) 29 Bom. L. R. 1334; *S. M. A. R. A. L. Firm v. R. M. M. A. Firm* (1927) 5 Rang. 772.
 (*m*) *Sharpe v. Birch* (1882) 8 Q. B. D. 111; *Freshfield v. Read* (1842) 9 M. & W. 404; *Seal v. Claridge* (1881) 7 Q. B. D. 516; *Penwarden v. Roberts* (1883) 9 Ch. D. 137;

Peary Mohan v. Sreenath (1909) 14 C. W. N. 1046; *Debendra v. Behari* (1911) 16 C. W. N. 1075; *Sarurjigar Begam v. Baroda Kant Miller* (1910) 37 Cal. 526.
 (*n*) *Balu v. Gopal* (1911) 13 Bom. L. R. 944; *Durga Din v. Siraj Bakhsh* (1931) 7 Luck. 41.
 (*o*) *Avabai v. Pestonji* (1887) 11 Bom. 87.
 (*p*) *Hurro Sundari v. Chunder Kant* (1881) 6 Cal. 17; *Bissonath v. Doyaram* (1880) 5 Cal. 738.
 (*q*) *Ganga Dei v. Shiam Sunder* (1904) 26 All. 69.

S. 59 lady signed the document, she being behind the *purdah* when she affixed her signature, it was held that having regard to the custom of the country, there was sufficient compliance with section 59 of the Act (r). Where a mortgage deed bore, at its conclusion, the signature of the witness and of the Sub-Registrar under section 63A of the Deccan Agriculturists' Relief Act, but it was not attested by two witnesses, held the signatures could not be treated as an attestation (s). Where by the authority of an illiterate mortgagor, a mortgage is signed by another, such authority need not be in writing (t).

(b) Received from the executant a personal acknowledgment

(i) of his signature or mark, or

(ii) of the signature or mark of such other person.

If a mortgage is not signed in the presence of witnesses, the executant must acknowledge his signature or mark in their presence (u). It is necessary that the acknowledgment or admission must be made by the party executing the deed and not by someone on his behalf and such executing party must acknowledge or admit that the signature or mark is of himself or someone who made it at his request on his behalf (v). It may be made in express words or by gesture, but it cannot be made by a letter addressed to the witnesses, as it would not be a personal acknowledgment; nor would it be a sufficient personal acknowledgment, if another person were to ask the witnesses to sign in the presence of the executant and the latter remained silent. It is necessary that the witness and the executant should be in the presence of each other, as it is imperative that the witnesses must sign in the presence of the executant. The acknowledgment must precede the attestation and the signature must be on the paper before the witnesses sign it. In this case there is no distinction between deeds and wills, and the authorities on the latter subject would be applicable to deeds. Where a testator's name was by his direction and in his presence subscribed and two others who were present, not at the time of the direction but when his name was subscribed, attested, and then the testator made his mark over his name so subscribed for him, it was held that the execution was invalid inasmuch as there was no evidence that the subscribed name had been acknowledged as his signature by the intending testator, and his mark had been made after attestation (w). The signature to be acknowledged may be made either by the testator or by another for him (x). A signature pencilled by a third person to shew the place of signature cannot be acknowledged (y). It is sufficient acknowledgment by a testator of his signature to his will, if he makes the attesting witnesses understand that the paper which they attest, is his will, though they do not see him sign it or observe any signature to the paper, which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it (z). The signature of a testator at the commencement of his will, when the witnesses attested it, and his admission to the attesting witnesses that the paper which they attest is his last will, constitute sufficient acknowledgment even though the witnesses do not see him sign it or observe any signature to the paper which they

(r) *Harmongal v. Narain Singh v. Ganaur Singh* (1907) 13 C. W. N. 40.

(s) *Ranu v. Laxmanrao* (1909) 33 Bom. 44.

(t) *Deo Narain Rai v. Kukur Bind* (1902) 24 All. 319.

(u) *Ganga Dei v. Shiam Sundar* (1904) 26 All. 69 ;
Ramji v. Bai Parvati (1903) 27 Bom. 91.

(v) *Ramji v. Parvatibai* (1903) 27 Bom. 91 ;

Ganga Dei v. Shiam Sundar (1904) 26 All. 69.

(w) *In the goods of Moore* (1875) Ir. R. 9 Eq. 609.

(x) *In the goods of Regan* (1838) 1 Curt. 908,
163 E. R. 314.

(y) *Reeves v. Grainger* (1908) 52 So. Jo. 355.

(z) *Manickbai v. Hormasji* (1876) 1 Bom. 547;
Balmukund v. Bhagwandas (1913) 15 Bom.
L. R. 209.

attest (a). Acknowledgment by a third person in the hearing of the testator and acquiesced in by him is an acknowledgment by the testator (b).

S. 59

III. Each witness must sign "in the presence" of the executant.—The attestation by each witness must be made in the presence of the executant (c). It is not necessary that he should actually see him sign but he must be conscious of the act upon which the witnesses are engaged (d). "In the presence" must be taken to mean actual visual presence and the signature must be written or acknowledged before either of them attests or subscribes (e). There must be on the part of the executant, capacity to see the witnesses sign (f). A will having been executed by A and attested by one witness, was carried into an adjoining room and shewn to B, who was desired to attest it also, which he accordingly did in the presence of A. It was held B was a good witness to prove the execution (g).

IV. The presence of more than one witness at a time is not necessary.—This provision, though analogous to the provision of section 63 (c) of the Indian Succession Act, XXXIX of 1925, is distinguishable from the provisions of the Wills Act, which require both witnesses to be present at the moment of execution or acknowledgment. In either case, however, the witnesses are not required to sign in the presence of each other. A mortgage, which had to be executed by two persons, after it was executed by the first, was attested by two witnesses and the second executant signed thereafter but there was no fresh attestation—it was held not to be validly executed (h).

No particular form of attestation is required.—The Act does not require any particular form of attestation (i). When the instrument *ex facie* is perfectly regular, as regards all the formalities of signature and attestation, the presumption *omnia præsumentur rite esse acta* applies, presumption irrebuttable by the evidence of the witnesses, who were confused on the occasion of attestation and whose recollection of what took place was evidently imperfect (j). When the witnesses acknowledged their signatures but had no recollection of having signed the paper nor of even having seen it before the attestation, the document was held to be duly executed (k). This presumption of due attestation may be rebutted, although there is a valid attestation clause, if it appear that the formalities have not been observed, from the distinct and positive evidence of the attesting witnesses, and the case is not one in which there is something on the face of the document which would shew that those witnesses cannot be quite accurate in their recollection (l). When execution is challenged, it is for the party taking benefit under the document to prove its due execution. Witnesses need not sign by name; as "sign" includes mark (m). Attestation by mark would be allowed (n); even initials or description are sufficient (o). A holograph will signed at the foot by testator

(a) *Amarendra Nath v. Kashi Nath* (1900) 27 Cal. 169.

(b) *In the goods of Bosanquet* (1852) 2 Rob. 577, 163 E. R. 1419; *Todd v. Thompson* (1863) 9 L. T. 177.

(c) *Abinash Chandra v. Dasarath* (1929) 56 Cal. 598; *Zamindar of Polavaram v. Maharaja of Pittapuram* (1931) 54 Mad. 163; *Venkataramayya v. Nagamura*, A. I. R. (1932) Mad. 272; *Ramanathan v. Delhi Batcha*, A. I. R. (1931) Mad. 335.

(d) *Jenner v. Finch* (1879) 5 P. D. 106; *Carter v. Seaton* (1901) 85 L. T. 76.

(e) *Brown v. Skirrow* (1902) P. 3.

(f) *Carter v. Seaton* (1901) 17 T. L. R. 671; *Brown v. Skirrow* (1901) 85 L. T. 645.

(g) *Horendranarain v. Chandrakanta* (1889) 16 Cal. 19.

(h) *Munlappa Chettiar v. Vellachamy* (1918)

M. W. N. 853.

(i) *Abinash Chandra v. Dasarath* (1929) 56 Cal. 598.

(j) *Wright v. Sanderson* (1884) 9 P. D. 149; *Sibo Sundari Debi v. Hemangini Debi* (1898) 4 C. W. N. 204.

(k) *Woodhouse v. Balfour* (1887) 13 P. D. 2; *Byles v. Cox* (1896) 74 L. J. 222.

(l) *Glover v. Wright* (1886) 57 L. J. 60; *Wyatt v. Berry* (1893) P. D. 5.

(m) General Clauses Act, sec. 3 (52).

(n) *Prem Krishna v. Jadunath* (1898) 2 C. W. N. 603, 605; *In the goods of Wynne*, (1874) 13 Beng. L. R. 392; *Shri Shrikishan v. Sonba Bhoer* (1905) 1 N. L. R. 14; *Nagamma v. Venkataramayya* (1935) 58 Mad. 220; *Chiranjil Lal v. Poorna* (1914) 12 A. L. J. 1114.

(o) *Ammayee v. Yalomalai* (1892) 15 Mad. 261.

S. 59 and containing an attestation clause appeared to be attested by two marksmen, who were in his employment and illiterate, and had both predeceased him. The document was found shortly after testator's death, in his house, preserved among his other papers. Held there were reasonable grounds for presuming that the will had been duly executed and attested (*p*). A seal is insufficient (*q*). One witness cannot sign for another (*r*). Nor can a third person sign for a witness (*s*), and a witness cannot sign in the name of another person (*t*). A witness or a third person may guide the hand of second witness, or subscribe for the witness while the witness holds the top of the pen while the signature is being made (*u*). A mortgage deed was held duly attested, when the signatures of the witnesses were affixed for them to the deed by another person with their consent, they being illiterate and not able to write (*v*). It is wrong to say that because a man's signature is on the document at all, the man in question is an attesting witness. Regard must be had to the purpose for which it is on the document and what the signature is put to authenticate (*w*).

Proof of attestation.—The Indian Evidence Act, 1872, has laid down rules in this behalf which will be found in sections 68 to 72, 89, 90, also in sections 45 and 73 relating to finger impressions.

Effect of attestation on witness.—As a general rule attestation does not affect the witness with knowledge or notice of the contents of a deed, and whether it imports concurrence, is a question of fact (*x*). Nor does it import assent to all the recitals (*y*), nor does it bind him to the description of the property (*z*), nor amount to an estoppel (*a*).

Invalid attestation.—A mortgage not attested as required by the Act cannot be relied on as a charge, though it would be admissible for proving the personal covenant inasmuch as the document is evidence of a money debt (*b*). The mortgagee has a further remedy under section 68 where there is no personal covenant (*c*). An instrument cannot operate as a charge if it cannot operate as a mortgage for want of due attestation (*d*), or where it is attested before the executant signed the instrument (*e*), or for failure to comply with the provisions for attestation (*f*), or where it is attested by one witness only (*g*), or if it is not properly attested (*h*). In some cases, personal liability to repay is to be implied from the fact that the

- (*p*) *Clarke v. Clarke* (1879) 5 L. R. Ir. 47.
 (*q*) *In the goods of Byrd* (1842) 3 Curt. 117, 163 E. R. 674.
 (*r*) *In the goods of Duggins* (1870) 22 L. T. 182.
 (*s*) *In the goods of Cope* (1850) 2 Rob. 335, 63 E. R. 1337.
 (*t*) *In the goods of Mead* (1842) 6 Jur. 351.
 (*u*) *Harrison v. Elvin* (1842) 3 Q. B. 117.
 (*v*) *Sasi Bhusan v. Chandra Peshkar* (1906) 33 Cal. 861.
 (*w*) *Abinash Chandra v. Dasarath* (1929) 56 Cal. 598.
 (*x*) *Chunder Dutt v. Bhagwat Narain* (1898) 3 C. W. N. 207; *Matadeen Roy v. Mussodun Singh* (1888) 10 W. R. 293 P. C.; *Ram Chunder v. Haridas* (1883) 9 Cal. 463; *Imam Ali v. Baij Nath* (1906) 33 Cal. 613; *Lakhpali v. Rambodh Singh* (1915) 37 All. 350; *Raj Lakhee Debia v. Gocul Chandra Chowdry* (1889) 13 M. I. A. 209; *Hari Kishen v. Kashi Pershad* (1914) 42 Cal. 876, 42 I. A. 64; *Fazal Hussain v. Jivan Singh* (1933) 14 Lah. 369; *Banga Chandra v. Jagat Kishore* (1917) 44 Cal. 186, 43 I. A. 249; *Pandurang v. Markandeya* (1922) 49 Cal. 334, 49 I. A. 16.
 (*y*) *Imam Ali v. Baij* (1906) 33 Cal. 613; *Ram*

- Chundur Poddar v. Haridas* (1883) 9 Cal. 463.
 (*z*) *Ganpat Singh v. Gopal* (1886) 1 C. P. L. R. 67.
 (*a*) *Ram Sarup v. Kishen Sahai* (1883) A. W. N. 142.
 (*b*) *Gomaji v. Subbarayappa* (1892) 15 Mad. 253; *Sada Kavaur v. Tadepally* (1907) 30 Mad. 284; *Sonatun Shaha v. Dino Nath* (1899) 26 Cal. 222; *Sama Rao v. Vannajee* (1923) 46 Mad. 64; *Zemindar of Polavaram v. Pithapuram* (1931) 54 Mad. 163.
 (*c*) *Ram Narayan v. Adhindra* (1917) 44 Cal. 388.
 (*d*) *Samoo Patter v. Abdul Sammad* (1912) 35 Mad. 607; *Royruddi Sheik v. Kali Nath* (1906) 33 Cal. 985; *Narayan v. Lakshmandas* (1905) 7 Bom. L. R. 934; *Pran Nath v. Jadu Nath* (1905) 32 Cal. 729.
 (*e*) *Pran Nath v. Jadu Nath* (1905) 32 Cal. 729.
 (*f*) *Narayan v. Lakshmandas* (1905) 7 Bom. L. R. 934.
 (*g*) *The Collector of Mirzapur v. Bhagwan Prasad* (1913) 11 A. L. J. 141; *Sreemutty Rani Kumari Bibi v. Rajah Sri Nath Roy* (1897) 1 C. W. N. 81.
 (*h*) *Debendra Chandra v. Behari Lal* (1912) 16 C. W. N. 1075.

document mentions an advance of money, and it does not contain a personal covenant to pay, as in the case of a usufructuary mortgage (i).

S. 59

Signature before Registrar.—There is a conflict of authority as to whether the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement under sections 58 and 59 of the Indian Registration Act are a sufficient attestation within the meaning of section 59 and its subsequent amending Acts. One view is that such signatures amount to sufficient attestation (j), the other view is to the contrary (k).

Scribe as attesting witness.—The scribe, who writes the name of an illiterate executant to a mortgage on his behalf, is not himself competent to attest the document as an attesting witness (l). An attesting witness to a document is a witness in whose presence a document is executed. A scribe by reason of his having signed the name of the executant on the document on his behalf, is not a competent attesting witness (m). To validate a scribe's attestation, he must purport to sign as a witness (n).

"Purdanashin" lady.—In case of dealings with *purdanashin* ladies, it is very important to see that such ladies understand what they are doing. It is also most important to see whether there was real consideration. A mortgage executed by a *purdanashin* lady and attested by her husband who saw her sign, and the other witness who was outside heard her say "yes" when the document was explained to her, was held valid (o). A mortgage executed by two *purdanashin* ladies behind a chick and the attesting witnesses who knew their voices recognized them and saw each lady execute the deed, though they were unable to see their faces, the attestation was regarded as valid (p). A mortgage, signed by a *purdanashin* lady and attested by witnesses who had not seen her executing the instrument but had seen her son come from behind the *purdah* and who said she had signed it, was held valid (q). Where the attesting witnesses did not actually see her sign the document, it was held not to have been duly attested, the fact that she admitted execution being considered immaterial (r).

Witness's ignorance of nature of document.—The signature of a testator to his will may be duly attested although an attesting witness does not know that the document in question is the testator's will. The intention of the witness is immaterial so long as he signs the paper in compliance with the requirements of the Wills Act (s).

(i) *Maharaja Ram Narayan Singh v. Adhindra Nath Mukerjee* (1917) 44 Cal. 388.

(j) *Neelima Basu v. Joharlal Sarkar* (1934) 61 Cal. 525; *Veerappa v. Subramania* (1928) 52 Mad. 123; *Sarada Prasad v. Triguna Charan* (1922) 1 Pat. 300; *Hurro Sundari v. Chander Kant* (1880) 6 Cal. 17; *Nitye Gopal v. Nagendra Nath* (1885) 11 Cal. 429; *Maneckbai v. Hormasji* (1897) 1 Bom. 547.

(k) *Lachman v. Surendra* (1932) 54 All. 1051; *Harkissandas v. Dwarkadas* (1935) 37 Bom. L. R. 913; *Ranu v. Laxmanrao* (1909) 33 Bom. 44; *Mushrafi Begam v. Lala Kundan* (1933) 9 Luck. 12; *Tofaluddi v. Mahar Ali* (1899) 26 Cal. 78.

(l) *Upendra Chandra v. Hukum Chand* (1919) 46 Cal. 522; *Shristidhar v. Rakshakaly* (1922) 49 Cal. 438; *Ram Samujh v. Mt. Mainath*, A. I. R. (1925) Oudh, 737.

(m) *Paban Khan v. Badal Sardar* (1921) 34 C. L. J. 498; *Upendra Chandra v. Hukum Chand* (1919) 46 Cal. 522.

(n) *Dalichand v. Lotu Sakharan* (1920) 44 Bom. 405; *Jadunandan v. Surajdeo* (1930) 52 All. 434; *Ram Samujh v. Mt. Mainath*, A. I. R. (1925) Oudh 737; *Dharamdas v. Ramoomal*, A. I. R. (1927) Sindh 118, 120; *Yacubkhan v. Guljarkhan* (1928) 52 Bom. 219; *Govind Bhikaji v. Bhau Gopal* (1916) 41 Bom. 384, 389; *Lakshman v. Krishnaji* (1927) 29 Bom. L. R. 1425.

(o) *Rukmini v. Nilmani* (1915) 19 C. W. N. 1309.

(p) *Padarath Hakwali v. Ram Nain* (1915) 37 All. 474 P. C.

(q) *Rai Ganga v. Ishri Pershad* (1918) 34 M. L. J. 545; *Saner Jigar v. Barada Kanta* (1910) 37 Cal. 526.

(r) *Hira Bibi v. Ram Hari Lal* (1926) 5 Pat. 58; *Shamu Patter v. Abdul Kadir* (1912) 35 Mad. 607, 39 I. A. 218; *Ganga Pershad v. Ishri Pershad* (1918) 45 Cal. 748, 45 I. A. 94; *Zamindar of Polavaram v. Pittapuram* (1931) 54 Mad. 169.

(s) *In the estate of E. Benjamin* (1934) 150 L. T. 417.

Ss. 59A-60

59A. *Unless otherwise expressly provided, reference in this chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.*

References to mortgagors and mortgagees to include persons deriving title from them.

New section.—This section has been added by the Amending Act, 20 of 1929, to render clear that the “mortgagor” and “mortgagee” include persons deriving title from them.

Unless otherwise expressly provided.—Where there is an express provision to the contrary, the rule in the section does not apply. For example, the proviso to section 68 saves a transferee from a mortgagor, from personal liability to which the latter is subject under clause (a) of the same section. The amendment is in conformity with the decisions of the Privy Council (t).

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become *due*, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Right of mortgagor to redeem.

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed

(t) *Jamnadas v. Ram Autar* (1912) 34 All. 63, 39 I. A. 7; *Muhammad Siddiq v. Muhammad*

Nasir (1899) 21 All. 223, 26 I. A. 45.

for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. S. 60

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Redemption of portion
of mortgaged property.

Analysis of the section—

- (1) At any time after the principal money has become due,
- (2) On payment or tender,
- (3) At the proper time and place,
- (4) Of the mortgage-money.

The mortgagor has a right to require the mortgagee

- (a) to deliver the mortgage deed and all documents relating to the mortgaged property,
- (b) If he the mortgagee be in possession to deliver possession of the mortgaged property to the mortgagor, or
- (c) to transfer the mortgaged property to him or such third person as he may direct at the cost of the mortgagor, or
- (d) to execute and register an acknowledgment that any such right in derogation of his interest transferred to the mortgagee has been extinguished.

Provided that the right conferred above is not lost

- (1) By act of parties, or
- (2) By decree of the Court.

The right conferred by this section is called the right to redeem and a suit to enforce the right is called a suit for redemption.

This section shall not invalidate a stipulation :

- (1) that the mortgagee shall be entitled to reasonable notice
 - (a) if the time fixed for payment of the principal money is allowed to pass, or
 - (b) if no time is fixed for payment.

This section shall not entitle one of several co-mortgagors to redeem his share only, on payment of a proportionate part of the amount due.

Unless (1) a mortgagee has

- (2) where there are more mortgagees than one, all have acquired in whole or in part the share of a mortgagor.

S. 60

Amendments of the section.—The following amendments have been made by Act 20 of 1929 :—

(a) for the word “payable” the word “due” shall be substituted. This is in accordance with the Privy Council ruling that a mortgagor can only redeem on the expiration of the specified period (u)

(b) for the words “the mortgage deed, if any, to the mortgagor” the following words shall be substituted, namely, “to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee” ;

This is to render clear that the mortgagee on redemption should deliver all deeds in his possession relating to the mortgaged property.

(c) The words and brackets “(where the mortgage has been effected by a registered instrument)” shall be omitted ;

As all mortgages not being by deposit of title-deeds are now effected by registered instruments,

(d) for the word “order” the word “decree” shall be substituted ; as the word “decree” is used in Order 34, rule 8, extinguishing the right of redemption.

(e) After the words “remaining due on the mortgage, except” the word “only” shall be inserted.

This is to get over the anomaly created by the Bombay decision allowing partial redemption by mortgagor (v).

Redemption and foreclosure are co-relative.—Amongst the changes made in this section by Act 20 of 1929, the word “due” has been substituted for the word “payable” in the first paragraph. By the substitution of the word “due” those decisions which laid down the principle that the right to redeem and the right to foreclose are co-extensive have been upheld. The general principle is that in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive. Where, therefore, a date is fixed in a mortgage for redemption, no suit could be brought for redemption within that date notwithstanding the fact that the deed mentions that the mortgage amount is payable “within” that date (w). In a deed of mortgage it was stipulated that “the interest should be paid every year and the principal in 10 years,” that “the principal shall be paid at the promised time and the interest every year” and that on failure by the mortgagor to pay the principal and interest “at the stipulated period” the mortgagee might realize the amount from the mortgaged property.

The obligations between the parties were regarded as mutual and reciprocal (x), so that when a day is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiration of the period fixed (y), nor can the representatives of the mortgagor be allowed to redeem before the term fixed though it be 20 years as it is neither inequitable nor one fixed without legal necessity, especially when it was fixed by the mortgagor as being best in his interest. Just as a mortgagor is not entitled to redeem before the expiry of the term, so a mortgagee is justified in refusing to allow him to do so (z). It is not true, however, that at all times and

(u) *Bakhtawar Begam v. Husaini Khanum* (1914) 36 All. 195, 41 I. A. 84.

(v) *Mayashankar v. Burjorji* (1925) 27 Bom. L. R. 1449.

(w) *Vadju v. Vadju* (1881) 5 Bom. 22.

(x) *Raghubar Dayal v. Budhu Lal* (1886) 8 All. 95.

(y) *Husaini Begum v. Husani Khan* (1907) 29 All. 471.

(z) *Urjooni Kambi v. Harbaji Jagannath* (1886) 1 C. P. L. R. 1.

under all circumstances the right of redemption and the right of foreclosure are co-extensive. Both these rights rest upon the contract between the parties. The right of redemption may be postponed or the right of the mortgagee to call in his moneys may be limited so that if the restrictions imposed be not unfair or inequitable, redemption will not be allowed before the expiration of the period.

When usufructuary mortgagee was entitled to remain in possession for 15 years in lieu of interest but was empowered to realize the entire mortgage-money and interest in the event of its being found that the property was mortgaged or transferred to another or any circumstances should arise so as to cause a total or partial loss of the mortgage-money before the expiry of the period, it was held that this condition was neither onerous, unreasonable nor oppressive and that the mortgagor was not entitled to redeem before the expiry of the term in the mortgage (a). The mortgagor may, however, redeem before the expiry of the term if the mortgagee consents (b). But if the whole of the mortgaged debt has been satisfied from the rents and profits of the property, the mortgagor has a right to redeem the property at once (c). The contrary view has also been expressed and it has been held that a period for redemption is fixed for the convenience of the mortgagor and that the mortgagor can redeem even before the expiry of the term fixed (d). This conflict of opinion has been set at rest by the Amending Act. It is, however, not clear whether on equitable principles, where the nature of the case clearly shews that the mortgagor is entitled to relief, a Court will not grant relief in consequence of the Amending Act, as in a case when the property in dispute was mortgaged to defendants by way of conditional sale for Rs. 599-15-0 for 10 years. Of the mortgage-moneys only Rs. 50-15-0 were paid and the balance left with the mortgagee for payment to prior encumbrancers. The mortgagee did not pay up the prior encumbrancers and the plaintiffs, the purchasers from the mortgagors, sued for redemption before the fixed period of 10 years. It was held, on equitable principles, the defendants not having performed what was a most reasonable part of their contract, the plaintiffs should be allowed to redeem before the expiry of 10 years stipulated for (e). But when in a mortgage there is an express provision giving the mortgagee power to call in his moneys at any time, any stipulation for postponement of redemption would be unilateral and void of consideration and consequently invalid so that the mortgagor would be equally empowered to redeem before the stipulated period. If the mortgagee can pursue the remedy of foreclosure it follows that he is bound to accept payment. The right of foreclosure necessarily involves the co-relative right of redemption (f).

Enforcement of the equity of redemption.—As a general rule it is not competent to the mortgagor to redeem a mortgage before the period fixed for redemption even though he tenders the principal money and interest upto the date named in the proviso for redemption (g). But the rule is modified when the mortgagee has demanded payment of his mortgage debt or has taken steps to compel payment of it, in which case the mortgagee is entitled to principal, interest and costs as also reasonable notice or interest in lieu of notice whether the time fixed for payment has expired or not (h).

(a) *Bhawani v. Sheodihal* (1904) 26 All. 479.
 (b) *Sakharam Sarpesai v. Vithu L. Gonda* (1866) 2 Bom. H. C. 225.
 (c) *Mt. Kundan v. Thakur Lal* (1892) 6 C. P. L. R. 28.
 (d) *Sri Raja Setrucherla v. Sri Raja Vairacherla* (1879) 2 Mad. 314; *Marana Ammanna v. Pendyala Perubotla* (1880) 3 Mad. 230; *Bhagwat Das v. Parshad Singh* (1888)

10 All. 662; *Jivan Lal v. Dhunde* 16 C. P. L. R. 59; *Rose Ammal v. Rajarathnam Ammal* (1900) 23 Mad. 33.
 (e) *Chhotku Rai v. Baldeo Shukul* (1912) 34 All. 659.
 (f) *Ruttonbai v. Fraser Ice Factory, Ltd.* (1901) 32 Bom. 521.
 (g) *Brown v. Cole* (1845) 9 Jur. 290. 60 E.R. 424.
 (h) *Bovill v. Endale* (1896) 1 Ch. 648.

S. 60

Entry by mortgagee into possession.—When a mortgagee enters into possession his entry is in effect a demand for payment, and the Court has jurisdiction upon payment of debt and interest then due and costs, to order the security to be given up (i).

Mortgagee seeking possession, mortgagor counterclaiming redemption.—It is often provided in the mortgage deed that if a mortgagor commits default in payment of interest or commits a breach of any covenant contained therein or fails to observe any conditions thereof the mortgagee shall be entitled to his mortgage-money forthwith “as if due date had elapsed.” In such cases the mortgage-money becomes payable on the happening of any of the events stipulated for by the contract between the parties, but the points which arise on such a contingency happening are, can the mortgagee claim interest right up to the date fixed for redemption from the date the money becomes due under the contract and whether the mortgagor can seek to redeem the property before the period of redemption has expired, that is to say, can the mortgagor take advantage of his own wrong and ask for relief? Both these questions arose in a Bombay case (j). In that case, in the mortgage deed, after enumerating several contingencies provision was made on the happening of any of them, in the following terms, “notwithstanding anything herein contained to the contrary the mortgage debt for the time being owing on the security of these presents shall at once become payable as if the due date had elapsed and in such case all such rights and remedies shall be available to the banker as will be available to her under the terms of these presents upon default being made in payment of the principal money or interest and other moneys hereby secured, and the banker may in such event in her discretion without any further consent on the part of the company forthwith enter upon or take possession of the mortgaged premises or any of them of which she is not already in possession.” It was held that the words “as if the due date had elapsed” were used merely to accelerate payment and it would be too forced a construction too hold that they also imposed on the Court the obligation to pay the further sum which was claimed by the mortgagee as it would involve payment of something in addition to interest. Such a sum would not clearly be interest for that implies continuance of the principal to which it is an accessory. As the mortgagee is entitled to enforce payment of the amount on the occurrence of the contingencies mentioned in the deed, as correlative to this, the mortgagor is entitled to redeem the mortgaged property by payment of what is due.

Legal tender.—Legal tender is made either out of Court or into Court as provided in section 83 of this Act. Tender is an offer of performance of a promise to do something or to pay something. In either case the concurrence of the party to whom the offer is made is necessary and for want of such concurrence the party making the offer fails. The results, however, are different as the case is of performance of a promise to do something or to pay something. In the case of a debt a tender does not operate to discharge the debtor and the plea of tender is incomplete as an answer to an action, unless accompanied by payment into Court of the amount of the debt (k). The creditor is entitled to a decree for the sum tendered, but cannot, it is conceived, claim further interest (l). A tender is not

(i) *Bovill v. Endale* (1896) 1 Ch. 648; *Wickens v. Shuckburgh* (1898) 78 L. T. 213 C. A.
(j) *Ruttonbai v. The Fraser Ice Factory Ltd.* (1908) 32 Bom. 521.

(k) *Abdul v. Noor Mahomed* (1892) 16 Bom. 141;
Behari Lal v. Ram Ghulam (1902) 24 All. 461.
(l) *Trimbak v. Sakharan* (1892) 16 Bom. 599.

vitiated because a receipt is asked (*m*). But if the debtor demands a stamped receipt the tender will be bad for statute requires a stamped receipt (*n*). But a tender refused on the ground of insufficiency cannot afterwards be objected to on the ground that the debtor demanded a receipt (*o*). A tender clogged with the condition that unless the creditor would allow the sum offered to be the full sum of his original demand the money offered should not be paid, is invalid (*p*). Money tendered with a demand of a receipt in full and refused on that ground is not a legal tender, neither is it when the money is not in sight but the witness supposed it was in a desk and never produced so that it does not appear that the party was willing and, if accepted, it could be immediately produced; the money should be at hand and capable of immediate delivery (*q*). An offer of a certain sum in full of a demand is not a legal tender (*r*). The exact amount due must be tendered (*s*). A tender of a part in satisfaction of the entire debt would not be valid so that the proper form to decide would be the amount of the whole claim and not the difference between the sum claimed and the sum tendered and costs would accordingly be awarded (*t*). A tender of a larger sum requiring change is bad (*u*), unless the mortgagee objects to give change, because he does not agree as regards the amount tendered (*v*). An unconditional tender under protest is good and so where a mortgagor tendered principal interest and costs, reserving at the same time the right to tax the costs, the tender was held unconditional (*w*). Where a mortgagee told his clerk previously authorized to receive money, not to receive the amount if offered by the debtor as he had placed the matter in the hands of his attorneys and the clerk refused the tender, giving the reason as aforesaid, it was held a good tender to the principal, and it was no answer to the debtor to say that the creditor had previously placed the matter in the hands of his attorneys (*x*).

Essentials of a valid tender.—In order to support a plea of tender it must be unconditional and in proper currency and made at the proper time and proper place by the proper person to the proper person of a specified and ascertained sum after due notice so that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do (*y*).

Production of money how far necessary.—For a valid tender the law requires that the money due should be produced to the creditor (*z*). A mere notice to the creditor of the payment of the principal to a third party is not sufficient (*a*). A tender, in order to be effective, must not only be unconditional but there must be an offer to pay a specific and ascertained sum. An offer to pay such sum as may be found due on settlement of accounts if the payee would execute an indemnity bond in accordance with law is not a valid tender (*b*). It must be complete, including the whole amount due, together with interest chargeable thereon and, moreover, according to English Law there must be actual production of the money,

(*m*) *Jones v. Arthur* (1840) 8 Dowl. P. C. 442;
Jagat Narain Dass v. Naba Gopal (1907)
34 Cal. 305.

(*n*) *Laing v. Meader* (1824) 1 C. & P. 257.

(*o*) *Richardson v. Jackson* (1841) 8 M. & W. 298.

(*p*) *Ford v. Noll* (1842) 12 L. J. C. P. 2.

(*q*) *Glascott v. Day* (1803) 5 Esp. 48.

(*r*) *Strong v. Harvey* (1825) 3 Bing. 304, 130 E. R.
580.

(*s*) *Peacock v. Dickerson* (1825) 2 C. & P. 51.

(*t*) *Chandu Caunt Mookerjee v. Jodoo Nath Khan*
(1876) 3 Cal. 468.

(*u*) *Robinson v. Cook* (1815) 6 Taunt. 336, 128
E. R. 1064.

(*v*) *Cadman v. Lubbock* (1824) 3 L. J. O. S. K. B.
41.

(*w*) *Greenwood v. Sulcliffe* (1892) 1 Ch. 1.

(*x*) *Moffat v. Parsons* (1814) 15 Taunt. 307 128
E. R. 707.

(*y*) *Startup v. Macdonald* (1843) 5 M. & G. 593;
Wiltshire v. Smith (1744) 3 Atk. 89, 26
E. R. 854; *Webb v. Crosse* (1912) 1 Ch. 323;
Sabapathy v. Vanmahalinga (1913) 38 Mad.
959.

(*z*) *Polglass v. Oliver* (1831) 1 L. T. Ex. 5, 149
E. R. 7; *Thomas v. Evans* (1752) 10 East
101, 161 E. R. 39; *Leatherdale v. Sweepstone*
(1828) 3 C. & P. 342.

(*a*) *Mulchand v. Babaji* (1899) 1 Bom. L. R. 841.

(*b*) *Lala Batcha v. Arcot Narainswami* (1911)
34 Mad. 320.

S. 60 unless expressly or impliedly the person to whom the tender is made dispenses with such production. And actual production is not necessary when the debtor offers to produce and the creditor refuses to accept or insists on more being due though production is important as likely to influence the creditor (c). In such case, however, it must be satisfactorily proved that the debtor was ready to produce and pay the money at the time when he offered (d). It is the business of the mortgagee to count the money and the mortgagor may keep the bundle tied up (e). If a person while offering, says how much he offers and holds the money twisted up in bank-notes it is a sufficient tender, but if the sum had not been mentioned it would not have done (f). Where the money, though not actually produced, was ready but negotiations fell through owing to the mortgagee's demand for three months' extra interest, the tender was held sufficient so as to cease interest from running (g). A mere offer by letter from the debtor to the creditor not enclosing the money is not a sufficient tender, and in order to stop interest strict tender must be proved (h).

If a tender is made by a cheque contained in a letter requesting a receipt in return and the creditor sends back the cheque but without objecting to the nature of the tender demands a larger sum, it is a good tender (i). A sufficient tender of money is not made if the money is locked up in a box, which the other party is not allowed to open (j). If the promisee gives the purchaser to understand that it is useless to tender anything less than what he wrongfully demands, the promisor is excused from making a tender, and this notwithstanding that he was not ready to tender the proper amount (k). A debtor's offer to pay on condition of the creditor admitting that no more is due, is clearly not a valid tender (l). But a tender "under protest" is good, because the protest merely obviates the effect of payment as an admission of the correctness of the account and does not impose any condition on the acceptance (m). The tender of a sum less than what is admittedly due is unavailing (n), but it has been suggested that the tender may be valid *pro tanto*, if the party making it does not admit that more is due (o). But generally nothing can amount to an offer, to perform which if completed or accepted, would not constitute a performance and, therefore, an offer will not be made 'at a proper time and place' unless it be in conformity with the rules laid down in sections 46 to 50 of the Indian Contract Act. A lender is not bound to accept payment by instalments unless he has so agreed (p).

Currency.—Tender must be made in the same currency in which the mortgagor received it (q), otherwise it must be made in the current coin of the realm. Under the Indian Currency Act (XXIII of 1870) the Indian Paper Currency Act (XX of 1882) and the Indian Coinage and Paper Currency Act (XXII of 1899), legal tender includes coins and currency notes but not a tender by cheque (r). A tender by cheque is good if the creditor raises no objection to the amount (s), for a tender

(c) *Harding v. Davis* (1825) 2 C. P. 77; *Jackson v. Jacob* (1837) 3 Bing. N. C. 869, 132 E. R. 645.
 (d) *Kraus v. Arnold* (1829) 7 Moo. C. P. 59.
 (e) *Wade's case* (1601) 5 Rep. 115, but see *Suckling v. Coney*, Noy. 74.
 (f) *Alexander v. Brown* (1824) 1 C. & P. 288.
 (g) *Pestonji v. Hormasji* (1903) 5 Bom. L. R. 387.
 (h) *Powney v. Blomberg* (1844) 14 Sim. 179, 60 E. R. 325; *Kamaya Naik v. Devapa* (1898) 22 Bom. 440; *Jagat Tarini v. Naba Gopal* (1907) 34 Cal. 305; *Sabapathy v. Vanmahalinga* (1913) 38 Mad. 959.
 (i) *Jones v. Arthur* (1840) 8 Dowl. 442.
 (j) *Tetherum v. Whitmore* (1843) 11 M. & W.

347, 152 E. R. 837.
 (k) *Borrowman v. Free* (1878) 4 Q. B. D. 500.
 (l) *Evans v. Judkins*, (1815) 4 Camp. 156; *Scott v. Uxbridge Ry. Co.* (1866) 1 C. P. 596.
 (m) *Greenwood v. Sutcliffe* (1892) 1 Ch. 1.
 (n) *Chunder Caunt v. Jadoonath* (1878) 3 Cal. 468; *Scarles v. Sedgrove* (1856) 5 E. & B. 539; *Dixon v. Clark* (1848) 5 C. B. 365.
 (o) *Abdul v. Noor Mahomed* (1892) 16 Bom. 141.
 (p) *Behari Lal v. Ram Ghulam* (1902) 24 All. 461.
 (q) *Noel v. Rockfort* (1836) 4 C. & F. 158.
 (r) *Jagat Narain v. Naba Gopal* (1907) 34 Cal. 305.
 (s) *Jones v. Arthur* (1840) 8 Dowl. 442.

by cheque is regarded as a tender in currency different from that required by law. The objection to the form of the tender may be expressly or impliedly waived by the creditor and he will be deemed to have waived the objection, if he rejects the tender on some ground or other without making any objection to the legality of the tender in point of quality (*t*). Tender must be unconditional but to demand a reconveyance on the spot, does not make the tender conditional (*u*).

By whom tender must be made.—Persons given a right to redeem under section 91 may tender. If a strict tender is not made the Court cannot stop interest nor order costs (*v*). A plea of tender before action must be accompanied by payment into Court after action (*w*). A mortgagee rejecting a tender will not be allowed his costs of a redemption action if he wrongfully refuses a tender (*x*). A tender by the agent of the debtor of the whole sum demanded by the creditor by pulling out his pocket book and offering, if he would go into a neighbouring public house, to pay it, which the creditor refused, is good although the agent is only authorized to tender a sum short of the whole sum and he offers the rest at his own risk (*y*). According to English Law, any person entitled to redeem may make a valid tender but not a stranger (*z*).

A creditor may undo the payment on discovering the stranger's want of authority and the debtor cannot ratify by placing the plea of payment on the record in the creditor action (*a*). According to section 41 of the Indian Contract Act (Act IX of 1872), performance by a stranger accepted by the creditor discharges the debtor although there be neither authority nor ratification on the part of the debtor. Illustration (c) to section 63 of the same Act is not only on the same point that a payment by a stranger on behalf of a debtor is a valid discharge but goes further, that payment of a smaller sum tendered by a stranger in satisfaction of a larger, if accepted by the creditor, is a discharge of the whole claim. A surety is not a stranger or third person to the contract as he is given a right to redeem under section 91 of this Act. The surety, on satisfaction of the debt both under section 92 of this Act and under section 140 of the Indian Contract Act, is subrogated to the rights of the creditor and the debtor, though discharged to the principal creditor, continues liable to the surety. A tender must be deemed to be made on behalf of the person owing the money (*b*).

Tender on death of mortgagee.—Tender must be made to the person entitled to receive the money and reconvey the estate to the mortgagor. It may be made to the executor of a deceased mortgagee as also to trustees, but in the latter case to all of them.

The executors of a deceased, on the 3rd of February 1902, called upon the mortgagor by giving him three months' notice to pay the principal and interest due. They applied to the Registrar of Assurances on the 8th of January 1902 to lodge the will in Court, which was done on the 24th of January 1902. It was sent for translation and translated on the 4th of April 1902 and an application was made on the 17th of June 1902 for probate. During March and April the mortgagor kept on inquiring whether petition for probate was filed and later intimated that the moneys were ready. No interest was allowed after the date of the expiration

(*t*) *Jagat Tarini v. Naba Gopal* (1907) 34 Cal. 305.

(*u*) *Rourke v. Robinson* (1911) 1 Ch. 480.

(*v*) *Kinnaird v. Trollope* (1889) 42 Ch. D. 610.

(*w*) *Haji Abdul Rehman v. Haji Noor Mahomed* (1892) 16 Bom. 141.

(*x*) *Govind v. Dilar Jung* (1899) 1 Bom. L. R. 381.

(*y*) *Read v. Goldring* (1813) 2 M. & S. 86, 105 E. R. 314.

(*z*) *Lomax v. Bird* (1683) 1 Vern. 192 23 E. R. 402.

(*a*) *Walter v. James* (1871) 6 Ex. 124.

(*b*) *Cheminant v. Thornton* (1825) 2 C. & P. 50.

S. 60 of the notice on the 3rd of May 1902 on the ground of delay on the part of the executors to accept (c).

Tender to whom made.—A tender of money to an agent or servant of the creditor authorized to receive payment is a good tender to the creditor himself (d). Such a person is not bound to accept a cheque but if he does accept it, it amounts to payment (e). A tender is not valid if made to a person not authorized to receive it (f). Nor is a tender valid if made on a condition of which there was no possibility of the mortgagee being able to fulfil (g). A tender to a solicitor, unless specially authorized, is not good.

Tender of mortgage-money not a condition precedent to a suit for redemption.—Tender of mortgage-money is not a condition precedent to a suit for redemption and this would obviously be impossible when the mortgage was usufructuary, where the plaintiff's case would be that the debt had been liquidated by the profits of the mortgage property (h). A tender improperly rejected does not extinguish the debt nor determine the mortgagee security (i).

Deposit by one of several mortgagors.—Order 34, rule 1 of the Code of Civil Procedure (Act V of 1908) requires all persons having an interest in the right of redemption to be joined as parties to any suit relating to the mortgage. On the analogy of this rule a tender by one or more of several mortgagors would not be good and would not be such a tender as a mortgagee is bound to accept and the tender to be valid must be made by all of them together or on their joint behalf and with their concurrence (j).

Effect of refusal of tender.—Interest ceases to run from the date of the tender (k). Where after due notice having been given to the mortgagee by the mortgagor that he would attend for the purpose and make a tender of the amount due upon the mortgage, but the mortgagee refused to hand over to the mortgagor then and there an endorsed reconveyance of the mortgaged property with the title-deeds, and an action for redemption was brought by the mortgagor, the Court refused to allow the mortgagee interest and costs subsequent to the date of the tender and ordered him to pay the costs of the action. It is the duty of the mortgagee on being paid the principal interest and costs to deliver to the mortgagor contemporaneously with such payment the title-deeds with a duly executed reconveyance of the mortgaged property (l). The mortgagor, however, ought to give reasonable notice before he makes the tender and if the tender is to stop interest the money must be kept dead from the time (m). And where tender is made conditional on the execution of a reconveyance a reasonable time must be allowed to obtain the execution of the deed, especially when the conveying parties are not the persons to whom the tender is to be made. As a general rule, the costs of reconveyance fall on the mortgagor, and the costs of obtaining a vesting order of land while the legal estate

(c) *Pandurang v. Dadabhoy* (1902) 26 Bom. 643.

(d) *Goodland v. Blewith* (1808) 1 Camp. 477; *Hart v. Hawthorne* (1880) 42 L. T. 79.

(e) *Bolyechund v. Moulard* (1879) 4 Cal. 572; *Jagat Tarini v. Naba Gopal* (1907) 34 Cal. 305.

(f) *Webb v. Crosse* (1912) 1 Ch. 323.

(g) *Webb v. Crosse* (1912) 1 Ch. 323.

(h) *Het Singh v. Bihari Lal* (1921) 43 All. 95; *Raghunandan Rai v. Ranghunandan Pandey* (1921) 43 All. 638; *Dinanath Rai v. Rama Rai* (1927) 6 Pat. 102.

(i) *Bank of New South Wales v. O'Connor* (1889)

A. C. 273; *Johnson v. Diprose* (1893) 1 Q. B. 512, 517; *Rukhminibai v. Venkatesh* (1907) 31 Bom. 527.

(j) *Ram Baksh v. Mohunt Ram* (1874) 21 W. R. 428.

(k) *Webb v. Crosse* (1912) 1 Ch. 323.

(l) *Rourke v. Robinson* (1911) 1 Ch. 480; *Colterell v. Stratton* (1872) L. R. 8 Ch. 295, 302; *Walker v. Jones* (1866) L. R. 1 P. C. 50, 61.

(m) *Gyles v. Hall* (1726) 2 P. Wms. 378, 24 E. R. 744; *Kinnaird v. Trollope* (1889) 42 Ch. D. 610.

is in an absconding trustee mortgagee are no exceptions to the general rule (*n*). And so also reasonable time must be allowed in a deed of assignment on the part of the mortgagee till he had an opportunity of obtaining advice as regards execution of the reconveyance (*o*). If the mortgagee unequivocally refuses, the mortgagor is not bound to tender (*p*). But a letter which states that there was no necessity for payment on certain grounds mentioned therein does not absolve the mortgagor from making the tender (*q*). A mere offer by letter by the debtor is not a tender (*r*).

Amount repayable on redemption.—The claim to redemption comprises the right to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, if any, to the mortgagor, and where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to him and at the cost of the mortgagor to retransfer the mortgaged property to him or such third person as he may direct and to execute and to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished upon payment of “the mortgaged money.” The mortgage-money, although it usually includes, according to the second paragraph of section 58 (*a*), principal and interest only, and according to this section cost of retransfer, yet there are several other payments due to the mortgagee which are included in the term “mortgage-money” all which the mortgagor must repay to the mortgagee before he can seek to redeem the property.

The cases turn upon the effect of ordinary contract which arises out of the relation between a mortgagor and mortgagee. It is well settled that under the contract, the mortgagor, if he desires to redeem the mortgaged property, must pay the principal debt ; interest thereon : all proper costs, charges and expenses incurred by the mortgagee in relation to the mortgaged debt on the mortgage security ; the mortgagee's costs of the redemption action (*s*). A solicitor mortgagee who acts in the capacity on his own behalf in proceedings relating to the mortgage debt or mortgage security cannot, in the absence of express contract, charge against the mortgagor as part of his costs, charges and expenses incurred as mortgagee, provided, as to costs in respect of professional services so rendered, he will be limited to disbursements, out of pocket (*t*). The terms on which a mortgagor or those claiming under him are entitled to redeem must be the same whether they are to be ascertained in a suit for redemption or for foreclosure (*u*).

Mortgage deeds and title-deeds.—Under this section the mortgagor is entitled to delivery of the mortgage deed and all other title-deeds on payment of the amount due (*v*). Besides the mortgagor, his assignee (*w*) and all persons interested in the equity of redemption can compel the mortgagee to deliver on payment of the mortgage debt (*x*). The mortgagee cannot refuse to part with the title-deeds because moneys are due to him on accounts not covered by the mortgage (*y*). But

(*n*) *Webb v. Crosse* (1912) 1 Ch. 323.

(*o*) *Wiltshire v. Smith* (1744) 3 Atk. 89, 26 E. R. 854.

(*p*) *Chalikani v. Tuni (Zemindar)* (1923) 46 Mad. 108, 50 I. A. 41.

(*q*) *Chalikani v. Tuni (Zemindar)* (1923) 46 Mad. 108, 50 I. A. 41.

(*r*) *Kamaya Naik v. Devapa* (1898) 22 Bom. 440 ; *Sabapathy v. Vanmahalinga* (1913) 38 Mad. 959 ; *Chetan Das v. Gobind Saran* (1914) 36 All. 139 ; *Muhammad Mushtaq v. Banke Lal* (1920) 42 All. 420.

(*s*) *Wallis, ex-parte Lickorish* (1890) 25 Q. B. D. 176 ; *Stone v. Lickorish* (1891) 2 Ch. 363

Re. Doody, Fisher v. Doody, Hibbert v. Lloyd (1893) 1 Ch. 129.

(*t*) *Re. Doody, Fisher v. Doody, Hibbert v. Lloyd* (1893) 1 Ch. 129.

(*u*) *Sober v. Kemp* (1847) Hare. 155 ; *Thayan Ammal v. Lakshmi Ammal* (1895) 18 Mad. 331.

(*v*) *Rourke v. Robinson* (1911) 1 Ch. 480.

(*w*) *Chilton v. Carrington* (1854) 1 Jur. N. S. 89, 139 E. R. 355.

(*x*) *Pears v. Morris* (1869) 5 Ch. App. 227.

(*y*) *Chilton v. Carrington* (1854) 1 Jur. N. S. 89, 139 E. R. 355.

S. 60

where the title-deeds cannot be handed over, as in the case of a mortgagee re-conveying on undivided moiety in satisfaction of a part of the debt, he is bound to give a covenant to the mortgagor who redeems him to produce the title-deeds (z). So also where the mortgage deed includes other properties (a). So also in the case of puisne encumbrancers the mortgagor cannot hand over the title-deeds without their concurrence (b). On a reconveyance and a subsequent mortgage to the original mortgagee the first mortgage and reconveyance ought to be handed over as being links in the chain of title (c). The mortgagor is entitled to the draft reconveyance though the mortgagee may keep a fair copy of the draft for his own protection (d).

Where mortgagee is in possession of the mortgage property to deliver possession thereof to the mortgagor.—The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money: but as soon as the mortgage-money has been fully paid he is bound to deliver over the mortgaged estate to the mortgagor (e). The question of the mortgagee's liability to restore possession of the land should be determined in the suit for redemption by the mortgagor and the mortgagor is liable to compensation for loss caused (f).

Right to possession.—Besides the right of redemption the mortgagor has the right to possession and until the mortgagee demands possession he is entitled to retain, but if once a demand is made and he is withholding possession from the mortgagees or persons on behalf of the mortgagees, it is wrongful (g). As his possession is rightful until demand is made by the mortgagee he is entitled to recover rents and profits as a person in possession. Rents and profits which accrued due prior to the demand belong to him and cannot be recovered by the mortgagee (h). But when a receiver is appointed he is liable for rent not from the date of the order appointing receiver but from the date when demand is made on him by the receiver. His possession being lawful, he is entitled to retain it against the mortgagee until order to deliver up possession or possession has been demanded by or on behalf of the mortgagee (i).

To execute and to have a registered acknowledgment, etc.—On payment of principal, interest and costs the mortgagor, besides being entitled to delivery of the title-deeds, including the mortgage deed and possession of the property where the mortgagee is in possession, has a right to call upon the mortgagee to execute in his favour a proper deed of reconveyance at his own costs of the property mortgaged (j). If the mortgage is of freehold there will be a retransfer of the property with a covenant that the mortgagee has done no act which prevents him from making the transfer and that the transfer is made freed and discharged from the mortgage debt and all claims to which he is entitled under the mortgage deed. If the mortgagee has died intestate the reconveyance would be executed by the executor or administrator. In the case of a leasehold property the form of transfer

(z) *Yates v. Plumbe* (1854) 2 Sm. & G. 174, 65 E. R. 354.

(a) *Capper v. Terrington* (1844) 8 Jur. 140, 63 E. R. 340.

(b) *Re. Magneta Time Co., Ltd., Molden v. The Company* (1915) L. J. Ch. 814; *Corbett v. National Provident Institution* (1900) 17 T. L. R. 5.

(c) *Hudson v. Malcolm* (1862) 10 W. R. 720.

(d) *Re. Wade and Thomas* (1881) 17 Ch. D. 348.

(e) *Palmer v. Hendrie* (1859) 27 Beav. 349, 54 E. R. 136; *Dildar v. Shukr-Ullah* (1924) 46 All 152.

(f) *Anandrao v. Bhikaji* (1922) 46 Bom. 218; *Ramchandra v. Mukund* (1901) 3 Bom. L. R. 152.

(g) *Bagnall v. Villar* (1879) 12 Ch. D. 812.

(h) *Heath v. Pugh* (1881) 6 Q. B. D. 345.

(i) *Yorkshire Banking Co. v. Mullan* (1887) 35 Ch. D. 125.

(j) *Palmer v. Hendrie* (1859) 27 Beav. 349, 54 E. R. 136; *Brecon Corporation v. Seymour* (1859) 26 Beav. 548, 53 E. R. 1010; *Walker v. Jones* (1866) 12 Jur. N. S. 381, 16 E. R. 151; *Rourke v. Robinson* (1911) 1 Ch. 480.

would be reassignment or a surrender of the residue of the term under the lease. The mortgagee may, however, refuse to take principal and interest though tendered till he is advised by his attorney that he could safely execute the document which contains covenants on his part (*k*). A man cannot be required to execute a deed containing incorrect recitals. Where all persons interested in an equity of redemption concur in the deed of reconveyance the mortgagee cannot insist on having the dealings with the equity of redemption stated in the deed or object to the deed because it contains no recital whatever (*l*). A mortgagee refusing to execute, after sufficient notice, on the amount being tendered, a reconveyance, will be disallowed interest and cost after tender and also made liable for a subsequent redemption action brought by the mortgagor (*m*). If, however, the parties to execute the reconveyance are different from those to whom the tender is made, a reasonable time for execution of the reconveyance should be allowed if the tender is conditional on the execution of the reconveyance (*n*).

Mortgagee's refusal to reconvey.—A mortgagee who has accepted principal, interest and costs from a person who has contracted to purchase a part of the mortgaged estate and has not accepted the title, is not bound to deliver the title-deeds or execute a reconveyance in his favour though in the case of a person having a partial interest giving him the right to redeem the mortgage, he is bound to reconvey on payment of full principal and interest and costs due, but the conveyance should reserve the equities of other persons' interests (*o*). Nor after having received notice of subsequent equitable mortgages is he bound, on being satisfied, to hand over to the mortgagor the title-deeds of the estate and to execute a reconveyance without being satisfied that the subsequent equitable mortgages of which he has received notice, have been paid off (*p*). Where a mortgagee refuses, upon payment of the mortgage debt, to reconvey the mortgaged property the Court may appoint an officer to execute the reconveyance on his behalf (*q*). Again, a mortgagee is not safe in transferring to the mortgagor or his nominee, without the consent of puisne encumbrancers, of whose charges he has notice. Conveyancing Act, 1881 (c. 41), s. 15, and Conveyancing Act, 1882 (c. 39), s. 12, have not altered the pre-existing rule in this respect (*r*).

Reconveyance when the mortgagee is a minor.—When the mortgagor is a minor, the proper course is, in cases to which the English Law is applicable (*s*), for the person beneficially interested in the equity of redemption, whether under disability or not, or interested in the moneys secured by the mortgage (*t*), to make an application by petition (*u*) to the High Court within the local limits of whose extraordinary original civil jurisdiction the property is situated (*v*), to make an order vesting such property in the mortgagor in such manner and for such estate as the Court shall direct. Such an order has the same effect as if the minor had attained majority and duly executed a conveyance (*w*), and when the minor mortgagee is entitled to a contingent interest in the immoveable property by way of mortgage the order will direct either a release of such property from such contingent right or to

(*k*) *Wiltshire v. Smith* (1744) 3 Atk. 89.
 (*l*) *Hartley v. Burton* (1868) 3 Ch. App. 365.
 (*m*) *Rourke v. Robinson* (1911) 1 Ch. 480; *Graham v. Seal* (1918) 88 L. J. Ch. 31.
 (*n*) *Webb v. Crosse* (1912) 1 Ch. 323.
 (*o*) *Pearce v. Morris* (1869) 5 Ch. App. 227;
 Hall v. Howard (1886) 32 Ch. D. 430;
 Kinnaird v. Trollope (1888) 39 Ch. D. 636;
 Tarn v. Turner (1888) 39 Ch. D. 456.
 (*p*) *Corbett v. National Provident Institution*

(1900) 17 T. L. R. 5.
 (*q*) *Holme v. Fieldsend* (1911) 55 So. Jo. 552.
 (*r*) *Re Magneta Time Co., Ltd. Molden v. The Company* (1915) 84 L. J. Ch. 814.
 (*s*) Sec. 3, Indian Trustees Act, 1866.
 (*t*) Sec. 39, Indian Trustees Act, 1866.
 (*u*) Sec. 40, Indian Trustees Act, 1866.
 (*v*) Sec. 3, Indian Trustees Act, 1866.
 (*w*) Sec. 8, Indian Trustees Act, 1866.

S. 60 dispose of the same to such person as the Court directs (*x*). The moneys payable to the minor may be paid into Court (*y*), and such order has the same effect as a decree and may be executed in the same manner (*z*). Costs of all applications and orders including those of conveyances and transfers made in pursuance thereof are usually directed to be paid out of the estate in respect of which the orders are made (*a*). Instead of making a vesting order the Court may appoint a person to execute the conveyance or release and such conveyance or release has the same effect as an order (*b*). The petition need not be served on the minor (*c*).

Reconveyance when mortgagee is a lunatic.—In case of a mortgagee who is a lunatic or a person of unsound mind, the same procedure may be adopted as in the case of a minor mortgagee (*d*).

In other cases.—Where a mortgagee has died without entering into possession or receipt of rents and profits and the amount due on the mortgage has been paid to the person entitled to receive or such last mentioned person consents to an order for the reconveyance or vesting of the property, the High Court will make an order which will have the effect of a duly executed conveyance in any of the following cases (*e*).

- (i) Where an heir or devisee of the mortgagee shall be out of jurisdiction or cannot be found.
- (ii) Where an heir or devisee shall, on demand by the person entitled to the reconveyance or his duly authorized agent, have stated in writing that he will not convey or fails to convey, for a space of 28 days after a proper deed is tendered for execution by the person entitled as aforesaid or his duly authorized agent.
- (iii) When it shall be uncertain which of several devisees or the heir of the mortgagee is alive or dead.
- (iv) Where the mortgagor dies intestate as to such property and without an heir or it is not known who is his heir or devisee.

Instead of making a vesting order the Court may appoint a person to convey such property or to release or dispose of such contingent right if it be convenient (*f*).

The general rule as to costs being ordered out of the estate applies even when a vesting order has to be obtained in consequence of an absconding trustee (*g*). Orders made by the High Court founded upon certain allegations are conclusive evidence of matters contained therein (*h*).

Extraordinary original civil jurisdiction.—This jurisdiction is conferred by Letters Patent on the various High Courts at Allahabad (*i*), Bombay (*j*), Calcutta (*k*), Lahore (*l*), Madras (*m*), Patna (*n*) and Rangoon (*o*).

Jurisdiction as to infants and lunatics.—Jurisdiction is conferred by Letters Patent on the various High Courts and Chief Courts with respect to the estates of infants and idiots and lunatics within the North West Provinces (*p*), the Presidencies of Bombay (*q*), the Bengal Division of Fort William (*r*) and Madras (*s*),

(*x*) Sec. 9, Indian Trustees Act, 1866.
 (*y*) Sec. 46, Indian Trustees Act, 1866.
 (*z*) Sec. 53, Indian Trustees Act, 1866.
 (*a*) Sec. 49, Indian Trustees Act, 1866.
 (*b*) Sec. 20, Indian Trustees Act, 1866.
 (*c*) *Re. Willan* (1861) 9 W. R. 689.
 (*d*) Secs. 4 and 5, Indian Trustees Act, 1866.
 (*e*) Sec. 19, Indian Trustees Act, 1866.
 (*f*) Sec. 20, Indian Trustees Act, 1866.
 (*g*) *Webb v. Crosse* (1911) 1 Ch. 323.
 (*h*) Sec. 44, Indian Trustees Act, 1866.

(*i*) Clause 9.
 (*j*) Clause 13.
 (*k*) Clause 13.
 (*l*) Clause 13.
 (*m*) Clause 13.
 (*n*) Clause 13.
 (*o*) Clause 11.
 (*p*) Clause 12.
 (*q*) Clause 17.
 (*r*) Clause 17.
 (*s*) Clause 17.

the provinces of the Punjab and Delhi (*t*), Bihar and Orissa (*u*) and Burma (*v*). Under its Charter the High Court has no original jurisdiction in respect of the persons and estates of lunatics who are natives of India (*w*). The Court of the Resident at Aden is subordinate to the High Court (*x*). The Court refused to exercise the summary proceeding under clause 17 when the minor was not a European British subject living outside the original jurisdiction and having testamentary guardians for whose removal there was no suit or application (*y*).

Discharge of one of two or more joint mortgagees.—The point is whether in the absence of fraud it is competent for one of two or more joint mortgagees jointly entitled under a mortgage deed to release a debt so as to enable the debtor to plead such payment as a valid discharge and the point becomes important in view of the varying decisions which we have on this subject of the different High Courts in India. Where the mortgage deed itself provides as to how the discharge is to be given, no difficulty can arise, but when it does not, then the answer to the question depends on the language of the instrument. If it is clear by the document itself that the lenders have a separate interest, the contract will be construed accordingly, and each of them will have his right of action for his personal loss. In the construction of the instrument, the source from which the money lent has been derived, whether the amount lent by the different lenders has been contributed equally, or unequally, and generally the circumstances in which the loan comes to be made, will be considered. But with a loan on mortgage, whether there be inequality or not, although in law there is a strong presumption of a joint tenancy, in equity it is the other way. Turning next to the Indian Contract Act of 1872, the only sections which deal with the matter are sections 38 and 45 which mention the case of joint promises. The first part of section 38 runs:—

“Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance.” The latter part of the section runs:—“An offer to one of several joint promisees has the same legal consequence as an offer to all of them.” Now this section deals with the effect of refusal of a tender and not with the discharge of one of several joint promisees. Section 45 deals with the devolution of joint rights as between joint promisees during their joint lives and after the death of any or all of them. The question is whether, having regard to these sections, discharge by one of several joint mortgagees, discharges the debt and discharges the security as well. The point arose in an English case (*z*), where in an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs by a part-payment in cash and a set-off of a debt due from that one to the defendants, and the Court held that this plea was good. This was a case under the Common Law. There is, however, another line of authority beginning with *Steeds v. Steeds* (*a*). The question there was whether in respect of a bond given by C to A and B accord and satisfaction made by C to A after the cause of action had arisen and accepted by A is an answer to the claim of A and B.

In equity, however, with regard to money lent by two persons to a third, they will, *prima facie*, be regarded as tenants in common and not as joint tenants both of the debt and of any security held for it. Though they take a joint security,

(*t*) Clause 12.

(*u*) Clause 12.

(*v*) Clause 15.

(*w*) *Jaunda Kuar v. The Court of Wards* (1882)

4 All. 160.

(*x*) *Municipal Officer, Aden v. Haji Esmail*

(1906) 30 Bom. 246 P. C.

(*y*) *In the matter of Srish Chander Singh and Others* (1894) 21 Cal. 206.

(*z*) *Wallace v. Kelsall* (1840) 17 M. & W. 264, 151 E. R. 765.

(*a*) (1889) 22 Q. B. D. 537.

S. 60

says Lord Alvanby, M.R., "each means to lend his own money and to take back his own" (b). Where a mortgage debt was paid to one of the mortgagees it was held that the loan was not discharged (c). The principal right of a mortgagee is to the money, the estate and the land is only an accessory to that right. But this proposition is not inflexible. In this country the earliest case on the subject is *Barber Maran's* case (d), where it was held a payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond. Shortly after this case came the decision in *Powell v. Brodhurst* (e) which raised doubts as to whether *Barber Maran's* case (f) was rightly decided. *Powell v. Brodhurst* (g) decided:—Where mortgagees have advanced money on a joint account, payment to one of them during the other's lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest (if any) even though the payee ultimately becomes the survivor of the joint account. The principle in *Barber Maran's* case (h) was held inapplicable to the case of co-heirs who were not joint promisees but the heirs of a single promisee (i). In a Bombay case of co-heirs amongst Hindus, after doubting whether *Barber Maran's* case (h) was rightly decided, it was held that according to Hindu Law, where the senior in age is constituted the *kartha* or manager of the inheritance on behalf of all the co-heirs, a discharge given to the debtor by an heir who was not the *kartha* and the manager of the family without the concurrence of the others did not discharge the mortgage (j). The point also arose in a Calcutta case (k) where, doubting *Barber Maran's* case (l), it was remarked that the effect of the case *Wallace v. Kelsall* (m), on which that ruling was based, was much qualified if not weakened by the decision in *Powell v. Brodhurst* (n). The correctness of the decision in *Barber Maran's* case (l) was further doubted by the same Court in the case of *Huseinrana Begum v. Rahimannessa Begum* (o). In *Sheikh Ebrahim v. Rama Iyer* (p), payment to one member of an undivided Hindu family or to one of several joint creditors fraudulently made and not for the benefit of all was held not to operate as a payment to all members of the family or creditors. It was there said that the decision of *Barber Maran's* case (l) was considerably shaken by the subsequent rulings of that Court (q). In this state of conflict of authorities the question arose before a Full Bench of the Madras High Court in *Anna Poornamma v. Akayya* (r) as to the validity of a discharge by one of several payees of a negotiable instrument without the concurrence of the other payees and the majority of the Full Bench treated the payment as a complete discharge. In his elaborate but dissenting judgment White, C. J., said, "If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the General Law and to see whether the rule of law, as laid down in *Wallace v. Kelsall* (s), applies, or whether the rule or rather the presumption of equity on which *Steeds v. Steeds* (t) was decided is to prevail. I think the equitable presumption applies and I do not think this presumption is negatived by the provisions of the Contract Act." This judgment

(b) *Morley v. Bird* (1798) 3 Ves. 628, 30 E. R. 1192.

(c) *Matson v. Dennis* (1864) 12 W. R. 926, 46 E. R. 952.

(d) (1897) 20 Mad. 461.

(e) (1901) 2 Ch. 160.

(f) (1897) 20 Mad. 461.

(g) (1901) 2 Ch. 160.

(h) (1897) 20 Mad. 461.

(i) *Ahimsa Bibi v. Abdul Kader* (1902) 25 Mad. 28, 39.

(j) *Sitaram v. Shridhar* (1903) 27 Bom. 292.

(k) *Jagat Tarini v. Nabha Gopal* (1907) 34 Cal.

305.

(l) (1897) 20 Mad. 461.

(m) (1840) 7 M. & W. 264.

(n) (1901) 2 Ch. 160.

(o) (1911) 38 Cal. 342.

(p) (1911) 35 Mad. 685.

(q) *Veeraswamy Naicker v. Ibramsa Rowther* (1909) 19 M. L. J. 221; *Ramasamy Muniandi* (1910) 20 Mad. L. J. 709.

(r) (1912) 36 Mad. 544 F. B.

(s) (1840) 7 M. & W. 264, 151 E. R. 765.

(t) (1889) 22 Q. B. D. 537.

of White, C.J., was followed by the Calcutta (*u*) and Patna (*v*) High Courts. In a recent Bombay case a purchaser's solicitor, while investigating the title of the vendor, refused to accept as valid a reconveyance signed by one partner in the name of the firm, and the Court held that the powers of an individual partner under Indian Law were sufficiently doubtful in the absence of any evidence or custom or practice of a particular business carried on, to justify a purchaser in refusing to accept a release or reconveyance executed by one partner alone (*w*). To avoid difficulty, if one of several mortgagees is to be authorized to receive the mortgage-moneys and to execute a reconveyance, a stipulation to that effect should be inserted and the mortgage deed signed by the mortgagees as well.

Equity of redemption is extinguished by act of parties.—The equity of redemption is extinguished when the mortgagor sells it to the mortgagee, or by abandonment or the mortgagee exercising the power of sale under section 69 of this Act.

Merger.—A purchaser at a sale in execution of a mortgage decree gets the mortgagee's rights as well as the rights of the mortgagor and, after the mortgagor's interest has once passed away to a purchaser, that interest cannot again be sold effectively (*x*). A plaintiff in a suit for recovery of *khas* possession of lands, which he had purchased, on declaration of his auction-purchased right in the lands, cannot claim any deduction of time, during which the alleged fusion of his rights, as mortgagee and purchaser of the mortgagor's rights by virtue of his auction-purchase at the mortgage sale, subsisted (*y*).

Release to mortgagee.—This is another mode whereby the equity of redemption becomes extinct and release from the mortgagor to the mortgagee of the equity of redemption will be valid if the transaction is not tainted by oppression, fraud or unfair dealing, and provided, that such transaction had been entered into subsequent to, and independent of, the mortgage transaction (*z*).

The equity of redemption is extinguished otherwise than by act of parties.—This would be by adverse possession, or limitation, or by attachment and sale of the equity of redemption, or sale of the equity of redemption for payment of Government revenue or tax, or by foreclosure proceedings, or sale by the Court, or acquisition of the mortgage property, or insolvency of the mortgagor.

Adverse possession by mortgagee.—A person entering into possession as mortgagee cannot afterwards set up an adverse possession as owner so as to defeat the mortgagor's right to redeem (*a*). No presumption of adverse possession arises as between a mortgagor and mortgagee (*b*). In order to enable the mortgagee to set up a title based on adverse possession his original entry must be as a trespasser. Where defendant has been in possession for over 12 years under a title which could be ascribed to an arrangement come to between the parties, the defendant must be taken to have acquired a good title by prescription (*c*). The possession of a usufructuary mortgagee after the expiration of the period of redemption is not adverse to the mortgagor (*d*). Where one co-mortgagor redeems under a decree

(*u*) *Shaik Hakim v. Adwaita Chandra* (1918) 22 C. W. N. 1021.

(*v*) *Parbhu Ram v. Jhalo Kuer* (1917) 2 P. L. J. 520; *Syed Abas v. Misri Lal* (1920) 5 P. L. J. 376.

(*w*) *Hirachand v. Jayagopal* (1925) 49 Bom. 245.

(*x*) *Jagatchandra De v. Abdul Rashid* (1935) 62 Cal. 75.

(*y*) *Jagatchandra De v. Abdul Rashid* (1935) 62 Cal. 75.

(*z*) *Prees v. Cock* (1871) 6 Ch. 645; *Reeve v.*

Lisle (1902) A. C. 461.

(*a*) *Bhagvant v. Kondi* (1890) 14 Bom. 279.

(*b*) *Khiarajmal v. Daim* (1905) 32 Cal. 296, 32 I. A. 23.

(*c*) *Usman Khan v. Dassana* (1914) 37 Mad. 545; *Varada Pillai v. Jeevarathnammal* (1920) 43 Mad. 244 P. C.

(*d*) *Pokhpal Singh v. Bishan Singh* (1898) 20 All. 115; *Ali Mahomed v. Lalla Baksh* (1879) 1 All. 655.

S. 60 passed against the mortgagors he acquires, at the end of 12 years, an absolute title against the other co-mortgagors, for in such a case article 148 does not apply as the redeeming co-mortgagor has not a mortgage but a charge on the property (e).

Adverse possession, both parties having uncertain possession.—Adverse possession, in order to bar by limitation, a suit for possession of land, must be adequate in continuity, in publicity and extent so as to shew that he has possession adverse to the competitor. When a person establishes title to the land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title (f).

Adverse possession by agent or manager.—In order to entitle a person who originally comes into possession of property in the character of manager or agent to succeed on a title by wrongful detention, it is not enough that he should repudiate that character to the knowledge of the owner unless it is accompanied by some overt act (g).

Adverse possession against mortgagee not necessarily adverse against the mortgagor.—Possession which is adverse to the mortgagee is not necessarily adverse to the mortgagor for such possession cannot become adverse until the mortgagor becomes entitled to immediate possession. Even mutation of names by the Revenue authorities without statutory authority will not affect the title of the true owner (h). Possession by a stranger who has ousted the mortgagee in possession is not adverse to the mortgagor whose possession accrues only on redemption (i). A mortgagee can set up adverse possession if his possession at the inception was that of a trespasser (j). An unregistered deed of sale of immoveable property which is subject to a mortgage is inadmissible in evidence for want of registration, but it may be referred to in order to ascertain the nature of the possession sought to be disturbed (k). Adverse possession against mortgagor is not *per se* adverse against simple mortgagee (l).

Limitation.—A suit for redemption brought by a mortgagor is governed by article 148 of the Limitation Act according to which the period is 60 years from the date the right to redeem or to recover possession accrues, otherwise the equity of redemption is extinguished by virtue of section 28 of the Limitation Act. This article applies not only to an English mortgage but also to a usufructuary mortgage (m), to a mortgage by conditional sale (n), to *qahan lahan* mortgages (o). To simple mortgages article 132 applies. There is no ruling as to equitable mortgages. A suit by a second mortgagee for surplus proceeds after sale by first mortgagee is governed by article 132 of Schedule II of the Limitation Act (p).

(e) *Vasudev v. Babaji* (1902) 26 Bom. 500.

(f) *Kuthali Moothavur v. Perin Gale Kunharan Kully* (1921) 44 Mad. 883 P. C.; *Radhamoni Debi v. The Collector of Khulna* (1900) 27 Cal. 943, 27 I. A. 136; *Secretary of State v. Chalikani* (1916) 39 Mad. 617, 43 I. A. 192.

(g) *Rugnathji v. Virjivandas* (1905) 7 Bom. L. R. 836.

(h) *Muhammad Husain v. Mul Chand* (1905) 27 All. 395.

(i) *Durga Devi v. Girivar Singh*, A. I. R. (1923) All. 11; *Binand Sawase v. Thuroo Mahto*, A. I. R. (1923) Pat. 598.

(j) *Quader Baksh v. Manga Mal*, A. I. R. (1923)

Lah. 496.

(k) *Quader Baksh v. Manga Mal*, A. I. R. (1923) Lah. 495.

(l) *Priya Sakhi v. Manbody* (1917) 44 Cal. 425.

(m) *Luchmee Buksh v. Runjeet Ram* (1873) 13 Beng. L. R. 177; *Fatimatunnissa v. Soonder Das* (1900) 27 Cal. 1000, 27 I. A. 103; *Muhammad Akbar v. Izzat-un-nissa* (1906) 28 All. 333.

(n) *Bakhtawar Begam v. Husaini Khan* (1913) 36 All. 195.

(o) *Bai Kanku v. Bai Jadav* (1919) 43 Bom. 861.

(p) *Barhamdeo v. Tara Chand* (1913) 41 Cal. 654, 41 I. A. 45.

Forfeiture.—Where property is forfeited to Government for non-payment of assessment the equity of redemption is destroyed (q). S. 60

Mortgagor's insolvency.—This is another instance where the equity of redemption is extinguished (r). On refusal of the assignee to sue, the mortgagor may, however, petition to allow him to proceed in redemption and use the name of the assignee (s). If, however, the Official Assignee proceeds to sell the property, the purchaser can only purchase the equity of redemption (t). The Act does not empower the Official Assignee to sell the mortgagor's estate free from encumbrance even with the consent of the mortgagee (u).

Acquisition.—The equity of redemption is extinguished when the property is compulsorily acquired under the Land Acquisition Act, I of 1894. The apportionment is then made between the mortgagor and the mortgagee. If the due date of payment has elapsed the mortgagee will be paid the full amount due to him together with arrears of interest, if any. But if the due date has not expired the mortgagee is only entitled, on acquisition, to be paid the amount of the principal sum together with interest till date of payment and not the full interest which he would have been entitled to had the due date been reached (v). The compensation money will, however, be paid to the mortgagee only if he is in possession, but if the mortgagor is in possession the Collector is not bound to recognize the mortgagee whose only remedy would be to apply under section 18. In the event of his not taking advantage of section 18 or not being able to do so, the mortgagee has a remedy under section 31 of the Land Acquisition Act to sue the mortgagor for the mortgage-money, for by the last paragraph of sub-section (2) of section 31 it is provided that receipt of compensation money by any person shall not affect his liability to pay the same to the person lawfully entitled thereto.

Revival of the right to redeem.—Mortgagor who has absolutely assigned his equity of redemption in the mortgaged property acquires, when sued by the mortgagee upon the covenant to pay principal and interest contained in the mortgage, a new right to redeem, and is entitled, upon paying the mortgage-money, to a reconveyance to himself, subject to any equity of redemption vested in any other person and he is so entitled even if after the assignment of the equity of redemption, the assignee has further charged the property either to the original mortgagee or to some other person. In 1870 defendants mortgaged property to plaintiffs to secure £12,000 and interest and entered into the usual covenants for payment of principal and interest. In 1872 defendants for value, absolutely assigned their equity of redemption to B and he covenanted to indemnify them against the £12,000 and interest. In 1875 B further charged the property to plaintiff to secure £8,000 as well as the £12,000. B afterwards became insolvent and the property having depreciated in value, plaintiffs brought an action against defendants on the covenant contained in the mortgage of 1870, to recover the £12,000 and interest. In a special case stated in the action—held, plaintiffs were entitled to judgment for £12,000 and interest but only upon the terms that they reconveyed the property to defendants, subject to such equity of redemption as might be subsisting in any person or persons other than defendants themselves (w).

(q) *Abdul Rehman v. Vinayak* (1927) 29 Bom. L. R. 1056.

(r) *Spragg v. Binkes* (1800) 5 Ves. 583, 31 E. R. 751.

(s) *Spragg v. Binkes* (1800) 5 Ves. 583, 31 E. R. 751.

(t) *Lang v. Heptullabhai* (1914) 38 Bom. 359.

(u) *Kanniappa v. Raju Chettiar* (1924) 47 Mad. 605.

(v) *Prokash Chandra Gosh v. Hassan Banoo Bibi* (1915) 42 Cal. 1146.

(w) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636

S. 60

Decree in redemption suit.—The provisions relating to this will be found in O. 34, rules 7 to 11 of the Code of Civil Procedure, 1908.

Right of redemption extinguished by decree.—Such extinction would occur under O. 34, rules 2 and 3 and rules 7 and 8 of the Code of Civil Procedure, 1908. Where the form of the decree does not comply with the provisions of the law the right to redeem is not extinguished (x).

Dismissal of redemption action.—A dismissal of redemption action for non-payment of mortgage-money does not operate as foreclosure so as to debar the plaintiff from suing again on the mortgage (y). The right to redeem conferred by section 60 could only be deprived in the manner enacted in that section (z).

Dismissal or withdrawal of redemption suit.—A dismissal for default (a) or withdrawal with liberty to file a fresh suit (b) of a redemption action is no bar to a fresh suit for redemption as the equity of redemption is not extinguished in such cases. Nor in a suit for sale where the mortgagee does not apply for a decree absolute for sale (c) even when the mortgage was before the Act (d).

Second suit for redemption and “res judicata.”—In a redemption suit brought in 1892 on a mortgage of 1864 a decree made in 1896 provided repayment on the 15th November 1896 and “in default his case will stand dismissed.” No payment was ever made and the mortgagee remained in possession of the mortgage property which was by way of conditional sale. In 1924 mortgagors’ representatives brought a suit against mortgagees’ representatives who were in possession. It was held that (1) the second suit, suit of 1924, was not an application to enforce the old decree of 1896 but that it was a proper redemption suit, (2) that no question of *res judicata* arose, but even if it arose the decree of 1896 did not operate as *res judicata* so as to prevent the Court under section 11 of the Civil Procedure Code, 1908, from trying the second suit, the issues in the two suits being different (e).

Redemption.—Redemption is a legal right, which a person entitled to redeem may seek to enforce : it is not a liability, which he may be compelled to discharge (f). Restriction of this right is known as the clog or fetter on the equity of redemption and is, therefore, void. It follows from this that “once a mortgage is always a mortgage and nothing but a mortgage.” The right to redeem is not a personal right but an equitable estate or interest in the property mortgaged. Being inconsistent with the idea of security, a clog or fetter is in its nature a repugnant condition. “If I convey land in fee subject to a condition forbidding alienation, that is a repugnant condition. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition. The Court of Equity have fought for years to maintain the doctrine that the security is redeemable. But when and under what circumstances ? On the performance of an obligation for which it was given. If the obligation is a payment of debt the security is redeemable on the payment of that debt. That is the true principle applicable to the cases and that is what is meant when it is said that there must not be any clog on the equity of redemption. Of course, the debt or obligation may be impeachable for fraud or oppression or

(x) *Raghunath v. Hansraj* (1934) 36 Bom. L. R. 1189 P. C.

(y) *Raghunath v. Hansraj* (1934) 36 Bom. L. R. 1189 P. C. ; *Sita Ram v. Madho Lal* (1901) 24 All. 44 ; *Hari Ram v. Indraj* (1922) 44 All. 730.

(z) *Raghunath v. Hansraj* (1934) 36 Bom. L. R. 1189 P. C.

(a) *Shridhar v. Ganu* (1928) 52 Bom. 111 ; *Rama Tulsa v. Bhagchand* (1914) 39 Bom. 41 ; *Ramchandra v. Hanmanta* (1920) 44 Bom.

939 ; *Kashiram v. Maheshwar* (1928) 30 Bom. L. R. 1089.

(b) *Ramchandra v. Hanmanta* (1920) 44 Bom. 939.

(c) *Rama v. Bhagchand* (1915) 39 Bom. 41.

(d) *Badraddin v. Sitaram* (1930) 32 Bom. L. R. 933.

(e) *Raghunath v. Hansraj* (1934) 36 Bom. L. R. 1189 (P. C.).

(f) *Jagatchandra De v. Abdul Rashid* (1935) 62 Cal. 75.

overreaching. There the obligation is denied to that extent and is invalid. But putting aside such cases as out of the question, when you get a security for your debt or obligation, that security can be redeemed the moment the debt or obligation is paid or performed but on no other terms" (g). There is no rule in equity which prohibits the limitation of the right to redeem. A mortgage may be made irredeemable for a reasonable period (h). The question in each case is whether the limited period is under the circumstances reasonable (i). But it cannot be made irredeemable as where a mortgage of a lease for twenty years provided that without the mortgagee's written consent, the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease (j).

Difference between equity of redemption and equity to redeem.—There is a considerable difference between the equity of redemption and the equity to redeem. The former comprises that interest in the land which remains for the mortgagor after the grant of the land to the mortgagee as security for the mortgagee's money, while the latter is that right which the mortgagor has to recover from the mortgagee, viz., the interest which has been conveyed to the mortgagee in the mortgaged land. The equity of redemption is the interest that is left in the mortgagor, while the interest which is conveyed to the mortgagee, which he is entitled to get back, is recovered by the right which he possesses and is known as the equity to redeem. This equity to redeem is different from the equity of redemption. The latter right can be exercised only till the period of the mortgage has not expired; once that period has expired the equity of redemption is gone and then for the first time the equity to redeem arises. By losing his equity of redemption the mortgagor is not barred from redeeming, that is, the equity of redemption is not extinguished. In spite of default the equity of redemption subsists and the right given to him, namely, the equity to redeem, enables him on repayment to the mortgagee of what is known as the mortgage-money, to get back his land.

Right to redeem indefeasible and invariable.—A *butwana* entered into between the mortgagees of an estate cannot bind the mortgagor or charge the nature of the security given by them. The mortgagor's right to redeem is indefeasible and cannot be interfered with by any unauthorized act of the mortgagees (k), nor is it variable by any agreement between the mortgagor and the mortgagee, it being an essential part of the transaction (l). A mortgage with a collateral stipulation is not necessarily void (m). With regard to collateral stipulations, questions arise whether they cease to operate on redemption. In *Santley v. Wilde* it was held that even after redemption the collateral stipulation did not cease to operate. It was, however, decided on circumstances peculiar to it and was not approved in *Noakes v. Rice* (n). In every mortgage there is a restriction that the mortgage shall be irredeemable for a certain period, but that period must be reasonable. The law will not allow a mortgagor to be precluded from redemption altogether, yet he may be precluded for a fixed period for 5 or 7 years (o). But where in a mortgage the restriction upon redemption was for a period of 28 years, it was held that the proviso exceeded all reasonable limits and could not be enforced (p).

(g) *Santley v. Wilde* (1899) 2 Ch. D. 474.
 (h) *Teevan v. Smith* (1882) 20 Ch. D. 724; *Biggs v. Hoddinott* (1898) 2 Ch. 307.
 (i) *Ramsbottom v. Wallis* (1835) L. J. Ch. N. S. 92; *In re Hone's Estate* (1873) 1r. R. 8 Eq. 65.
 (j) *James Fairclough v. Swan Brewery Co., Ltd.* (1912) A. C. 565.
 (k) *Shaikh Muzuhur Hoosein v. Hen Pershad*

Koy (1871) 15 W. R. 353.
 (l) *Samathal v. Her H. M. M. Kamatchi* (1872) 7 M. H. C. 395.
 (m) *Santley v. Wilde* (1899) 2 Ch. D. 474.
 (n) (1902) A. C. 24.
 (o) *Teevan v. Smith* (1882) 20 Ch. D. 724; *Biggs v. Hoddinott* (1898) 2 Ch. D. 307.
 (p) *Morgan v. Jeffreys* (1910) 1 Ch. D. 620.

S. 60

Proviso for redemption.—A mortgage being a transfer of interest in specific immoveable property, it follows that after the debt is discharged for the purpose for which the property was made the security, the mortgagee must retransfer the property to the mortgagor. This right of obtaining a retransfer of mortgaged property to himself, the mortgagor or to such third person as the mortgagor may direct, is the right of redemption generally expressed in the deed of mortgage in the form of a proviso and known as the proviso for redemption. The mortgagor must bear the cost of reconveyance (*q*) as provided in the section. The Courts have, however, always allowed redemption on terms which were fair, if not liberal to the mortgagee. Thus the mortgagor always pays the extra costs occasioned by the legal estate having descended to an infant or lunatic heir or been devised to a trustee who cannot be found, or by reason of the mortgagee having settled the mortgage security (*r*). The practice appears to have varied in the case of extra costs occasioned by the lunacy of the mortgagee himself where costs were payable out of his estate (*s*), a distinction which appears to be anomalous. The absence of a covenant for repayment of the money cannot affect the right to redeem, for every loan imports a debt and the right to redeem is based on the principle that on payment of principal, interest and costs, a creditor shall return the security (*t*).

Proviso for redemption in the nature of a penal condition.—A mortgage deed contained a condition that if the principal were not paid by a certain day, the mortgage should only be redeemed on payment of one *mura* of rice for each rupee of the mortgage-money. The mortgagee was in possession under a prior *iladarawara* mortgage, and rice rose in the market. Held that the condition was unreasonable and such as should not be enforced in equity (*u*). The *iladarawara* mortgage occurs in Kanara and resembles a Welsh mortgage, the mortgagee being in possession and taking the rents and profits in lieu of interest, and the security carrying a right to redeem, but none to foreclose. The *iladarawara* mortgagee pays the Government revenue.

Period of redemption.—A covenant postponing redemption for a long period cannot by itself be regarded as a fetter on the equity of redemption. Periods restricting redemption are undoubtedly much longer in this country than in England. They are usually noticeable in usufructuary mortgages (*v*). Such periods have varied from 15 to 150 years (*w*) for repayment of money and were enforceable, but in none of these cases was the doctrine of clog on the equity of redemption argued or discussed. A period of 200 years was held to be a clog (*x*). But where a long period is coupled with other covenants in the mortgage shewing an intention to make redemption difficult, if not impossible, it is open to the Court to allow redemption at any time on such terms as it thinks fit (*y*). Equity will not permit

(*q*) *Dinnath v. Lachmi Narain* (1902) 25 All. 446; *Webb v. Crosse* (1912) 1 Ch. 323.

(*r*) *Webb v. Crosse* (1912) 1 Ch. 323; *Ex-parte Ommaney* (1841) 10 Sim. 298, 59 E. R. 629; *King v. Smith* (1848) 6 Hare. 473, 67 E. R. 1251; *Wetherell v. Collins* (1818) 3 Mad. 255, 56 E. R. 502.

(*s*) *Ex-parte Richards* (1852) 21 L. J. Ch. 739, 42 E. R. 732; *In re Townsend* (1847) 2 Ph. 348; *In re Wheeler* (1852) 21 L. J. Ch. 759, 42 E. R. 620.

(*t*) *Re Bogg Allison v. Paice* (1917) 2 Ch. 255.

(*u*) *Mayilaraya v. Subbaraya Bhut* (1862) 1 Mad. H. C. R. 81.

(*v*) *Narasimha v. Seshayya*, A. I. R. (1925) Mad. 825.

(*w*) *Lila Morji v. Vasudeo* (1875) 11 Bom. H. C. 283; *Dalthammam v. Amardeo* (1914)

12 A. L. J. 492; *Aga Muhammadally v. Venkatappayya* (1918) 35 M. L. J. 287; *Sarban Singh v. Bhagwan*, A. I. R. (1926) Lah. 457; *Sayad Abdul Hak v. Gulam Jilani* (1896) 20 Bom. 677; *Narain v. Jagan*, A. I. R. (1925) All. 42; *Shubratam v. Dhanpat* (1932) 54 All. 1041.

(*x*) *Fateh Mohammad v. Ram Dayal*, A. I. R. (1927) Oudh 224.

(*y*) *Balbaddar v. Dhanpat*, A. I. R. (1924) Oudh 193; *Raza Mahommed v. Ram Lal*, A. I. R. (1925) Oudh 406; *Bachu v. Perbhu*, A. I. R. (1926) Oudh 356; *Baldeo v. Losai*, A. I. R. (1929) Oudh 54; *Har Dayal v. Raja Ram*, A. I. R. (1933) Oudh 460; *Darghai Lal v. Rafiquunnissa*, A. I. R. (1927) Oudh 237.

any device or contrivance designed or calculated to prevent or impede redemption (z). Rules of equity contained in English cases are inapplicable when statutory law applies. To be a ground for relief, the cases must come within section 14 and subsequent sections of the Indian Contract Act (a). In a usufructuary mortgage the redemption fixed for only one particular day at the end of sixty years is a clog. Sections 60 and 62 of the Act read with section 58 make it clear that the "term" in section 62 (b) must be read to mean a reasonable term or a term which does not amount to a denial of the right to redeem. Where the covenant is unduly hard and unconscionable so as to nullify redemption or where the exercise of the right is so restricted as to amount to a denial of the right, it is a clog on redemption (b). And where the term was for 82 years and at the expiration of the term a day was allowed for redemption, it was held to be a clog (c). Where a long term savours of clog, it is competent to the mortgagee to sue for redemption before the period fixed for redemption has expired (d).

Redemption limited during life of mortgagor.—Where a covenant in a mortgage provided that the mortgagor should redeem the property within three years if he should live till then, but the mortgagor died without redeeming the property within the period of three years, his heirs were allowed to redeem even after the expiration of three years (e). Where a mortgage was made with a condition that if the mortgagor paid at any time during his life, the mortgagee should reconvey, the condition being repugnant to the right to redeem, the heir was allowed to redeem after his decease notwithstanding the fact that redemption was limited to the mortgagor during his life only (f). The trustee of an insurance society advanced £10,000 to C. on the security of a reversionary interest to which C. was entitled contingently on his surviving his father. As part of the loan transaction, the trustees insured the life of C. for £34,500 and paid the premiums till C.'s death. C. executed a bond charging the reversion with principal, premiums and interest on principal and premiums. By written agreements the interest on premiums were accumulated at compound interest for five years. It was further provided that on repayment during the life of the father, the policy should be assigned to C. but if he predeceased his father, the policy was to belong to the trustees absolutely. It was held that the policy was only mortgaged to the trustees and that in accordance with the equitable doctrine against fettering redemption C.'s representatives were entitled to the policy moneys after deducting all sums due (g). In England, periods of 5 or 7 years have been treated as permissible (h). But a period of 28 years was considered beyond all reasonable limits (i). And even 20 years when the transaction was between a solicitor and client (j). In determining the question whether any particular postponement is extravagant and oppressive, the absence of corresponding restraint on the mortgagee must be regarded as an important factor and where mutual covenants are binding on both, Courts will not interfere. The longer the suspensory period, the more incumbent it is to consider whether there are any provisions in the contract calculated to make the ostensible mutuality more apparent than real. And where redemption was postponed for 20 years together

(z) *Bradly v. Carritt* (1903) A. C. 253.

(a) *Shubrat v. Dhanpat* (1932) 54 All. 1041.

(b) *Bhullan v. Bachcha Kunbi* (1931) 53 All. 518.

(c) *Sarbdawan v. Bijai Singh* (1914) 36 All. 551.
Raja Singh v. Randir Singh, A. I. R. (1925) All. 643.

(d) *Bhullan v. Bachcha Kunbi* (1931) 53 All. 548.

(e) *Jason v. Eyres* (1681) Freem. Cn. 69, 22

E. R. 1064.

(f) *Price v. Perrie* (1702) Freem Ch. 258, 22 E. R. 1195; *Floyer v. Lavington* (1714) 1 P. Wms. 268, 24 E. R. 384.

(g) *Salt v. Northampton* (1892) A. C. 1.

(h) *Teevan v. Smith* (1910) 2 Ch. 724.

(i) *Morgan v. Jeffreys* (1910) 1 Ch. 610.

(j) *Cowdroy v. Day* (1859) 1 Giff. 316.

S. 60 with other provisions which made the policies in effect irredeemable, it was regarded as a clog on the equity (*k*).

Mortgagor cannot be compelled to redeem the whole property.—A mortgagor cannot be compelled to redeem the whole of the mortgaged property. He is bound to pay the whole of the mortgage debt before he can redeem any portion of the mortgaged property : but subject to this condition there is nothing to prevent his relinquishment of the right to redeem one portion of the property, while suing to redeem other portions (*l*). Under a mortgage of September 1879, and a subsequent agreement, S. became the mortgagee in possession for a term of 12 years, of a four annas share of K. and an 8 annas share of B. in two villages. In December 1888, K. mortgaged his 4 annas share for 30 years to the plaintiff who redeemed the mortgage of 1879 and took possession of both shares. In 1897 B. mortgaged his 8 annas share to the defendant who then sued the plaintiff for redemption of that share on the payment of the amount due on it under the mortgage of 1879. The plaintiff insisted on the defendant redeeming the whole share of 12 annas, and the defendant's suit was dismissed. In 1899, the defendant brought another suit for redemption of both shares, obtained a decree and took possession. In 1901 the plaintiff sued for redemption of the 4 annas share of K. only on payment of the amount due on it under the mortgage of 1879, but offered to redeem the share of B. also. The defendant did not accept the offer. Held that the plaintiff was entitled to redeem K.'s four annas share (*m*). There is nothing to prevent a mortgagee from purchasing the equity of redemption in a portion of the mortgaged property from the mortgagor. The fact of such purchase would be to extinguish the portion of the mortgage debt proportionate to the value of the part of the property so purchased, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage (*n*).

Mortgagor not owner.—A mortgage by a person other than the real owner may be by a *benamidar* or person holding adversely. In the former case a *benamidar* mortgagor may sue for redemption (*o*). A *benamidar* mortgagee can sue for sale (*p*). In the latter case the mortgagor's possession is adverse to the real owner (*q*). On the 24th October 1873 D., widow of G., mortgaged to K., the husband of R., her daughter, certain property and died in 1882. Plaintiff claiming as heir of the husband of D. claimed the property to the exclusion of R. On the 22nd of June 1882, K. accepted a mortgage of the plaintiff to which R. acquiesced. In 1889 R. sold the equity of redemption to S. who paid off the mortgage of K. and obtained possession. In 1899 plaintiff sued K. and S. to redeem the mortgage of 22nd June 1882. He was held entitled to do so, R.'s claim to the equity of redemption having become time-barred (*r*).

Mortgage to two mortgagees.—In the case of a mortgage to two mortgagees as tenants in common, the question arises whether the mortgage to each is of a divided half or a conveyance to them of the whole. In the former case two independent mortgages would be combined in one deed and independent relief might be granted

(*k*) *Davis v. Symons* (1934) 1 Ch. 442 ; *Fairclough v. Swan Brewery Co., Ltd.* (1912) A. C. 565 ; *Biggs v. Hoddinott* (1898) 2 Ch. D. 307 ; *Morgan v. Jeffery* (1910) 1 Ch. 620.
 (*l*) *Venkatvarahacharya v. Kotraja* (1901) 3 Bom. L. R. 935.
 (*m*) *Jawahir Singh v. Baldeo Baksh Singh* (1908) 12 C. W. N. 515.
 (*n*) *Bisheshur Dial v. Ram Sarup* (1900) 22 All.

284 F. B. ; *Lakshmidas Ramdas v. Jamnadas Shanker Lal* (1898) 22 Bom. 304.
 (*o*) *Muhammas Sheriff v. Syed Kassim*, A. I. R. (1933) Mad. 635.
 (*p*) *Surendranatha v. Kshitindra*, A. I. R. (1919) Cal. 314.
 (*q*) *Purshottam v. Sagaji* (1904) 28 Bom. 87.
 (*r*) *Purshottam v. Sagaji* (1904) 28 Bom. 87.

to each. In the latter case no redemption could be effected of a part by paying to one of the mortgagees his separate debt. When a mortgage is made by one mortgagor to two mortgagees as tenants in common, the right of one mortgagee, if the consent of the other cannot be obtained, is to add him as a defendant and to ask for a proper mortgage decree which would provide for all necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor (s).

Separate redemption on division of mortgagee's interest.—The point arose in a Bombay case where the question in effect was, can a mortgagor at his pleasure bring separate redemption suits for redemption of a single mortgage debt, where the interest of the original mortgagee had been divided by a gift or assignment. The Court held that so far as the matter rested on principle, it seemed concluded by a consideration of the converse case in *Nilakant Banerji v. Suresh Chandra Malik* (t) and that although the original mortgagee had deliberately split up his interest, the suit was essentially one to redeem the original mortgage debt and the question did not depend on the ultimate incidence of the mortgage debt or the ultimate result of the taking of the mortgage accounts (u).

Code of Civil Procedure (V of 1908), O. 2, r. 2.—The common form of an English mortgage adopted in Presidency towns enables a mortgagee to sue for arrears of interest without waiting till due date. In such case the danger of splitting up the claim against which the Code of Civil Procedure has provided must be avoided.

This rule provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. The illustration given shews that a personal claim for the mortgage-money under a mortgage and the enforcement of the security for the debt, are to be regarded as one and the same cause of action. This provision is in marked distinction to the English Law. If the mortgage provided for an independent obligation to pay principal and interest and a suit is brought to obtain a personal judgment in respect of interest alone, this rule would not prevent a subsequent claim for payment of principal. In such a case the cause of action would have been distinct. The matter, however, is different if the non-payment of the interest causes the principal moneys to become due, as in that case the cause of action for the non-payment of the interest gives rise to two forms of relief which the Code provides shall not be split (v).

In the Privy Council cases in default of payment of interest the whole of the principal and interest had become due and the above observations as to independent obligations were *obiter*. O. 2, r. 2 bars a second suit for principal when the first suit has been for interest, unless it could be shewn that the principal had not then become due, or that the demand for principal was merely a threat that proceedings would be taken. O. 2, r. 2 will apply only if at the date of the suit, both the interest and principal had become payable. In none of the cases on the subject was O. 34, r. 14 of the Code of Civil Procedure argued or discussed. Where plaintiff's redemption suit comprised only two out of three pieces of land mortgaged and resulted in payment of amount due, a subsequent suit for possession of the third land was held barred under O. 2, r. 2 (w).

(s) *Sunitibala v. Dhara Sundari* (1920) 47 Cal. 175, 46 I. A. 272.

(t) (1885) 12 Cal. 414, 12 I. A. 171.

(u) *Purshottam v. Isab Mahamad* (1927) 29 Bom. L. R. 1052.

(v) *Kishan Narain v. Pala Mal* (1923) 4 Lah. 32, 50 I. A. 115; *Muhammad Hafiz v. Muham-*

mad Zakariya (1922) 44 All. 121, 49 I. A. 9; *Mt. Nando v. Pandit Ram* (1930) 5 Luck. 431; *Sawmy Rao v. Official Assignee* (1925) 48 Mad. 703; *Krishna v. Mammad*, A. I. R. (1932) Mad. 466.

(w) *Bhau Daji v. Patlu Malu* (1922) 24 Bom. L. R. 1157.

S. 60

Necessity of proof of title to equity of redemption.—The plaintiff seeking to redeem must prove at his own cost (*x*) the specific mortgage set up in his plaint, clearly and indefeasibly (*y*), but the question of proof necessary for the plaintiff to succeed, must in each case depend upon, and may be affected by, the pleadings and the defence raised by the defendant (*z*). The onus lies on the plaintiff to shew the existence of a subsisting mortgage, which he is entitled to redeem (*a*) and that he is the individual entitled to the equity of redemption (*b*). Merely alleging that the mortgage deed is in possession of the mortgagee and failing to take steps to produce the document to let in secondary evidence in regard to facts and contents of the deed, is not sufficient proof of mortgage and the mortgage cannot be said to have been proved by legal evidence (*c*). *Prima facie* title is sufficient and no issue will be directed, though the title be complicated, if it be uncontradicted (*d*). But evidence must be adduced that the mortgage is redeemable and if the mortgage deed cannot be produced, secondary evidence of the contents must be proved, according to section 63 of the Evidence Act, but no admission by the mortgagee can operate to make a mortgage redeemable, which by law was irredeemable at the time when the admission was made. In order to adduce secondary evidence of the contents of the mortgage deed, the party proposing to give such secondary evidence must give notice to the party in whose possession or power the document is, but such notice is not required in order to render secondary evidence admissible, when from the nature of the case the adverse party must know that he will be required to produce it (*e*). But if in a redemption suit, the mortgagee contends that a larger sum is due than that on payment of which the mortgagor seeks to redeem, it is for the mortgagee to produce the mortgage deed and to prove that further liabilities which he claims were charged on the mortgaged property (*f*). But the mortgagee will not be allowed to prove the contents of the deed or the amount of the mortgage debt by secondary evidence, if it be found that the mortgagee with a view to deprive the mortgagor of the equity of redemption, has destroyed the deed, by which the property was mortgaged and in that case, the mortgagor shall be allowed to recover the lands without any payment (*g*). The plaintiff failing to establish the particular mortgage which he sues to redeem, will be allowed to rely on defendant's admission (*h*). But he cannot be allowed to fall back on some other mortgage, as to which, admission has been made by the defendant. No redemption decree can be passed on admissions made within the statutory period of a mortgage, under which the defendant held, but which was not pleaded in the plaint (*i*). The above cases establish the rule that he who comes to redeem a mortgage, must shew title to the equity of redemption (*j*) before the defendant can be put to proof of his defence.

Clog doctrine.—The clog doctrine is merely a corollary to or, perhaps, a figurative but forcible way of stating the general rule, that on repayment of all that is

- (*x*) *James v. Biou* (1819) 3 Swan. 234, 36 E. R. 844.
 (*y*) *Sevaji v. Chinna* (1864) 10 M. L. A. 151, 160.
 (*z*) *Dada v. Genu* (1903) 5 Bom. L. R. 333.
 (*a*) *Musafir Rai v. Mussammul Lagan Barta Kuar* (1905) A. W. N. 14.
 (*b*) *James v. Biou* (1819) 3 Swan. 234, 36 E. R. 844.
 (*c*) *Sheoharakh v. Sheobikh* (1882) A. W. N. 131.
 (*d*) *Bowerman v. Pym* (1793) 3 Swan. 241, 36 E. R. 847.
 (*e*) *Sahai v. Sheo Dhar Shan* (1888) A. W. N. 147; Sections 65 (c) and 66 (a), Evidence Act, 1872.
 (*f*) *Sheo Sahai v. Sidhgopal* (1881) A. W. N. 92.
 (*g*) *Shek Abdulla v. Shek Muhammad Jafar*, 1

- Bom. H. C. 177.
 (*h*) *Lakshman v. Hari Dinkar* (1880) 4 Bom. 584; *Chimnaji v. Sakharan* (1893) 17 Bom. 365; *Bala v. Shiva* (1903) 27 Bom. 271; *Unnian v. Rama* (1885) 8 Mad. 415; *Kadakam v. Makkath* (1907) 30 Mad. 388; *Kailash Rai v. Mst. Jaga* (1931) 10 Pat. 417.
 (*i*) *Krishna Pillai v. Rangasami Pillai* (1895) 18 Mad. 462; *Sheo Prasad v. Lalit Kuar* (1896) 18 All. 403; *Govindrav v. Ragho* (1884) 8 Bom. 543.
 (*j*) *Lomax v. Bird* (1683) 1 Vern. 182; *Ramchandra v. Mukund* (1901) 3 Bom. L. R. 152; *Balaji v. Babu* (1868) 5 Bom. H. C. 159; *Pormanand v. Sahib Ali* (1889) 11 All. 438.

properly payable on the security of property charged, the whole of that property must be restored to the borrower unfettered and undiminished by anything created in favour of the lender, as part of consideration of the loan. The corollary applies to all cases where there is a right to redeem and is incident to or part of that right. The sole question is, is there a right to redeem? The right to redeem is inherent in the thing itself and it is firmly settled that equity will not permit any device or contrivance, designed or calculated to prevent or impede redemption. It follows as a necessary consequence, that when money secured by a mortgage of lands is paid off, the land itself and the owner of the land in the use and enjoyment of it, must be as free and unfettered to all intents and purposes as if the land had never been made a subject of the security (*k*). The principle underlying the rule against fetters or clog against the equity of redemption is this. That an equity which arises on failure to exercise contractual rights, cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction and the rule is equally applicable to all transactions of mortgage whether the mortgagor is or is not under personal liability to pay the money secured and whether or not the mortgage is given to secure a loan made at the time of the mortgage or some existing debt of the mortgagee. For example, it would be applicable to a mortgage with a proviso for reconveyance on the payment, to the mortgagee by the mortgagor or a third party, of all moneys owing by such third party to the mortgagee (*l*). This is illustrated by the case where an insurance company advanced £10,000 on a reversionary interest and secured themselves by insuring the life of the reversioner. The agreement contained a provision, that if before the reversion falling, the amount was repaid together with premiums with interest, the policy should belong to the reversioner, but that if he died before the reversion falling in, without having repaid the amount of the loan and the premium with interest, the policy should belong to the society. The latter event happened and the question arose whether the policy belonged to the society or whether it was redeemable upon payment of what was due in respect of the money advanced and the premiums and interest. This agreement was held to be void as being a clog on the equity of redemption on the ground that it was part of the property which had been mortgaged to secure the advance and there being a contractual right to redeem during the father's lifetime and the equitable right to redeem arising if the contractual right were not exercised, the clause providing that if the contractual right were not exercised, the policy should belong to the society, was in the nature of a penalty against which equity would relieve (*m*). Any fetter or clog imposed in the instrument of mortgage on this equitable right, may be properly regarded as a repugnant condition and as such invalid. The right to redeem in the very outset arises. It is merely the right to have the property freed from the charge, on payment of the moneys charged thereon. If the charge be for payment of a specified sum on a specified date, payment on that day will set the property free and if the day passes without payment, there will still be an equity to have the property so freed, notwithstanding any provision in the nature of penalty, such penal provision being a clog on the equity (*n*). Various devices are adopted by lenders to fetter redemption against which, the Courts have always struggled, on the ground "once a mortgage always a mortgage." And this is the rule whether the question is to be determined under the Transfer of Property Act, 1882, or accord-

(*k*) *Noakes v. Rice* (1902) A. C. 24, 30; *Rajmal v. Shivaji* (1903) 27 Bom. 154.

(*l*) *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (1914) A. C. 25, 48.

(*m*) *Salt v. Marquess of Northampton* (1890) 45 Ch. D. 190.

(*n*) *Kreglinger v. New Patagonia Meat & Cold Storage Co.* (1914) A. C. 25, 52.

S. 60

ing to rules of justice, equity and good conscience in provinces where the Act has not been extended (o).

Collateral bargain stipulated for in a mortgage deed.—Every mortgagor is entitled to redeem, such a right being inherent in the thing itself (p). Every mortgage contains a term at the end of which, the mortgagor is entitled to redeem. A proviso for the continuance of the loan for a term certain, is usual and is a lawful provision (q). And the mortgagor cannot compel the mortgagee to accept against his will, repayment otherwise than in accordance with the contract (r). But the question which often arises is, when a mortgage contains a covenant which is collateral to the mortgage and in favour of the mortgagee, whether such a covenant is valid and can be enforced, or whether against this covenant, the mortgagor would be given relief, as being a clog on the equity of redemption. In England collateral advantages used to be regarded as a clog on the equity of redemption, on the ground that the mortgagee was not entitled to stipulate for any advantage beyond principal, interest and costs, and that he could not bargain for any advantage to himself, but since the repeal of the usury laws, the last of which was repealed in 1854, the trend of decisions has veered round, and in every case, stipulation by a mortgagee for a collateral advantage, has been held valid or invalid according to circumstances. It is to be observed that stipulations for collateral advantages in a mortgage, may be classified into two heads, (1) those, the performance of which, is made a term of the contractual right to redeem, and (2) those, the performance of which, is not made a term of such contractual right to redeem. In the former case, the Court of Chancery in allowing redemption entirely ignores such stipulations. In the latter case, stipulations were regarded as immaterial, unless some statute or public policy was infringed (s). There is now no rule in equity, which precludes the mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided that such collateral advantage is not either (1) unfair and unconscionable, (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem (t). Taking a simple case of a mortgage by way of conveyance with a proviso for reconveyance on payment of a sum of money upon a specified date, two events might happen. The mortgagor might pay the money on the specified date, in which case equity would specifically perform the contract for reconveyance; on the other hand, the mortgagor might fail to pay the money on the date specified for that purpose. In this case the property conveyed became at law an absolute interest in the mortgagee. Equity, however, did not treat time as of the essence of the transaction, and hence on failure to exercise, what may be called the contractual right to redeem, there arose an equity to redeem, notwithstanding that the specified date had passed. Till this date had passed, there was no equity to redeem, and a bill either to redeem or foreclose would have been demurrable. The equity to redeem, which arises on failure to exercise the contractual right to redemption, must be carefully distinguished from the equitable estate, which from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption.

It will thus be seen that a collateral advantage will be valid, provided the equity of redemption is not thereby fettered and the bargain is a fair and reasonable one,

(o) *Rajmal v. Shivaji* (1903) 27 Bom. 154; *Mehrbani Khan v. Makhna* (1930) 11 Lah. 251, 57 I. A. 168.
 (p) *Noakes & Co. v. Rice* (1902) App. C. 24.
 (q) *Teevan v. Smith* (1882) 20 Ch. D. 724.
 (r) *West Derby Union v. Metropolitan Life As-*

urance Society (1897) A. C. 647.
 (s) *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.*, (1914) A. C. 25, 55.
 (t) *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.*, (1914) A. C. 25, 61.

entered into between the parties, while on equal terms, without any improper pressure, unfair dealing or undue influence. Where the mortgage of an hotel for a time certain to a brewer, effected in the usual way, contained a covenant by the mortgagors during the continuance of the security to take all their beer and malt liquor and a covenant by the mortgagee to supply, it was held that the covenant was not a clog on redemption (*u*). There is nothing to prevent the mortgagee from securing to himself a collateral advantage, provided there is no unfair advantage being taken and provided such a provision or stipulation has not the effect of clogging or fettering the equity of redemption. In a mortgage of a leasehold public house by a licensed victualler to brewers, the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not, during the continuance of the term, and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt-liquors, except such as should be purchased of the mortgagees. This covenant was held to be a clog on the equity of redemption (*v*). A mortgagor and mortgagee may by a separate and independent transaction entered into subsequent to the mortgage, make a valid agreement giving the mortgagee the option of purchasing the mortgaged property and which may thus have the effect of depriving the mortgagor of his right to redeem (*w*). But where a mortgagee by agreement, either in the mortgage or by a separate deed, fetters the redemption with a fraudulent design to get the estate, it will not avail (*x*). Collateral stipulations, however, cease to operate on redemption and a mortgagee after redemption cannot keep on foot the benefit of any collateral stipulation, which is part and parcel of a mortgage transaction (*y*). The property which comes back to the mortgagor must not be worse than when it was mortgaged, and the mortgagee must not, either expressly or by implication, reserve the right of any hold upon the property after the time for redemption has arrived and the right to redemption has been put in force (*z*). The question whether the agreement between the mortgagor and the mortgagee amounted to a bargain, as would cut down the right to redeem, or did simply stipulate for a collateral undertaking outside and clear of the mortgage, and without which, the loan would not have been made, is a matter of substance and not of form and depends upon the facts of each case and upon looking at all the circumstances and not by mere reliance on some abstract principle or upon the dicta which have fallen *obiter* from Judges in other and different cases (*a*). In dealing with collateral advantage, the general principle must be adhered to where it can possibly be, that a man shall abide by his contracts and that a man's contracts should be enforced as against him. It is true that in a well-known authority, the Master of the Rolls stated that a man shall not have interest for money and collateral advantage besides the loan of it, or clog the redemption with any by-agreement (*b*). In that case the mortgagor came to redeem and it was sought to clog his redemption by saying that there was a collateral agreement with regard to other property, which ought to prevent his being allowed to redeem. It was in fact a case of clogging the equity of redemption, the collateral agreement being unconscionable. Moreover, when that case was decided, the usury laws were in force. On the subject in question, before the repeal of the usury laws, Lord Eldon stated the law (*c*) which, as set forth by Kay, J., in his judgment in a case (*d*) before him

(*u*) *Biggs v. Hoddinott* (1898) 2 Ch. D. 307.

(*v*) *Noakes & Co. v. Rice* (1902) A. C. 24.

(*w*) *Reeve v. Lisle* (1902) A. C. 461.

(*x*) *Mellor v. Lees* (1742) 2 Atk. 494, 26 E. R. 698.

(*y*) *Bradly v. Caritt* (1903) A. C. 257.

(*z*) *Noakes v. Rice* (1900) 2 Ch. D. 457.

(*a*) *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.* (1914) A. C. 25, 39.

(*b*) *Jennings v. Wards* (1705) 2 Vern. 520, 26 E. R. 935.

(*c*) *Chambers v. Goldwin* (1804) 9 Ves. 254, 32 E. R. 600.

(*d*) *Mainland v. Upjohn* (1889) 41 Ch. D. 126.

S. 60

was as follows:—"I read that for this reason that Lord Eldon there, although no doubt, one objection he makes to these exactions was that they tend to usury, still does not rest his objection entirely upon that ground. He says, besides, they are oppressive and are exactions that a mortgagee is not allowed to make." A mortgagee, however, can contract with his mortgagor that in consideration of an advance of £700, he should be repaid £1,000 at a future time with interest on £1,000 in the meantime. In that case the bargain stands and cannot be disturbed, and for a very good reason, as the mortgagor obtained his advance on the footing and faith of the contract (e). But it would be otherwise if the agreement relied upon by the mortgagee, is oppressive and improper and clogged the redemption (f), or raised questions, on what terms as to amount, the mortgagor should be permitted to redeem, these being questions affecting the clogging of redemption (g).

Where a young man in poor circumstances, requiring funds to defend a probate action, borrowed money from K., a solicitor, on mortgage, whereby he covenanted to employ a particular person as a solicitor in the action and to pay £225 to the mortgagee by way of bonus on his succeeding in the action and the mortgage deed further provided for further advance as and when the mortgagee should think fit to meet any further necessities, or to be applied in or towards the costs of the action, and the advances both present and future as well as interest and the bonus £225 were secured by a charge on the mortgagor's interest on the property, the subject-matter of the action,—it was held in an action to redeem by the mortgagor, that bonus was illegal as being a collateral advantage stipulated for by the mortgagee, that the transaction was voidable as an undue advantage obtained when the mortgagor was under pressure, and redemption was decreed on payment of the actual advance with interest (h). Similarly, a mortgagee cannot at the time of the advance stipulate for an advantage which does not naturally arise out of the mortgage. Therefore when the auctioneers at the time of advancing money upon a mortgage, provided for themselves an authority to conduct the sale of the estate and for a commission of 5 per cent. on the purchase-money, besides principal and interest, the charge for commission was not covered by the security (i); nor would commission be allowed to a mortgagee solicitor on sales of coke or coal or additions to the colliery, on the ground that such agreements were obtained from the client under undue pressure and without independent advice (j).

Right of pre-emption and output.—Covenant in a mortgage of property in West Indies to consign the produce of the mortgaged estate to the mortgagee, is not usurious (k) even where the covenant provided that the mortgagee should continue as consignee, during a fixed period of five years after repayment of the loan (l). Where a holder of shares in a tea company, mortgaged the shares to secure a loan and agreed to use his best endeavours to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and in the event of the same being sold through another broker, to pay him the amount of commission he would have earned, if the same had been sold through him; and the mortgage

(e) *Potter v. Edwards* (1857) 26 L. J. Ch. 468.
 (f) *Mainland v. Upjohn* (1889) 41 Ch. D. 126;
 James v. Kerr (1889) 40 Ch. D. 449.
 (g) *Broad v. Selfe* (1863) 11 W. R. 1036; *Field v. Hopkins* (1890) 44 Ch. D. 524.
 (h) *James v. Kerr* (1889) 40 Ch. D. 449; *Field v. Hopkins* (1890) 44 Ch. D. 524.
 (i) *Broad v. Selfe* (1863) 11 W. R. 1036; *James v.*

Kerr (1889) 40 Ch. D. 449; *Field v. Hopkins* (1890) 44 Ch. D. 524; *Mainland v. Upjohn* (1889) 41 Ch. D. 126.
 (j) *Ward v. Sharp* (1884) 53 L. J. Ch. 313.
 (k) *Sayers v. Whitfield* (1829) 1 Knapp. 133, 12 E. R. 271.
 (l) *Bunbury v. Winter* (1820) 1 Jac. & W. 255, 37 E. R. 372.

having been paid off, the company having changed their broker, it was held that the agreement was not binding and that the action could not be maintained (*m*).

Option to purchase by mortgagee.—As option in a mortgage deed giving the right to the mortgagee to purchase the equity of redemption, has been regarded in the nature of a clog, for all that a mortgagee is entitled to, is the interest on his money and his principal, but no collateral advantages besides the loan of it (*n*). He is not entitled at the time of the advance, to make a contract for the purchase of the mortgaged property. Where in a mortgage by a limited company, upon the security of their debenture-stock, giving the lenders an option to purchase the stock at 40 per cent. of its price within 12 months, and the loan to become due and payable with interest at 30 days' notice on either side, and before the company gave notice of their intention to repay the loan, the lender claimed to purchase the stock at the agreed price, it was held that the option was void and the company was entitled to redeem the loan on payment of principal, interest and costs (*o*). But equity will not interfere where the covenant giving the mortgagee the benefit of pre-emption, be not insisted upon until the estate is sold (*p*). But no Court will allow any agreement, whereby the mortgagee becomes the absolute purchaser upon any event whatsoever (*q*). But the parties may by a separate and independent agreement subsequent to the mortgage, provide for the mortgagee, the option to purchase the mortgaged property and thus have the effect of depriving the mortgagee of his right to redeem (*r*).

Covenant to pay money under both mortgages simultaneously.—A executed a usufructuary mortgage in favour of B. He made a further loan, to secure which, a bond was executed, which recited the fact of the previous mortgage being usufructuary and under which the mortgagee was in possession. The deed contained a covenant not to redeem that usufructuary mortgage, unless and until money was paid under the second bond. It was held that the second loan created a charge and that the mortgagor was not entitled to redeem the first mortgage unless he paid the moneys due. A covenant of this nature is not a clog on redemption (*s*). But where subsequent to the first mortgage, bonds of later dates were executed and there was a stipulation not to redeem the first mortgage without paying off the moneys due on the later bonds, one of which was a simple bond, the others being mortgage bonds, it was held that so far as regards the simple bond, the agreement not to redeem without paying off the sums due under the subsequent bonds was a clog on redemption (*t*). The covenant with regard to the other bonds was valid (*u*).

(*m*) *Bradley v. Carritt* (1903) A. C. 253; *Samuel v. Jarrah Timber & Wood Paving Corporation* (1904) A. C. 323; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* (1910) 2 Ch. 502; *Morgan v. Jeffreys* (1910) 1 Ch. 620; *Re. Rainbow Syndicate* (1916) W. N. 178.

(*n*) *Jennings v. Ward* (1705) 2 Vern. 520, 23 E. R. 935.

(*o*) *Samuel v. Jarrah Timber & Wood Paving Corporation* (1904) A. C. 323.

(*p*) *Orby v. Trigg* (1722) 9 Mod. Rep. 2, 88 E. R. 276.

(*q*) *Toomes v. Conset* (1745) 3 Atk. 261, 76 E. R. 952.


(*r*) *Reeve v. Lisle* (1902) A. C. 461.

(*s*) *Mahomed Abdul Hamid v. Jeraj Mal* (1906) 3 A. L. J. 768; *Brij Lal Singh v. Bhawani Singh* (1910) 32 All. 651; *Jokhu Bhunja v. Silla Bakhsh* (1930) 52 All. 539; *Ram Kishore v. Ram Nandan*, A. I. R. (1928) All. 99; *Pannu Ram v. Ghulam Hussain*, A. I. R.

(1926) Lah. 494; *Sultan Muhammad v. Ladha Singh*, A. I. R. (1926) Lah. 633.

(*t*) *Durga Prasad v. Dukhi Roy* (1904) 9 C. W. N. 789; *Chotalal v. Gobindram* (1893) 18 Bom. 591; *Rajmal v. Shivaji* (1903) 27 Bom. 154; *Rugad Singh v. Sat Narain* (1905) 27 All. 178; *Sheo Shankar v. Parwa Mahton* (1903) 26 All. 559.

(*u*) *Durga Prasad v. Dukhi Roy* (1904) 9 C. W. N. 789; *Ranjit Khan v. Ramadhan Singh* (1909) 31 All. 482; *Brij Lal Singh v. Bhawani Singh* (1910) 32 All. 651; *Shib Narain v. Gajadhar* (1926) 48 All. 292; *Lala Bahadur Singh v. Rameshwar Prasad*, A. I. R. (1927) Oudh. 510; *Ram Kishore v. Ram Nandan* (1927) 25 A. L. J. 1086; *Mt. Jugeshri Kuer v. Aftab Chand* (1929) 8 Pat. 68; *Muhammud Abdul v. Jairaj Mal* (1906) 3 A. L. J. 768; *Har Prasad v. Ramchandar* (1922) 44 All. 37; *Hari v. Vishnu* (1904) 28 Bom. 349.

S. 60  **Covenant to redeem before expiry of the period on payment of interest for the full period.**—Such a covenant is not a clog on redemption (v).

Covenant for pre-emption or sale in favour of mortgagee.—A covenant in a mortgage deed, whereby the mortgagee obtains for himself a collateral advantage, is enforceable unless unfair or unreasonable. In a suit for pre-emption by a mortgagee, based on a covenant which did not preclude the mortgagor from transferring the mortgage property to any person other than the mortgagee, but only gave the mortgagee a preferential right to purchase the property at a price specified in the covenant, it was held that such a covenant would not be a clog on redemption, that the mortgagee was entitled to pre-empt, unless the covenant was oppressive or unfair (w). There is nothing in law to prevent the parties to a mortgage coming to a subsequent arrangement, qualifying the right to redeem. A covenant made subsequent to the mortgage for the sale of the mortgaged property to the mortgagee, is not a clog on redemption (x).

Covenant for renewal in perpetuity.—A covenant in a mortgage deed to renew the mortgage in perpetuity, is a clog on the mortgagor's right of redemption and cannot be enforced, and even if the mortgage be anomalous, and created prior to the Act, such an agreement would be inoperative and void (y).

Power to mortgagee to call for moneys before the expiry of the period.—A clause in a mortgage deed giving the mortgagee the option to call in the moneys before the expiry of the specified period, is a clog on redemption, as such an agreement is unilateral and void of consideration and consequently void (z) unless introduced for the protection of the mortgagee's security (a).

Redemption fettered by confining it to a particular time or description of person.—Where a mortgagor stipulated that the mortgage was not redeemable for 15 years but that after 15 years, if the mortgagor himself, his son or daughter, or any of these three should pay whatever might be due on the mortgage, redemption should be allowed, it was held that this provision as to redemption was not purely a personal concession, but that an alienee of the mortgagor could enforce redemption after the period stipulated (b).

Covenant to sell premises to mortgagee a clog.—A covenant in a mortgage deed, that if default be made in payment on the due date, the mortgagor should sell the mortgaged premises to the mortgagee, is not binding on the mortgagor, as it in effect deprives the mortgagor of his right to redeem (c). Where in a usufructuary mortgage it is stipulated that on default of redemption on a fixed date, the mortgage should operate as a sale, the condition is void as a clog (d). So also if the covenant be that in default of payment within three years, the mortgaged property was to be held on absolute sale (e).

(v) *Kaulesar Singh v. Raghuo Bir Singh* (1904) 1 A. L. J. 224.

(w) *Bimal Jati v. Biranja Kuar* (1900) 22 All. 238.

(x) *Kanhyalal v. Narhar* (1903) 27 Bom. 297; *Shankar v. Yeshwant* (1920) 22 Bom. L. R. 965; *Sangat Baksh v. Ravadjadeo*, A. I. R. (1923) Oudh 143; *Shankar Din v. Gokal Prasad* (1912) 34 All. 620 P.C.; *Usman Khan v. Dasanna* (1914) 37 Mad. 545; *Ramalinga v. Arunchala*, A. I. R. (1926) Mad. 386.

(y) *Murthy Khandan v. Anantanarayana Patter* (1907) 30. Mad. 61.

(z) *Sayed Abdul Hak v. Gulam Jilani* (1896) 20 Bom. 677; *Sari v. Motiram* (1898) 22 Bom. 375; *Narasimha v. Seshayya* (1925) 48 M. L. J. 363; *Shiam Lal v. Jagdamba* (1927)

25 A. L. J. 1051.

(a) *Bhawani v. Sheodihal* (1905) 26 All. 479.

(b) *Sayed Abdul Hak v. Gulam Jilani* (1896) 20 Bom. 677.

(c) *Kanaran v. Kuttooly* (1898) 21 Mad. 110.

(d) *Srinivasa v. Radhakrishnam* (1915) 38 Mad. 667; *Kandula Venkiah v. Donga Pillaya* (1920) 43 Mad. 589; *Pandiyan v. Vellayappa* (1917) 33 M. L. J. 316; *Vaddiparthi v. Appalanarasimhulu* (1921) 41 M. L. J. 563; *Mehrban Khan v. Makhna* (1930) 11 Lah. 251, 57 I. A. 168, *Ram Bali v. Ram Asre*, A. I. R. (1925) Oudh 386; *Ram Ganesh v. Rup Narain*, A. I. R. (1925) All. 34.

(e) *Nallana Gaundan v. Palani Gaundan* (1867) 3 M. H. C. 420; *Sapenswar v. Brindiban*, A. I. R. (1934) Pat. 397.

Heavy rate of interest is a clog.—Where the rate of interest has been very high and such as would be regarded as inequitable and unfair, the Court has relieved the mortgagor (f). Compound interest exceeding the rate of interest with principal is a penalty. Increased interest on default from date of bond is a penalty, in which case, reasonable compensation under section 74 of the Contract Act is to be allowed. Interest after date fixed for realization, is allowed at the Court rate and not at the mortgage rate (g). But compound interest at the contract rate was allowed in passing a decree on second mortgage, allowing redemption of the first mortgage in the hands of the mortgagee, who had purchased the property in execution of his mortgage decree (h). "Penalty" in section 74 of the Contract Act is used in the sense of secondary stipulation, which provides for payment of additional burden on default. Compound interest at the same rate, if a primary stipulation, is not a penalty (i). Where there is no undue influence or unfair dealing, a high rate of interest is not a clog (j). The Court cannot interfere with the terms of the contract, unless the mortgagor can shew good reason that the bond could not be enforced; nor can a Court reduce the rate of interest merely on the ground that it was excessive (k). The Usurious Loans Act (X of 1918) which applies to a mortgage executed after the passing of the Act, empowers a Court to re-open the transaction if (a) the interest is excessive, and (b) the transaction was substantially unfair. Twelve per cent. per annum with yearly rests cannot be considered as excessive (l).

Condition restraining alienation.—Such a condition is a clog on the equity of redemption (m). A postponement of the right of redemption for a long period of 25 years with covenants which are wholly advantageous to the mortgagee and without corresponding advantages to the mortgagor, operates as a clog on the equity of redemption (n).

Void undertaking.—Ordinarily the right to redeem and the right to foreclose are co-extensive, being reciprocal rights, but there is nothing in law to prevent parties stipulating that the mortgagor could redeem before the specified period (o), usually on terms that the mortgage-money belonged to the mortgagor. Some Courts hold that such a concession is not personal and may be taken advantage of by the assignee (p); others have taken the view that the concession is personal (q). An undertaking of this nature is, however, absolutely void as tending to clog the redemption (r). A provision that there should be no redemption except in the month of *Jeth* is not a clog, inasmuch as the intention is to permit redemption when the crops are not standing (s). But a provision, that redemption can only be on a particular day, the mortgage being for 40 years, was held not enforceable (t). So also where the mortgage was for 82 years (u). The right to redeem cannot be

(f) *Dinonath v. Dharmola* (1890) 4 C. P. L. R. 146.

(g) *Sundar Koer v. Rai Sham* (1907) 34 Cal. 150, 34 I. A. 9.

(h) *Ganga Pershad v. The Land Mortgage Bank* (1894) 21 Cal. 366.

(i) *Rama Krishnayya v. Venkata*, A. I. R. (1934) Mad. 31.

(j) *Sarfaraz v. Udawat Singh*, A. I. R. (1929) Oudh 30; *Gajraj v. Munnu*, A. I. R. (1930) Oudh 173.

(k) *Ram Krishna v. Heramba* (1929) 56 Cal. 960; *Aziz Khan v. Duni Chand* (1918) 23 C. W. N. 130; *Balla Mal v. Ahad Shah* (1918) 23 C. W. N. 233; *Raghunath Prasad v. Sarju Prasad* (1923) 3 Pat. 279, 51 I. A. 101.

(l) *Ram Krishna v. Heramba* (1929) 56 Cal. 960.

(m) *Ram Saran Lal v. Amirta Kuar* (1881) 3 All. 361; *Trimbak v. Sakharan* (1892) 16 Bom. 599; *Visvanathan v. Ethirajulu*, A. I. R. (1924) Mad. 57.

(n) *Raja Mahomed Khan v. Ram Lal*, A. I. R.

(1925) Oudh 406.

(o) *Bakhtawar Begum v. Husaini Khan* (1914) 36 All. 195, 41 I. A. 84; *Kuddi Lal v. Aisha Jehan*, A. I. R. (1927) Oudh 199; *Shiam Lal v. Jagdamba*, A. I. R. (1928) All. 131.

(p) *Kuddi Lal v. Aisha Jehan*, A. I. R. (1927) Oudh 199; *Ram Saran Lal v. Amirta Kuar* (1881) 3 All. 369.

(q) *Shiam Lal v. Jagdamba*, A. I. R. (1928) All. 131.

(r) *Ram Ganesh v. Rup Narain*, A. I. R. (1925) All. 34; *Kirpal Singh v. Sheombar Singh*, A. I. R. (1930) All. 283; *Trimbak v. Sakharan* (1892) 16 Bom. 599; *Sarbdawan v. Bijai Singh* (1914) 36 All. 551.

(s) *Kirpal Singh v. Sheombar*, A. I. R. (1930) All. 283.

(t) *Sarbdawan Singh v. Bijai Singh* (1919) 36 All. 551.

(u) *Ram Ganesh v. Rup Narain*, A. I. R. (1925) All. 34.

S. 60

met by an agreement for pre-emption, which under section 54 confers no right to immoveable property, especially when a suit to enforce the right for pre-emption is barred under article 10 of the Limitation Act (v).

Postponement of redemption.—By itself this is not a clog on the equity of redemption (w), unless such a condition be intended to defeat or exclude redemption, in which case it cannot be enforced, as where a mortgage for 40 years was to be redeemed on a particular day, failing which, it was to be renewed for another term of 40 years (x); or when on failure to redeem at the end of five years, it was not to be redeemed for another 12 years (y). But where on the mortgagor failing to redeem at the end of 21 years, the mortgagee was to remain in possession so long as fruit-bearing trees remained on land, the Court gave relief to the mortgagor under the special provisions of the Deccan Agriculturists' Act (z).

Foreign lands.—This doctrine of clog on the equity of redemption applies equally to mortgage of foreign lands. If A by an English contract agreed to give a mortgage upon land in a foreign country, the law of which country does not recognize the existence of what we call an equity of redemption, and if a mortgage was given and duly perfected according to the *lex situs*, our Courts could restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage, in the sense in which that word is used by us. In doing this, the Courts would not interfere with *lex situs*, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. An English contract to give a mortgage on foreign land, although a mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage, which between the parties, is to be treated as an English mortgage, subject to such rights of redemption and such equities, as the law of England records as necessarily incident to a mortgage (a). The *prima facie* rule in such cases is, that the law of the place where the contract was executed is the proper law (b), based on decisions, that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British Dominions, this Court will hold the same jurisdiction as if they were situated in England (c). This equitable rule against clogging the equity of redemption of a mortgage applied to an English contract for issue of debentures to secure a loan and could be enforced against a contracting party in the jurisdiction although the floating security to be created by the debentures comprised foreign land where the clog doctrine was possibly not recognized (d).

Anomalous mortgages.—These are also within the clog rule (e).

Reasonable notice.—This means that the notice to be given to the mortgagee, must give him reasonable time to make his arrangements. In a mortgage deed it is usual to insert a stipulation as to this, if the moneys are not paid on the due date fixed by the mortgage. As a matter of practice and not of law three months have come to be regarded as reasonable time so that even if the mortgage deed should contain no provision, the mortgagee would be entitled to such time. Notice

(v) *Visvanathan v. Ethirajulu*, A. I. R. (1924) Mad. 57.

(w) *Narsingh v. Rupan*, A. I. R. (1929) All. 388.

(x) *Sarbdawan Singh v. Bijai Singh* (1914) 36 All. 551.

(y) *Muhammad Sher Khan v. Raja Seth Swami* (1922) 44 All. 185, 49 I. A. 60.

(z) *Genu v. Narayan* (1921) 45 Bom. 117.

(a) *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* (1910) 2 Ch. D. 502.

(b) *Peninsular and Oriental Steam Navigation Co. v. Shand* (1865) 3 Moo. P. C. (N. S.) 290.

(c) *Cranstown v. Johnston* (1800) 5 Ves. 277, 31 E. R. 586.

(d) *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* (1910) Ch. 502.

(e) *Mohammad Sher Khan v. Seth Swamy Dayal* (1922) 44 All. 185, 49 I. A. 60; *Chellakutti v. Vengappa*, A. I. R. (1925) Mad. 366.

must be reasonable in point of time (f). What is reasonable time, is stated in section 46 of the Contract Act. In each case it is a question of fact. Decided cases can hardly be of any importance. In England, however, the rule is to give six months' time. There is no law which compels him to do so (g). In default of payment of the mortgage-money on the date fixed in the mortgage deed for repayment, the mortgagor is at liberty to do one of two things, either give six months' notice to pay off the mortgagee, or give six months' interest in lieu of notice (h). In the case, however, of an equitable mortgage by deposit of title-deeds accompanied by a memorandum, the mortgagee is not entitled to six months' notice nor to interest in lieu thereof, the idea being that a mortgage by deposit of title-deeds is a temporary loan, whereas in the case of a regular mortgage, the loan is of a permanent character. If, however, the just inference from the transaction be that the loan is temporary, then it is not reasonable to infer that notice was intended to be given (i). The rule of giving six months' notice or in default six months' interest in lieu thereof, applies even when the mortgagee has required payment on a particular day and the money is not paid on that day (j). But this rule is relaxed where before expiration of the period of notice, some correspondence takes place as regards execution of the reconveyance, and the matter is delayed thereby and a week after date, on which payment ought to have been made according to the notice, the mortgagor tendered principal and interest, which the mortgagee refused to accept on the ground that he must give further notice of six months or pay interest for six months in lieu of notice; for such a tender is good and no fresh notice is required or interest for six months in lieu thereof, but in such a case the money must be actually kept dead from the date of tender to the date of actual payment, otherwise interest will be allowed (k). But where mortgagee consents to be paid moneys out of fund in Court, and the failure to redeem is caused by delay in drawing up the order which extends the period of payment to the mortgagee beyond the date mentioned by the notice given by the mortgagor to the mortgagee, then the mortgagor is not bound to give a fresh notice or additional interest, because the mortgagee by accepting the order, assents to the payment out of fund in Court, subject to all contingencies to which the order might be subjected to in completing (l).

Loss of right by mortgagee to notice.—The right to reasonable notice which is given to the mortgagee by the section, is lost if the mortgagee takes action to enforce the security and although notice may be given to him and accepted by him after the action. He is bound to accept payment of the money when tendered with interest upto date of payment, although such payment was made before the expiration of the notice (m). And where a mortgagee has demanded payment of his mortgage debt or taken steps to compel payment of it, he is not entitled to notice or interest in lieu of notice, whether the time fixed for payment for redemption by the mortgage deed has expired or not, and this rule applies equally well where the mortgagee has entered into possession, entry being in effect a demand for payment (n). But where in an administration action, property was ordered to be sold free from the mortgage debt, with the consent of the mortgagee, the latter was held

(f) *Davies v. Davies* (1890) 36 Ch. D. 359.

(g) *Browne v. Lockhart* (1840) 4 Jur. 167, 59 E. R. 678.

(h) *Johnson v. Evans* (1889) 61 L. T. 18 C. A.

(i) *Fitzgerald Trustee v. Mellerish* (1892) 1 Ch. 385.

(j) *Barlett v. Franklin* (1867) 17 L. T. 100.

(k) *Edmondson v. Copland* (1911) 2 Ch. 301; *Cromwell Property Investment Co., Ltd. v. Western* (1934) 150 L. T. 335.

(l) *Re. Moss, Levy v. Sewill* (1885) 31 Ch. D. 90.

(m) *Re. Alcock, Prescott v. Phipps* (1883) 23 Ch. D. 372.

(n) *Bovill v. Endle* (1896) 1 Ch. 648.

S. 60 entitled to six months' notice from the date of his consent, if paid within that time and to interest to the date of payment, if paid afterwards out of the sale proceeds of the sale (o). And there is no difference whether the sale be out of Court or by the Court, so long as the mortgagee's consent is given (p). A proviso for a longer period of notice, say 12 months, contained in the deed, can be waived by the mortgagee consenting to the sale (q). The rule as to interest in lieu of notice does not apply, if the mortgagee of his own motion, releases the mortgaged property (r).

Redemption indivisible.—The following rules are deducible from the authorities :

1. The general rule is that a mortgage is one and indivisible and a mortgagor should not be allowed or permitted to break up its integrity and cause depreciation of the mortgagee's security by partial redemption (s) and the same rule applies where the mortgage is made to two mortgagees as tenants in common (t). A contrary rule would lead to different proportions of value to be struck in different suits and the utmost confusion and embarrassment would be created (u). This rule is for the protection of the mortgagee.

2. A mortgagor of an undivided share may offer to redeem (v) or may redeem the whole (w) even against the will of the mortgagee (x). It is for the mortgagee to object to such redemption, so that the equities may be investigated (y).

3. But a mortgagor of an undivided share in the mortgaged property cannot redeem his own share only on payment of a proportionate part of the amount due on the mortgage, nor a purchaser or assignee from him (z).

4. Where the integrity of the mortgage is broken up by a mortgagee acquiring in whole or in part the share of a mortgagor, the indivisible character of the mortgage is destroyed and thereupon any mortgagor (a), or a purchaser from him (b), may redeem his own share only on payment of a proportionate part of the mortgage-money. He cannot redeem the remainder of the mortgaged property against the wishes of the mortgagee.

- (o) *Day v. Day* (1862) 31 Beav. 207, 54 E. R. 1142; *Re. Fowler, Bishop v. Fowler* (1922) 128 L. T. 620.
 (p) *Day v. Day* (1862) 31 Beav. 207, 54 E. R. 1142.
 (q) *Re. Fowler, Bishop v. Fowler* (1922) 128 L. T. 620.
 (r) *Banner v. Berridge* (1881) 18 Ch. D. 254.
 (s) *Hall v. Heward* (1886) 32 Ch. D. 430; *Yadalli Beg. v. Tukaram* (1921) 48 Cal. 22, 47 I. A. 207; *Huthasanan v. Parameswaran* (1899) 22 Mad. 209.
 (t) *Sunitibala v. Dhara Sundari* (1920) 47 Cal. 175.
 (u) *Nilakant v. Suresh Chandra* (1886) 12 Cal. 414, 423, 12 I. A. 171, 181.
 (v) *Mirza Yad Ali v. Tuka Ram* (1921) 48 Cal. 22, 47 I. A. 207.
 (w) *Chaudri Ahmed v. Seth Raghubar* (1906) 28 All. 1, 17, 32 I. A. 229; *Shankar v. Bhikaji* (1929) 53 Bom. 353; *Rugad Singh v. Sat Narain* (1904) 27 All. 178.
 (x) *Fakir Chand v. Babu Lal* (1917) 39 All. 719; *Huthasanan v. Parameswaran* (1899) 22 Mad. 209.
 (y) *Sri Kanta v. Jag Sah* (1924) 3 Pat. 818; *Huthasanan v. Parameswaran* (1899) 22, Mad. 209.

- (z) *Yadalli Beg v. Tukaram* (1921) 48 Cal. 22; 47 I. A. 207; *Pranballabh v. Bhagabanchandra* (1934) 61 Cal. 894; *Kuppusami v. Papathi Ammal* (1898) 21 Mad. 369; *Nainappa v. Chidambaram* (1898) 21 Mad. 18; *Huthasanan v. Parameswaran* (1899) 22 Mad. 209.
 (a) *Kuray Mal v. Puran Mal* (1879) 2 All. 565; *Kallan Khan v. Mardan Khan* (1906) 28 All. 155; *Azimut Ali v. Jowahir Singh* (1870) 13 M. I. A. 404; *Girish Chunder v. Juramoni De* (1900) 5 C. W. N. 83; *Munshi v. Daulat* (1907) 29 All. 262; *Jai Gobind v. Abhairaj, A. I. R.* (1924) Oudh 40; *Zaibun-Nissa v. Parbhu Narain* (1917) 39 All. 618; *Ahmad Husain v. Muhammad Qasim* (1926) 48 All. 171; *Jagannath Kunwar v. Jaipal* (1933) 55 All. 359; *Dina Nath v. Luchmi Narain* (1903) 25 All. 446; *Kudhai v. Sheo Dayal* (1888) 10 All. 570; *Rathna Mudali v. Perumal* (1915) 38 Mad. 310; *Debendra Nath v. Mirza Abdul Samad* (1909) 10 C. L. J. 150.
 (b) *Subramanyan v. Mandyan* (1886) 9 Mad. 453; *Marana v. Pendyala* (1880) 3 Mad. 230; *Raghunath v. Sadhu Saran, A. I. R.* (1925) Pat. 31; *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7.

5. One of several coparceners may redeem the whole, leaving it to the mortgagee, who has purchased a portion of the equity of redemption, to have his rights ascertained and defined in a suit for partition (c).

6. The exception only applies when the integrity of the mortgage is broken by the mortgagee, or where there are more mortgagees than one, by all of them as a body acquiring in whole or in part the share of a mortgagor (d); otherwise the mortgagor must redeem the whole mortgage. A sub-mortgage does not destroy the integrity of the mortgage. To effect a merger, the two rights must be co-extensive. The proviso is by no means exhaustive and there are cases where piecemeal redemption is permitted as, for instance, (a) where the mortgagee does not insist on keeping the security entire, or (b) where the original mortgage itself recites that the mortgagors joined together in mortgaging their separate shares, or (c) where a Hindu father mortgages joint family property partly for legal necessity, when the sons on payment of a part of the consideration supported by necessity, may redeem the whole. The fusion of these two rights may also take place by foreclosure (e), by purchaser at an execution sale (f), by inheritance (g).

7. The rule does not apply where the mortgagee having acquired ownership of a portion has deprived himself of the protection afforded by the section, nor does it apply when the mortgage is invalid (h).

8. A holder of a part of the mortgaged property on payment of the mortgage debt can exact contribution from his co-mortgagor (i).

9. Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part, but where the rights of the mortgagor are vested partly in a purchaser from a prior mortgagee, and partly in a purchaser from a subsequent mortgagee, after a suit had been brought by each of them to enforce his mortgage, the former cannot be compelled to redeem the whole nor can the latter be compelled to give up his interest in the share of the mortgagor which he has acquired (j).

10. An assignee of a portion of the equity of redemption is entitled to deposit the whole of the mortgage debt under section 83 of the Transfer of Property Act, even though the mortgagee has purchased the equity of redemption in some of the mortgaged properties, and upon such deposit or tender, he becomes entitled to all the mortgagee's rights, including his right to possession, if he is a mortgagee in possession, of the whole of the mortgaged properties, including those purchased by the mortgagee (k).

11. The integrity of the mortgage is not destroyed by the mortgagee allowing a release of a portion of the mortgaged property on receipt of proportionate amount due on such property (l). A contrary view was taken in earlier cases (m). And where different persons by the mortgagee's act have become interested in fragments of the equity of redemption, the mortgagee is not entitled to throw the burden of

(c) *Bhikaji v. Lakshman* (1891) 15 Bom. 27.

(d) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7; *Jagmohan Singh v. Harbans Singh*, A. I. R. (1925) Oudh 609; *Mohan Lal v. Prasadi Lal* (1923) 45 All. 46; *Mahtab Rai v. Sant Lal* (1883) 5 All. 276.

(e) *Brij Kishore v. Madho Singh* (1906) 28 All. 279.

(f) *Ariyaputri v. Alamelu* (1888) 11 Mad. 304.

(g) *Zafar v. Zubaida*, A. I. R. (1929) All. 604; *Hamida Bibi v. Ahmed Husain* (1911) 31 All. 335.

(h) *Maung Tun Ya v. Maung Aung Dun*, A. I. R. (1925) Rang. 1.

(i) *Chagandas v. Gansing* (1896) 20 Bom. 615; *Jagat Narain v. Qutub Husain* (1880) 2 All. 807.

(j) *Amba Prasad v. Wahid-Ullah* (1922) 44 All. 708.

(k) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7.

(l) *Ali Jan v. Majid-ud-din* (1923) 45 All. 524; *Lachmi Narain v. Muhammad Yusuf* (1895) 17 All. 63.

(m) *Marana Ammanna v. Pendyala Perubotulu* (1881) 3 Mad. 230; *Subramanyan v. Mandayani* (1886) 9 Mad. 453; *Hari Kisen v. Velial Hossein* (1903) 30 Cal. 755.

S. 60 the entire mortgage debt on a portion of the mortgaged property (n). The transferee of a portion of the equity of redemption is not entitled to redeem his portion only, although subsequent to his purchase, the mortgagee released from the mortgage, some other of the mortgaged properties, unless it is proved that before such partial release, the mortgagee had knowledge of the transfer (o). The anomalies to which the latter decisions have given rise, are now set at rest by the addition of the word "only" in this proviso. A *zuripeshghee* mortgagee till repayment of the whole amount due to him, is entitled to retain the property but he is open to receive a proportionate amount and release a portion of the property (p). But if the *zuripeshghee* mortgagees take possession of the property in moieties, that circumstance will not enable the mortgagor to claim redemption piecemeal (q).

12. A redeeming co-mortgagor has a charge under section 95 on the share of each of the other co-mortgagors for his proportion of the expenses properly incurred.

Land taken in exchange is subject to the mortgagor's right to redeem.—Where a mortgaged property, as a result of acquisition or purchase or otherwise, is given in exchange for other lands, the mortgagor has a right to redeem the land so taken in exchange (r).

Equity of redemption not to be sold except to a responsible person.—A covenant in a mortgage deed, by which the mortgagor covenanted not to sell the equity of redemption except to a responsible person, is a special and unusual covenant and one which must hamper the mortgagor to an unreasonable extent. Such a covenant was found in the undermentioned case which was decided on another ground (s).

Title-deeds lost by mortgagee.—A decree for redemption directed the mortgagee to reconvey the mortgaged property and deliver up the title-deeds upon payment of the amount by the mortgagor. The mortgagee being unable to deliver the title-deeds as they were lost, an order directing him to furnish security for the value of the property, before withdrawing the amount from the Court, was held not maintainable as there was no such direction in the decree (t).

Purchase by mortgagee.—On this subject the authorities lead to the following conclusion:—

1. A mortgagee cannot, properly in execution of a simple decree for money, the repayment of which is secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged; but if he does so, and purchases it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title (u). It will be ordered to be resold (v). In this behalf reference may be made to sections 68 (2) and 69 (4) of the Act.

2. Leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser (w). Leave will be granted if other modes of sale have proved abortive (x).

(n) *Budmul Kevalchand v. Rama* (1920) 44 Bom. 223; *Imam Ali v. Baij Nath* (1906) 33 Cal. 613; *Mayashankar v. Burjorji* (1925) 27 Bom. L. R. 1449; *Ponnusami Mudaliar v. Srinivasa* (1908) 31 Mad. 333.
(o) *Pranballabh v. Bhagabanchandra* (1934) 61 Cal. 894.
(p) *Hurrechur Singh v. Dabee Sahay* (1884) W. R. 260.
(q) *Shaikh Imam Ali v. Oograh Singh* (1874) 22 W. R. 262.

(r) *Babaji v. Magniram* (1897) 21 Bom. 396.
(s) *Davis v. Symons* (1934) 1 Ch. 442.
(t) *Subbaraya Iyer v. Padhmanabha Vadhyar* (1896) 12 M. L. J. 63.
(u) *Kamini Debi v. Ramlochan Sirkar* (1870) 5 Beng. L. R. 450; *Sardar Singh v. Ratan Lal* (1914) 36 All. 516.
(v) *Sidney v. Ranger* (1841) 12 Sim. 118.
(w) *Mahabir Pershad v. Macnaghten* (1889) 16 Cal. 682.
(x) *Tennant v. Trenchard* (1869) 4 Ch. 537.

3. When a mortgagee of several properties mortgaged, has purchased the equity of redemption in one of the properties, sold in execution of a money decree of a third person, that property is freed from the liability to be redeemed (*y*). The decision in *Martand v. Dhondo* (*z*) can no longer be considered as an authority after the decision in *Khairajmal v. Daim* (*a*). The same rule applies when the purchase is made in execution of sale under a mortgage decree, where the purchaser is not the execution creditor (*b*).

4. Section 99 recognized the principle of equity that a mortgagee could not, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself, of his obligation as mortgagee or deprive the mortgagor of his right to redeem (*c*). It is now settled that a sale in contravention of that section is not void but voidable (*d*). Hence where a mortgagee has in contravention of section 99 (now repealed) of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside (*e*). Section 99 of the Transfer of Property Act has now been replaced by the less comprehensive rule in O. 34, r.14 of the Code of Civil Procedure, 1908.

5. Proceedings to set aside must be taken under section 47 of the Civil Procedure Code and not by separate suit and must be before the confirmation (*f*). After confirmation the equity of redemption is extinct (*g*).

6. In the absence of fraud, on the principle laid down in section 82, the purchase by a mortgagee at a Court sale of the equity of redemption in some items of the mortgaged properties, discharges a portion of the mortgage debt, which bears the same ratio to the whole mortgage debt, as the value of those items bears to the value of all the mortgaged properties (*h*).

7. A mortgagee cannot purchase mortgaged property sold for arrears of revenue owing to his default and the equity of redemption subsists (*i*); nor would it make a difference where another had shared responsibility (*j*). It is otherwise where the mortgagee is not to be blamed for the forfeiture incurred and consequent purchase by him (*k*).

8. A sale by a mortgagor to a mortgagee is governed by the same principle as one between strangers and cannot be impeached except on the ground of fraud or undue pressure (*l*). The onus lies on the party alleging fraud (*m*). And the rule that a trustee cannot purchase from his *cestui que trust* does not apply (*n*). The right to set aside the sale may be purchased from the mortgagor or his assignee (*o*).

- (*y*) *Siddeshwar v. Ganpatrao* (1926) 50 Bom. 331;
Ikkotha v. Chakkiamma (1903) 27 Mad. 428.
- (*z*) (1897) 22 Bom. 624.
- (*a*) (1904) 32 Cal. 296.
- (*b*) *Sesha Ayyar v. Krishna* (1901) 24 Mad. 96.
- (*c*) *Khairajmal v. Daim* (1904) 32 Cal. 296, 316.
- (*d*) *Asutosh Sikdar v. Behari Lal* (1908) 35 Cal. 61, 32 I. A. 23; *Kishan Lal v. Umrao Singh* (1908) 30 All. 146; *Muhammad Abdul v. Dilsukh Rai* (1905) 27 All. 517.
- (*e*) *Uttam Chandra v. Rajkrishna* (1920) 47 Cal. 377-410.
- (*f*) *Izhuvan v. Izhuvan* (1907) 30 Mad. 313;
Kishan Lal v. Umrao Singh (1908) 30 All. 146; *Ashutosh v. Behari Lal* (1908) 35 Cal. 61, 32, I. A. 23.
- (*g*) *Lal Bahadur v. Abharan* (1915) 37 All. 165;
Dharnikota v. Budhraru (1907) 30 Mad. 362;
Raja Jagdischandra v. Bhubaneswar (1922) 27 C. W. N. 38.
- (*h*) *Ponnambala v. Annamalai* (1920) 43 Mad. 372;

- Bisheshur Dial v. Ram Sarup* (1910) 22 All. 284; *Lakshmidas v. Jamnadas* (1898) 22 Bom. 304; *Nyaunglebin Co-operative Bank v. Maung Ba U*, A. I. R. (1928) Rang. 266.
- (*i*) *Jaikaran Singh v. Sheo Kumar Singh* (1928) 50 All. 36; *Nawab Sidhee v. Rajah Ojoodhyaram* (1866) 10 M.L. A. 540; *Kalappa v. Shivaya* (1896) 20 Bom. 492; *Babaji v. Magniram* (1897) 21 Bom. 396.
- (*j*) *Ram Kishore v. Jagannath*, A. I. R. (1934) Pat. 307.
- (*k*) *Abdul Rehman v. Vinayak* (1927) 29 Bom. L. R. 1056.
- (*l*) *Knight v. Marjoribanks* (1849) 2 Mac. & G. 10; *Ford v. Olden* (1867) 6 Eq. 461.
- (*m*) *Melbourne Banking Corporation v. Brougham* (1882) 7 A. C. 307.
- (*n*) *Melbourne Banking Corporation v. Brougham* (1882) A. C. 307.
- (*o*) *Melbourne Banking Corporation v. Brougham* (1882) A. C. 307.

S. 60A

60A. (1) *Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a retransfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.*

Obligation to transfer to third party instead of retransference to mortgagor.

(2) *The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.*

(3) *The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.*

The section.—The section is new, having been added by Act 20 of 1929.

Paragraph 1.—A mortgagee's right to transfer the mortgage debt and security has never been denied and this he can do either by assignment of the debt or by creating a sub-mortgage. Prior to the 1st of July 1929 a mortgagor had no power to compel his mortgagee to assign the mortgage debt and transfer the mortgaged property to a third person as he may direct. All that the mortgagor could compel him to do was to retransfer the mortgaged property to him or to such third person as he may direct under section 60 of the Transfer of Property Act. It is only when the mortgagor is entitled to redeem, that power is given to him to require the mortgagee, instead of reconveying and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor may direct (*p*). The section applies to mortgages made either before or after the commencement of Act XX of 1929.

Paragraph 2.—This paragraph deals with the rights of encumbrancers, viz., where there are several encumbrancers the right to call for a transfer lies not only with the mortgagor, as in para 1, but also with any encumbrancer, subject, however, that the requisition of an encumbrancer shall prevail over that of a mortgagor and as between two or more encumbrancers the right to call for a transfer shall be determined according to their priority (*q*).

Paragraph 3.—By this paragraph it is enacted that a mortgagor cannot call upon the mortgagee who is or has been in possession, to assign the mortgage debt and to transfer the mortgaged property, for a mortgagee in possession being an accounting party and being liable to render accounts, it would be imprudent and unsafe for him to assign the mortgage debt and transfer the mortgaged property

(*p*) Conveyancing Act, 44 & 45 Vic., c. 41, sec. 15 (1).

(*q*) Conveyancing Act, 45 & 46 Vic., c. 39, sec. 12.

unless his accounts are passed, and even in case the mortgagor or a subsequent encumbrancer dispenses with the rendering of accounts by the mortgagee, still, such a mortgagee would be liable at the instance of any other party entitled in the equity of redemption (r).

How is the transfer to be effected.—The transfer may be made either with or without the mortgagor as party. It must be, however, in writing and registered, but attestation as required by section 59 is not necessary (s). The transfer may be subject to the old equity of redemption, or if the parties so choose, to a new equity of redemption, the mortgagor being made a party to the transfer. If the mortgagor joins, it is usual to make him enter with the transferee into a covenant for payment of debt and interest which may accrue. The transferee takes subject to equities and it is, therefore, in practice always prudent to join the mortgagor or obtain from him an admission as to the state of the accounts, otherwise the transferee would be bound by the state of accounts between the mortgagor and the transferor (t). If interest be in arrears, the arrears are assigned as principal and carry interest according to the rate in the mortgage (u). Usually it is expressed that the full benefit of all powers, rights, remedies and securities in the mortgage are included together with the power of sale and other remedies. Such words are, however, not necessary.

Arrears of rent.—On an assignment of a mortgage, arrears of rent do not pass to the transferee unless specially included (v).

Transfer of part of mortgage debt.—It is sometimes desired to transfer a part of the mortgage debt together with part of the mortgaged property. As the mortgagee's power of sale, foreclosure, etc., cannot be divided, the only way of carrying out such a transaction in the absence of the mortgagor is either to transfer the entire debt and property to a trustee for both parties, or merely to take a declaration of trust of part of the debt from the mortgagee himself. In either case the document should state whether the parties are to rank *pari passu* or one after the other (w).

Separate assignment.—The mortgage comprises both the debt and the property. Either may be assigned or conveyed separately. A mortgagee who has assigned his mortgage debt with a reservation of the security is entitled to foreclose (x). A transfer of the property without the debt is impossible, for an estate can never be taken except by payment of the debt, as a mortgage cannot pass to one person and yet the debt remain in another (y).

Transfer of equitable mortgage by deposit.—See commentaries on section 58 (f).

Costs.—The section says nothing about costs. Where the transfer is made without the privity of the mortgagor, costs must be borne by the mortgagee (z). If, however, the transfer is made at the request of the mortgagor, the costs must be borne by the mortgagor. He can require the mortgagee to transfer on the terms on which he would be bound to reconvey, which under section 60 of this Act includes payment of costs by him.

(r) Conveyancing Act, 44 & 45 Vict., c. 41, sec. 15 (2).

(s) *William Arratoon Lucas v. Bank of Bengal* (1926) 31 C. W. N. 179 P.C.

(t) *Turner v. Smith* (1901) 1 Ch. 213; *Mathews v. Wallwyn* (1798) 4 Ves. 118, 31 E. R. 62; *Bateman v. Hunt* (1904) 2 K. B. 530.

(u) *Agnew v. King* (1902) 1 L. R. 471.

(v) *Salmon v. Dean* (1851) 15 Jur. 641, 42 E. R. 293.

(w) *Encyclopædia of Forms and Precedents*, 2nd Ed., Vol. 10, p. 52.

(x) *Morley v. Morley* (1858) 25 Beav. 253-53 E. R. 633.

(y) *Jones v. Gibbons* (1804) 9 Ves. 407, 411, 32 E. R. 659.

(z) *Re Radcliffe* (1856) 22 Beav. 201, 52 E. R. 1085; *Sevell v. Bishopp* (1893) 62 L. J. Ch. 985.

Ss. 60A-
60B

Stamp duty.—On a transfer of mortgage under article 62 (c) (ii) of the Stamp Act the stamp duty is a fixed amount varying in the different provinces of India. The amount fixed by the Stamp Act, however, only relates to the principal amount secured, as the definition of mortgage deed in section 2, sub-section (17), indicates, so that where a transfer of mortgage comprises arrears of interest due on the former mortgage an *ad valorem* mortgage duty will have to be paid on the amount of interest, plus the duty on the transfer on a further advance; if the old equity be extinguished and a new equity of redemption created, the instrument would be treated as a transfer of mortgage to the extent of the old debt and an *ad valorem* duty will have to be paid on the fresh advance (a). And an instrument comprising a transfer of mortgage and a security for fulfilment of certain duties would be liable to a fixed duty under article 62 (c), and the duty in respect of the other portion of the instrument would be fixed according to the article to which it applies (b). And so on a transfer of mortgage which included an agreement to lend money for improvement, additions and repairs was charged with a fixed duty for the transfer of mortgage and as for an agreement to lend money (c). Where part of the mortgage debt is paid and the transfer is for the balance, the old equity of redemption being extinguished, the instrument is chargeable only as a transfer of mortgage and not as a release of the former mortgage and for the amount transferred (d).

60B. *A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.*

*Right to inspection
and production of documents.*

Addition to the law.—This section which is new, has been added by section 23 of the Amending Act, XX of 1929. Thus the Legislature has supplied a long-felt want inasmuch as the debtor having once mortgaged his property had no means whereby he could compel the mortgagee to produce the document for inspection even if he wanted to obtain a new loan to repay the creditor or sell the property and the result was that the mortgagee was in a position to crush the mortgagor by withholding inspection, a privilege which many mortgagees have in the past exercised to the ruin of the already oppressed debtor. The section has been modelled on section 96 of the Law of Property Act, 1925, which re-enacts with slight modification, section 16 of the Conveyancing and Law of Property Act, 1881. It is not, however, clear whether a person having a charge is entitled to enjoy the rights of the mortgagor conferred by this section. According to the Law of Property Act, 1925, section 205, sub-section 1 (XVI) "mortgage" includes any charge or lien on any property for securing money or money's worth and "mortgagee" includes a charge by way of legal mortgage.

Law prior to the amendment.—Before the present section was introduced into the Act the mortgagee was not obliged to produce the deeds as he could not be

(a) *Wale v. Inland Revenue Commissioners* (1879) 41 L. T. 165.

(b) *McDowell v. Ragava Chetty* (1904) 27 Mad. 71.

(c) *The Hitwardha Cotton Mills Co., Ltd. v.*

Sorabji Dinshaw Karaka (1909) 33 Bom. 426.

(d) *Humphreys v. Inland Revenue Commissioners* (1899) 81 L. T. 199.

compelled to shew his title (*e*) until payment of principal and interest (*f*) even though he be a trustee and executor and mortgagee of part of the estate (*g*). But a mortgagee was compelled to produce the mortgage deed for the purpose of inspecting an endorsement on the instrument (*h*). The general rule between mortgagor and mortgagee is, that when the mortgagor comes offering to redeem, the mortgagee is not bound to produce his deed till he is paid (*i*) and when mortgagor impeached the mortgage (*j*) or paid into Court the largest sum due (*k*), this was considered insufficient. This privilege of the mortgagee to refuse inspection applies to drafts and copies (*l*).

Mortgages executed prior to 1st April 1930.—By section 63 of Act XX of 1929, a retrospective effect has been given to this section so that mortgagors of documents executed prior to 1st April 1930 would be entitled to the benefit of this section.

A limited right.—The right conferred by this section on the mortgagor is limited by the words “as long as his right of redemption subsists.” The right of redemption subsists only during the period of redemption so that if the contractual period has elapsed the mortgagor cannot compel the mortgagee to produce the documents or give the requisite inspection. To limit the right to the contractual period could hardly have been the intention of the Legislature but the judicial interpretation given to the words “the right to redeem” is against the mortgagor claiming inspection after the contractual period. The distinction between right of redemption and equity to redeem has already been pointed out in the commentaries to section 60. According to the Law of Property Act (*m*), section 205, sub-section 1 (XVI) “right of redemption” includes an option to repurchase only if the option in effect creates a right of redemption.

Custody or power.—Statutory right to compel production applies to documents in the custody or power of the mortgagee. If the documents are pledged by the mortgagee, he will nevertheless be compelled to produce them (*n*). But where a defendant admitted that documents were in his solicitor's hands, having come to them as the representatives of the solicitors of the defendant's testator, and swore that they were not “in his possession or power or under his control” the Court refused to order a production (*o*).

Mortgage deed.—A distinction is, however, made in the case of the mortgage deed with regard to which it has been held that a mortgagee is always bound to produce it for inspection of the mortgagor (*p*). This view has never been acted upon (*q*).

Mortgagee of remainderman.—A mortgagee of a remainderman whose estate is vested, not contingent, may maintain a bill against the tenant for life, for the sole purpose of production and inspection of the title-deeds and documents relating to the estate. If the tenant for life suggests that the purpose for which production is required is improper, the onus is on him to shew it. This right, however, only

(*e*) *Bycroft v. Sibel* (1852) 20 L. T. O. S. 197;
Smith v. Pawson (1855) 25 L. T. O. S. 40.
(*f*) *Brown v. Lockhart* (1840) 10 Sim. 420, 59
E. R. 678; *Jhonston v. Tucker* (1847) 11
Jur. 382.
(*g*) *Freeman v. Buller* (1863) 33 Beav. 289, 55
E. R. 379.
(*h*) *Phillips v. Evans* (1843) 2 Y. & C. Ch. cases
647, 63 E. R. 290.
(*i*) *Cannock v. Jauncey* (1853) 1 Drew. 497, 61
E. R. 542.

(*j*) *Crisp v. Platel* (1844) 8 Beav. 62, 50 E. R. 24.
(*k*) *Senhouse v. Earl* (1752) 2 Ves. Sen. 450, 28
E. R. 287.
(*l*) *Agnew v. King* (1902) 1 I. R. 471.
(*m*) 15 Geo. 5, Ch. 20.
(*n*) *Rogers v. Rogers* (1842) 6 Jur. 497.
(*o*) *Palmer v. Wright* (1846) 10 Beav. 234, 50
E. R. 572.
(*p*) *Parch v. Ward* (1865) 13 L. T. 496.
(*q*) *Couler v. Hubback* (1876) 24 W. R. 354.

Ss. 60B-61 exists when the title of the remainderman is undisputed; for, if there be a reasonable cause for litigating his title, he cannot compel production (r).

Surprise and fraud.—Where pressure and surprise were alleged against a solicitor mortgagee he was compelled to produce the mortgage deed in a suit to set aside the mortgage (s). Fraud must not only be alleged, but the pleadings must state that the deed proves the fraud (t).

Joint possession.—In a mortgage of leasehold, where the lessor is not possessed of the counterpart, the mortgagee will be compelled, in an ejectment action, on forfeiture, to allow inspection and give a copy of the lease (u). So also trustees and executors in an administration action must produce, though the mortgagors object (v). In case of joint possessors, one of whom is not a party to the action, the Court will not compel production (w).

Mortgagee's right to demand inspection.—No provision is made in the section for a mortgagee claiming redemption to demand inspection of a prior mortgagee, so that any such mortgagee is not entitled to claim such production and inspection. He may, however, claim this right through a mortgagor who would naturally be willing to give him the benefit of the section as by redeeming the prior mortgagee the subsequent mortgagee prevents the mortgaged property from sale. But it seems that such a question can hardly arise for a subsequent mortgagee cannot claim to redeem during the period of redemption of the prior mortgagee and the section only gives the right to demand production and inspection so long as the right of the mortgagor to redeem subsists.

61. A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

Right to redeem separately or simultaneously.

Old section.—A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Substitution of new section.—For section 61 of the Act and the illustration thereto the present section has been substituted by the Amending Act, 20 of 1929.

Changes in the section.—The section as it originally stood allowed a mortgagor to redeem any one mortgage without paying any money due under any separate

(r) *Noel v. Ward* (1878) 1 Mad. 322; *Davis v. Dysart (Earl)* (1855) 20 Beav. 405, 52 E. R. 659.

(s) *Davis v. Parry* (1857) 27 L. J. Ch. 294.

(t) *Dendy v. Cross* (1848) 11 Beav. 91, 50 E. R. 751.

(u) *Doe d'Morris v. Roe* (1836) 1 M. & W. 207,

150 E. R. 408.

(v) *Gough v. Offley* (1852) 5 De. G. & Sm. 653, 64 E. R. 1285.

(w) *Coomes v. Hayward* (1913) 1 K. B. 150; *Kearsley v. Phillips* (1883) 10 Q. B. D. 465 followed.

mortgage made by him on property other than that comprised in the mortgage which he sought to redeem. Fortified with these words and the illustration to the section, the High Court of Madras (x) held that when two mortgages were executed in favour of the same person relating to the same property the mortgagee could consolidate them and refuse to be redeemed as to one of such mortgages only. The High Courts of Bombay (y) and Calcutta (z) adopted the same view. But the Allahabad High Court (a) took the opposite view which was followed subsequently by the Madras High Court (b). To set at rest this conflict of decisions, the section has been amended and the illustration as well as the concluding portion omitted. The amendment to the section has been made so that all consolidation, even in a case where the mortgagor and mortgagee are the same persons and the property is the same, is abolished. The change was made in consequence of the decision of the Judicial Committee that section 61 enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property (c).

What is consolidation.—Consolidation is that when a mortgagor comes into a Court of Equity to redeem his property, and the Court says, "You shall not do this, if the mortgagee has another debt due from you, which is secured upon an insufficient security. You must pay both debts; if not, you cannot redeem either property" (d). Treating the section as for a moment out of the way, the law is settled that when the owner of different properties mortgages them to different individuals and such mortgages afterwards become united in title, the person in whose hands the fusion has taken place has a right to consolidate them and to refuse to be redeemed as to one without payment of what is due to him on all, and this not only against the mortgagor but also against a person to whom the mortgagor has assigned, and this may be exercised by the transferee of the mortgagee as well as by the original mortgagee, and may be exercised in respect of equitable mortgages as well as by a mortgagee holding the legal estate, and on the other hand it may be asserted not only against the mortgagor but also against the assignee of the equity of redemption from the mortgagor, and even against an assignee whose assignment has become united in title. The right of consolidation is, however, taken away where a contrary intention is not expressed in the mortgage deeds or one of them (e). The principle is "he who comes into equity must do equity." If the mortgagor comes within the time limited by the deed for payment the equitable doctrine has no application, but if he has allowed that time to pass, and has no legal rights, then the equitable doctrine applies (f).

English Law.—The distinction (g) in English Law pointed out in the celebrated judgment (h) of Lord Parker of Waddington between the contractual right to redeem and the equity to redeem (the latter expression being used after the fixed

(x) *Dorasami v. Venkateshchayyar* (1902) 25 Mad. 108.

(y) *Keshavram Dulavram v. Ranchhod Fakira* (1906) 30 Bom. 156.

(z) *Atab Pramanik v. Arif Tarafdar* (1914) 19 C. L. J. 590.

(a) *Khuda Baksh v. Aum-un-nissa* (1905) 27 All. 313; *Sundar Singh v. Bholu* (1898) 20 All. 322; *Tajjo Bibi v. Bhagwan Prasad* (1894) 16 All. 295.

(b) *Pangali Ramarayanimgar v. Maharaja of Venkatagiri* (1921) 44 Mad. 301, reversed *sec* (1927) 50 Mad. 180.

(c) *Panaganti Ramarayanimgar v. Maharaja of Venkatagiri* (1927) 50 Mad. 180, 54 I. A.

68; *Ram Ratan Lal v. Aditya Prasad*, A. I. R. (1928) Oudh 273.

(d) Per Cotton, L. J., *In re Raggett, ex-parte Williams* (1880) 16 Ch. D. 117; *In re Gregson, Christison v. Bolam* (1887) 36 Ch. D. 223.

(e) *Hughes v. Britannia Permanent Benefit Building Society* (1908) 2 Ch. 607; *Pledge v. White* (1896) A. C. 187; *Vint v. Padget* (1858) 4 Jur. N. S. 1122, 44 E. R. 1126.

(f) *Chesworth v. Hunt* (1880) 42 L. T. 774.

(g) See commentaries to sec. 60.

(h) *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.* (1914) A. C. 25.

S. 61 period has expired) has not been made so far in any Indian case. In this country the right of redemption is treated as one, whether arising out of contract or otherwise, though the expressions used in several sections of the Act lend colour to that distinction. The English authorities are not unmindful of this distinction. Nevertheless, those authorities on this subject have been quoted as being of assistance, when there is a contract to the contrary.

Doctrine of consolidation overthrown.—Prior to the passing of the Act, for the application of the principle it was necessary that—

- (1) the original mortgages should have been made by the same person and not by different mortgagors,
- (2) they must be united under the same title,
- (3) the default has been made in respect of them all, that is, they are all redeemable at the same time,
- (4) the moneys due under them all are legally recoverable,
- (5) none of the mortgages has ceased to exist,
- (6) the equities of redemption have not been separated before the union of the mortgages.

The section was enacted with the object, not of indicating that there might be some other restriction on the rights of a mortgagor, but of prohibiting the application of the principle of consolidation to this country, except where the parties had by contract agreed that such consolidation should take place. In England consolidation was done away with by section 17 of the Conveyancing and Law of Property Act, 1881, on which the present section is framed.

Contrary intention.—The operation of the section could be excluded by the parties expressly agreeing that the mortgages should be discharged at the same time and not at different times. The rule enunciated in this section applies only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them.

A clause excluding section 61 is a reasonable clause to insert in a mortgage, and is usually inserted by conveyancers where there is a chance of further transactions between the parties, particularly in the case of builders where there is a likelihood of several mortgage transactions occurring between the same parties. The provisions of the section, which is modelled on section 17 of the Conveyancing and Law of Property Act, 1881, are a restriction of the equitable doctrine regarding the consolidation of mortgages.

Prior to the passing of the Transfer of Property Act, in the absence of contract the right of consolidation existed. Since the passing of the Act, the Legislature has thought fit that there shall be no right of consolidation apart from contract, but that it shall be lawful for the parties to contract that such a right shall exist. The ordinary law now being that no consolidation shall be allowed unless there is an agreement to the contrary, there must be a special contract if it is desired to get rid of the ordinary law on the subject, and it must be expressed in clear unequivocal language. Where the plaintiff mortgaged freeholds by a deed which contained no provision for excluding the operation of section 17 of the Conveyancing Act and subsequent thereto, an agreement was made whereby she made an equitable mortgage of other property to the same mortgagee and signed a memorandum to execute at any time a legal mortgage with powers and provisions in the form required by the mortgagee, it was held that this covenant did not enlarge the security and that the mortgagee was not entitled to demand a legal mortgage containing a clause excluding

the operation of the section (i). A mortgage of leasehold property M. made to the defendants contained a provision that the mortgagor shall not be entitled to redeem without paying all moneys that might be secured to the mortgagees by any other mortgage executed by the mortgagor and the mortgagor afterwards mortgaged another leasehold, R., to the same defendants. A day after, the mortgagor gave a second mortgage of it to the plaintiffs of which the defendant had notice. He subsequently gave two further mortgages of different properties to the defendants. In a suit by the plaintiff as second mortgagees to redeem R., it was held that defendants as first mortgagees of R. were entitled to consolidate their prior mortgage of M. with their mortgage of R. but not the two mortgages subsequent in date to the plaintiff's mortgage (j). And where a mortgagor executed three mortgages in favour of three different persons of the same property, the third mortgage including other properties in addition, the first, which contained a clause for consolidating together with the third, became united in title with the second on the bankruptcy of the mortgagor, it was held that the trustee could not redeem the third mortgage without also redeeming the first and second (k). Similarly, where the rules of a building society provided for consolidation, it was held that a mortgagor covenanting to observe the rules, was bound, as he and his solicitor, who had a subsequent charge having notice of the covenant, took the risk of consolidation (l). In the absence of a special contract between the parties, consolidation of several mortgages and amounts under them due in the same decree is illegal (m). Two mortgages were executed on six items of property and a third mortgage was executed on the same six items along with two other items, a decree which consolidated the amounts due under all the three bonds and making all the mortgaged properties liable for the amount, was held to be contrary to the provisions of Order XXXIV, rule 2, Civil Procedure Code, and to section 61 of the Transfer of Property Act, 1882 (n). There are a number of cases prior to the amendment of the section in which it has been held, that where a mortgagor seeks redemption the only qualifications of his right are that he cannot redeem without paying money due to the mortgagee under a separate mortgage or charge upon the same property, even without a contract to this effect, or upon a different property if there is a contract to this effect (o).

Mortgage to one of two or more co-mortgagees.—Where a mortgage is made in favour of two mortgagees and a second mortgage of the same hereditaments and certain leasehold premises are made in favour of one of them, the right of consolidation does not arise, the principle being that such a right can only arise when the mortgages are vested in one and the same hand (p).

Mortgage by one of two or more co-mortgagors.—The principle is that one of several mortgagors by executing a tacking bond cannot affect the rights of his co-mortgagors to redeem. Two mortgagors executed a mortgage on the 7th May 1876, and one of them executed a mortgage on the 12th August 1891 which contained a condition that the mortgagor would not redeem it without, at the same time, redeeming the earlier mortgage. Such a condition was held to be inoperative, and

(i) *Farmer v. Pitt* (1902) 1 Ch. 954; *Whitley v. Challis* (1892) 1 Ch. 64.

(j) *Hughes v. Britania Permanent Benefit Building Society* (1906) 2 Ch. 607; *Hopkinson v. Rolt* (1861) 9 H. L. C. 514 applied.

(k) *Re. Salmon ex-parte Trustee* (1903) 1 K. B. 147.

(l) *Andrews v. City Permanent Benefit Building Society* (1881) 44 L. T. 641.

(m) *Parameswar Pandey v. Raj Kishore Prasad*, A. I. R. (1925) Pat. 59.

(n) *Parameswar Pandey v. Raj Kishore Prasad*,

(1924) 3 Pat. 829.

(o) *Aditya Prasad v. Ram Ratan* (1930) 5 Luck. 365, 57 I. A. 173; *Janardhan v. Anant* (1908) 32 Bom. 386; *Har Prasad v. Ram Chandar* (1921) 44 All. 37; *Lallu Singh v. Ram Nandan* (1930) 52 All. 281; *Khiali Ram v. Nathu Lal* (1893) 15 All. 219; *Panaganti Ramarayaningar v. Maharaja of Venkatagiri* (1926) 50 Mad. 180, 54 I. A. 68; *Jagannath v. Jaipal* (1933) 55 All. 359.

(p) *Riley v. Hall* (1898) 79 L. T. 244.

S. 61 the earlier mortgage was allowed to be redeemed without the subsequent mortgage being redeemed at the same time (*q*). Nor is a mortgagee of a usufructuary mortgage executed by two brothers entitled to consolidate with a simple mortgage executed in his favour by one of them (*r*). Two persons mortgaged in 1879. In 1883 one of them mortgaged part of the mortgaged property along with others with a stipulation to redeem this before the mortgage of 1879. Held covenant void (*s*).

Puisne mortgagee.—Although the Act speaks only of a mortgagor seeking to redeem, the puisne mortgagee claiming under him must be governed by the same rule because his equity cannot be greater than that of the mortgagor himself (*t*).

Consolidation when clogging the equity of redemption.—Consolidation is distinguishable from clogging. The doctrine of clogging, which is a creature of the English Court of Equity, prohibits any contrivance or device calculated to impede redemption. But if a lender should make a further advance to the borrower and take a charge upon the property already mortgaged, it cannot be said that he was impeding redemption because of a stipulation that the mortgagor shall not redeem his mortgage without at the same time paying the subsequent loan (*u*). Nor is it objectionable for a mortgagee to set up subsequent bonds against redemption of the first mortgage when there was a special stipulation in the bonds not to redeem the mortgage without payment of what was due on them. Such an agreement is not a fetter on the equity of redemption (*v*). The doctrine of clogging has no application when the mortgagor pledges his equity of redemption to secure further advances. And when a usufructuary mortgage followed by a simple mortgage contained a covenant that the usufructuary mortgage should not be redeemed without redeeming the simple mortgage, the covenant was not a clog on the equity of redemption (*w*).

Undivided shares.—The principle of the section applies to separate mortgages of portions of the same property whether such portion belongs to the same owner or different owner as the omission of the word “property” from the old section indicates. But not if undivided shares are mortgaged by different owners by one instrument to secure the same debt.

Conditional redemption gives rise to consolidation.—A mortgage bond contained a stipulation that the mortgagors were not to redeem the mortgaged property without paying an amount due on a bond simultaneously executed in respect of money due under a decree. Without expressing any opinion, whether the bond created a charge, the Court held that redemption was conditional on payment of what was due on the bond, although there might be no longer a bond debt in contemplation of law still in existence owing to a decree having been passed on it, and that decree had become barred (*x*).

Consolidation—marshalling.—In the event of there being conflict between these two rights the right of marshalling is to prevail. By a mortgage dated 29th March 1849 Col. Tynte covenanted to repay the sum advanced to one Thomas within six months after his father's decease with interest, and mortgaged his life-interest in the real estate and certain policies of insurance. He covenanted to keep

(*q*) *Taerkeshwar v. Kalka Pathak*, A. I. R. (1927) All. 144; *Mahomed Hossain v. Sheo Darshan* (1907) 4 A. L. J. 178.
 (*r*) *Ganapathi v. Beeru*, A. I. R. (1927) Mad. 1039.
 (*s*) *Ganga Rai v. Kirtanath Rai* (1911) 33 All. 393.
 (*t*) *Hughes v. Britannia Permanent Benefit Building Society* (1906) 2 Ch. 607.
 (*u*) *Noakes v. Rice* (1902) A. C. 24.

(*v*) *Ranjit Khan v. Ram Dhan Singh* (1909) 31 All. 482.
 (*w*) *Muhammad Abdul v. Jairaj Mal* (1906) W. N. 267.
 (*x*) *Sundar v. Bapuji* (1894) 18 Bom. 755; *Ranjit Khan v. Ramdhar Singh* (1909) 31 All. 482.

on foot the two policies of insurance already effected and any other assurance on his life and to pay to the mortgagee all sums of money expended by him in keeping on foot the two policies and any other policies effected as aforesaid within six months after his father's death. The mortgagee was to hold the policy moneys after discharge of principal, interest and sums expended to keep on foot the policies in trust for the mortgagor. The indenture of mortgage contained no power of sale. Thomas was the first encumbrancer on the estate in respect of the mortgage of 29th March 1849 and he had also a charge upon the real estate in respect of subsequent judgments obtained against Col. Tynte; but between these two there were several other intermediate encumbrancers who had no charge upon the policies. It was held that notwithstanding the trusts of the deed, the mortgagee might sell the policies and apply the proceeds towards payment of his mortgage debt, but that if he was paid his mortgage debt out of the rents of the real estate, the subsequent encumbrancers were entitled to the benefit of the policies and that they were not affected by any consolidation of the mortgagee's debt. Whether it be a judgment debt or simple interest debt or whatever other debt it may be, he cannot consolidate it with the secured debt so as to disappoint the persons who are prior to him in point of time and that therefore he could not consolidate his charges so as to 'oust the intermediate encumbrancers (y).

Union of mortgages on different estates after assignment of equity of redemption on one of them.—When two mortgages are made by the same mortgagor to different individuals on different estates and they become united for the first time in one person after the mortgagor has assigned (by way of sale or mortgage) the equity of redemption of one of them, the mortgagee cannot consolidate them as against the assignee of the equity of redemption even though both the mortgages were created before the assignment (z).

Election.—The principle of election does not affect the doctrine of consolidation, and so where there were three mortgages between the parties and the first contained a clause negating the application of section 17 of the Conveyancing and Law of Property Act, 1881 (corresponding to section 61 of the Transfer of Property Act), the mortgagee was held entitled to consolidate the mortgages and was considered not to have lost his right to do so by giving notice under section 20 of that Act corresponding to section 69 of the Transfer of Property Act to the mortgagor, to pay off one of the mortgages in order to enable him to exercise the power of sale, when in consequence of such notice, the mortgagor had prepared for the payment and tendered the money (a). Giving notice of enforcement of a statutory right does not alter the true relation of mortgagor and mortgagee.

Loss of right.—There cannot be consolidation of two securities one of which has ceased to exist. The right of consolidation is lost where the right of the mortgagee against one of the properties is lost as by its ceasing to exist (b) or by the mortgagee's remedy on one of them being barred by the Statute of Limitation, and that in spite of a stipulation in the second mortgage that the mortgagor shall pay the money due under it before discharging the prior mortgage (c). So also where a severance takes place of the equity of redemption prior to the union of the mortgages, the

(y) *Ford v. Tynte* (1861) 31 L. J. Ch. 177, 70 E. R. 1008.

(z) *Harter v. Colman* (1882) 19 Ch. D. 630; *Minter v. Carr* (1894) 3 Ch. 498; *Hughes v. Britannia Permanent Benefit Building Society* (1906) 2 Ch. 607.

(a) *Griffith v. Pound* (1890) 45 Ch. D. 553.

(b) *In re Raggett ex-parte Williams* (1880) 16 Ch. D. 117; *In re Gregson, Christison v. Bolam* (1887) 36 Ch. D. 223.

(c) *Kesar Kunwar v. Kewal Singh* (1915) 37 All. 634.

- S. 61 owner of the mortgages cannot consolidate them against the assignee of the equity of redemption (*d*).

Mortgagee holding two mortgages on the same property.—The question whether provisions relating to consolidation afforded sufficient reason for refusing to allow the mortgagee suing on a subsequent mortgage to sell, subject to a prior mortgage in his favour, has given rise to conflicting views. It was held by the High Court of Madras in *Dorasami v. Venkateseshayyar* (*e*) and *Nattu Krishnama Chariar v. Annangara Chariar* (*f*) that it was not open to a mortgagee to bring a suit to recover the debt due under only one of the mortgages and to sell the property under the decree subject to his claim under a prior mortgage. In a later case—*Radhakrishna Iyer v. Muthuswamy Sholagan* (*g*)—the contrary was held. Because of this conflict a reference was made to a Full Bench (*h*) which held, that it was open to a mortgagee to bring a suit for recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage in consonance with the decision in *Radhakrishna Iyer v. Muthuswamy Sholagan* (*i*) and *Abdul Rakmian v. Mahomed* (*j*). The same view has been adopted by the High Courts of Bombay (*k*) and Calcutta (*l*) though the Allahabad High Court maintains the opposite view (*m*) following the Full Bench ruling in *Mata Din v. Kazim Hussain* (*n*). But if the remedies on the two mortgages are not concurrent, as when the first mortgage is usufructuary and the other simple, the rule does not apply (*o*).

Doctrine applicable within certain limits : and against certain persons.—The nature of the right of consolidation was briefly explained by Lord Selborne, in *Jennings v. Jordon* (*p*) where his Lordship said, “a mortgagee who holds several distinct mortgages under the same mortgagor redeemable, not by express contract but only by virtue of the right which (in English Jurisprudence) is called ‘Equity of Redemption’ may, within certain limits, and against certain persons (entitled to redeem all or some of them) ‘consolidate’ them, that is, treat them as one and decline to be redeemed as to any, unless it is redeemed as to all. There is no difficulty in its application when all mortgages whether originally made to the same mortgagee or having come into a single hand by subsequent assignment, are redeemable at the same time by the same person. Its extension to a case in which after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they have been combined, though it may, perhaps, be open to objection on some practical grounds, rests upon an intelligible principle.” The purchaser of the equity of redemption takes subject to all equities which affected his vendor. The mortgagee cannot be said to have lost that right to consolidate, because the mortgagor thinks fit to separate the equities of redemption. Therefore, where the owner of different properties mortgages them to different mortgagees and the mortgages afterwards become united in title, the mortgagee has a right to consolidate them and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the owner of the properties but also

(*d*) *Minter v. Carr* (1894) 3 Ch. 498; *Squire v. Pardoe* (1891) 66 L. T. 243; *Harter v. Colman* (1882) 19 Ch. D. 630; *White v. Hillacre* (1839) 3 Y. & C. Ex. 597, 160 E. R. 839.
 (*e*) (1902) 25 Mad. 108.
 (*f*) (1907) 30 Mad. 353.
 (*g*) (1908) 31 Mad. 530.
 (*h*) *Subramania v. Balasubramania* (1915) 38 Mad. 927.
 (*i*) (1908) 31 Mad. 530.
 (*j*) (1902) 2 M. L. J. 188.
 (*k*) *Keshavram Dulavram v. Ranchhod Fakira*

(1906) 30 Bom. 156; *Dhondur v. Bhicaji* (1915) 17 Bom. L. R. 144.
 (*l*) *Atab Pramanik v. Arif Tarafdar* (1914) 19 C. L. J. 590.
 (*m*) *Sundar Singh v. Bholu* (1898) 20 All. 322; *Bhagwan Das v. Bhawani* (1904) 26 All. 14.
 (*n*) (1891) 13 All. 432.
 (*o*) *Rangasami Nadan v. Subbaraya* (1907) 30 Mad. 408; *Govind Bhatta v. Narain Bhatta* (1906) 29 Mad. 424.
 (*p*) (1887) 6 A. C. 698.

as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title (*q*). In *Selby v. Pomfret* (*r*), the facts were :—(1) mortgages to defendants of Mark Lane property on June 26, 1858, (2) mortgage to Stileman and Neale of Herne Hill property on February 1, 1859, (3) mortgagor on February 9, 1859, became bankrupt, (4) transfer of Herne Hill mortgage to defendants on February 16, 1859. Thus the union was after the bankruptcy of the mortgagor. The defendants were allowed to consolidate the two mortgages against the assignees in bankruptcy of the mortgagor, and to retain the balance due on the Mark Lane mortgage which was deficient, out of the surplus proceeds of the sale of the Herne Hill mortgage.

Rule not applicable.—The following are some of the instances when consolidation was refused :—

1. Where the union of two mortgages made to different mortgagees had taken place after the assignment of the equity of redemption of both mortgaged properties to the same person (*s*).

2. Where the first mortgage was to a firm and the subsequent mortgage to a member of that firm, in spite of a stipulation in the second mortgage to discharge it, before payment of the first (*t*).

3. The doctrine has no application when the mortgagor of one property assigned the equity of redemption (here the equity of redemption was separated) and afterwards mortgaged another property to the mortgagee of the first (*u*).

4. Even where two mortgages on different estates were executed by the same mortgagor in favour of different individuals, and before they become united for the first time in one person, the equity of redemption of one of them was assigned by way of sale or mortgage, the mortgagee on such fusion could not claim to consolidate them as against the assignee of the equity of redemption (*v*).

5. Nor will consolidation be allowed in respect of mortgages executed in favour of the same mortgagee subsequent to such separation of the equity of redemption (*w*), and that, in spite of a clause in the first mortgage rendering the section inoperative (*x*). And even so, where the new mortgage was in substitution of the old (*y*).

6. If the purchaser of one of two equities of redemption desires to prevent consolidation, he has it in his power to redeem any one mortgage where consolidation takes place ; but if for his own convenience he delays doing so, he runs the same risk as his assignor ran of the mortgages becoming united by transfer in one hand (*z*).

7. There is no authority or principle upon which a mortgagee can consolidate a mortgage by three persons, with one by two, in trust for the three. An equitable

(*q*) *Pledge v. White* (1896) A. C. 187 ; *Tweeddale v. Tweeddale* (1857) 23 Beav. 341 ; *Vint v. Padget* (1858) 2 De G. & J. 611, 44 E. R. 1126 ; *Bovey v. Skipwith* (1871) 1 Ch. Ca. 201, 22 E. R. 762 ; *Willie v. Lugg* (1761) 2 Eden 78, 28 E. R. 825.
 (*r*) (1861) 4 L. T. 314, 45 E. R. 1009.
 (*s*) *Tweeddale v. Tweeddale* (1857) 23 Beav. 341, 53 E. R. 134.
 (*t*) *Chhotalal v. Mathur Kavalram* (1894) 18 Bom. 591.
 (*u*) *Jennings v. Jordan* (1881) 6 A. C. 698 ; *Beevor v. Luck* (1867) L. R. 4 Eq. 537 commented on ; *White v. Hillacre* (1838) 3 Y. & C. (Ex.) 597 approved.
 (*v*) *Harter v. Colman* (1882) 19 Ch. D. 630 ; *White v. Hillacre* (1838) 3 Y. & C. Ex. 597

approved and followed ; *Beevor v. Luck* (1867) L. R. 4 Eq. 537, disapproved and not followed on the ground that its authority has been much impaired by the remarks of Lord Selborne and Lord Blackburn in *Jennings v. Jordan* (1881) 6 A. C. 698 ; *Vint v. Padget* (1858) 2 De. G. & J. 611 distinguished ; *Minter v. Carr* (1894) 3 Ch. 498.
 (*w*) *Hughes v. Britannia Permanent Benefit Building Society* (1906) 2 Ch. 607 ; *Baker v. Grat* (1875) 1 Ch. D. 491 ; *Jennings v. Jordan* (1881) 6 A. C. 698.
 (*x*) *Hughes v. Britannia Permanent Benefit Building Society* (1906) 2 Ch. 607.
 (*y*) *Bird v. Wenn* (1886) 33 Ch. D. 215.
 (*z*) *Pledge v. White* (1896) A. C. 198.

Ss. 61-62

mortgage was made by two partners of a mercantile firm, who afterwards took a third partner giving him a share in the equity of redemption. The firm then mortgaged their interest in another property, which they held as joint tenants to the same mortgagee for a further debt and then became bankrupt. On bankruptcy, the lease was determined and the lessor re-entered. The mortgagee claimed to consolidate both the debts, and contended that the second mentioned house could not be redeemed without paying both the debts. It was held that when one property has ceased to exist there could be no consolidation of the two debts (a).

8. The mortgagee must hold the mortgages under the same mortgagor; it is not enough that the different equities of redemption have got into the same hands by assignment (b).

9. The title of the mortgagees in respect to each mortgage must be shewn to be vested in one and the same hand. So, where first, the mortgage was to two mortgagees advancing money on a joint account, and afterwards, a mortgage of the same hereditaments and certain leasehold premises was made to one of such mortgagees only, the right of consolidation was denied (c).

10. The doctrine of consolidation does not apply to a case, wherein one of the mortgages sought to be consolidated, there has been no default whatever (d).

Mortgagee not entitled to the benefit of this section.—The rule in the section is enacted for the benefit of the mortgagor and the converse of the proposition does not apply (e).

Charge.—The section has been made applicable to a charge (f).

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property *together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,*

Right of usufructuary mortgagor to recover possession.

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, when such money is paid;

(b) where the mortgagee is authorized to pay himself from such rents and profits or *any part thereof a part only of the mortgage-money*,—when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee *the mortgage-money or the balance thereof* or deposits it in Court as hereinafter provided.

The section.—A usufructuary mortgagor has the right to recover possession together with the mortgage deed and other title-deeds in possession of the mortgagee:

(a) *In re Raggett, ex-parte Williams* (1880) 16 Ch. D. 117.
(b) *Sharp v. Richards* (1909) 1 Ch. 109.
(c) *Riley v. Hall* (1898) 79 L. T. 244.

(d) *Cummins v. Fletcher* (1880) 14 Ch. D. 699.
(e) See section 67A of the Act.
(f) *Aditya Prasad v. Ram Ratan* (1930) 5 Luck. 365, 57 I. A. 173.

- (a) When the mortgagee has realized the mortgage-money from the rents and profits. S. 62
- (b) When the term (if any) has expired and the mortgagor pays or tenders or deposits in Court.
- (i) the mortgage-money or
- (ii) the balance thereof.

Amendment of the section.—The following amendments are made by Act 20 of 1929 :—

- (a) after the word “property” where it first occurs, the words “together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee” shall be inserted.
- (b) for the words “the interest of the principal money” the words “or any part thereof a part only of the mortgage-money,” shall be substituted; and
- (c) for the words “the principal money” where they occur for the second time, the words “the mortgage-money or the balance thereof” shall be substituted.

When such money is paid.—These words in clause (a) with reference to the context have been determined to mean “when such money is paid from the rents and profits” (g).

Mortgage prior to the Act.—The principle in section 62 applies to a transaction prior to the passing of the Transfer of Property Act as a matter of general law (h).

Clause (a).—The provisions of this clause refer to a mortgage when the debt and interest subsist and are to be paid out of the usufruct and where the term of the mortgage determines on the satisfaction of the debt and interest. So that where a transaction was described as a mortgage, but was in fact a sale of a term of nine years to the creditor, who was to enjoy the profits or suffer the loss and pay a rent of Rs. 35 per annum, the document for purposes of stamp duty was held to be a lease with a premium (i). On the other hand, an instrument described as a lease executed in consideration of Rs. 120, empowering the creditor to remain in possession for 12 years, but containing no provision for repayment or payment of rent, was held to be a usufructuary mortgage and not a lease (j). Under this clause the mortgagee's right to recover possession arises no sooner the principal and interest are worked off, out of the rents and profits which usually by previous calculation are so fixed that the period of regaining possession is ascertained (k). When the mortgage debt is satisfied out of the usufruct, each of several usufructuary mortgagors is not entitled to recover possession of more than his share of the mortgaged property (l).

Alteration of clause (b).—The clause as originally framed provided for appropriation of the entire rents and profits towards interest. This has been amended by extending the clause so as to enable the mortgagee to appropriate the rents and profits towards interest in part or principal in part or both in part and with that view, the words “mortgage-money or the balance thereof” have been substituted for “Principal money.” It appears that the words “mortgage-money” are wrongly added. The mortgage-money would be due if nothing were paid to

(g) *Seshayya v. Lakshminarasimha*, A. I. R. (1930) Mad. 160; *Tirugnana v. Nallatambi* (1893) 16 Mad. 486.
 (h) *Mohini v. Sarat*, A. I. R. (1925) Cal. 862.
 (i) Refer under the Stamp Act (1884) 7 Mad. 203

F. B.
 (j) Refer under the Stamp Act (1898) 21 Mad. 358.
 (k) *Tirugnana v. Nallatambi* (1893) 16 Mad. 486.
 (l) *Fakir Baksh v. Sadat Ali* (1885) 7 All. 376; *Gobardhan v. Sujan* (1894) 16 All. 254.

- S. 62** the mortgagee, but the condition in the mortgage is to appropriate the rents and profits in part-payment of the mortgage-money, so that the whole of the mortgage-money cannot be said to be due. In the report of the Special Committee it is stated that the words "principal money" should be changed into "the balance of the mortgage-money" but apparently the alteration is something different.

Clause (b).—Under this clause the mortgagee appropriates the whole or part of the usufruct towards a portion of the mortgage-money only. The mortgagor on the expiration of the period, if any, fixed, in the mortgage deed, becomes entitled to recover possession of the mortgaged property on payment or tender of the balance of the mortgage-money to the mortgagee or deposits it in Court under section 83. A mortgage deed contained a clause for interest at 2% until possession was delivered and thereafter contained a stipulation for payment of interest out of the usufruct. The clause ran "until I pay up Rs. 5,600 on account of principal with interest to the very last pie the mortgagee shall continue in possession and occupation of the villages." Possession was given of the villages mortgaged, which were reduced in number by acts beyond the mortgagor's control and to which the mortgagee acquiesced. The mortgagee having taken the rents and profits in lieu of interest, the mortgagor was allowed to redeem on payment of Rs. 5,600 only (*m*).

Acquiescence of mortgagee in loss of a portion of his security.—A usufructuary mortgagee, if after being placed in possession of his security, is dispossessed of a portion by a pre-emptor (*n*) or by acts beyond control of the mortgagor (*o*) and the effect is to diminish his security, he cannot in a suit for redemption claim to have accounts taken of what the profits of such lost property were and that redemption could be decreed only on payment of these profits, in addition to the sum due on the mortgage, if he remained satisfied with his security after dispossession and took no steps to enforce the amount due or for enhancement of the rents and profits of the remaining lands so as to recoup the loss and in fact acquiesced in such dispossession and remained content with the remainder of the land in his possession. The result is the same when the mortgagee takes possession of a part and allows the mortgagor to retain the residue (*p*).

Redemption before the term.—When a term is fixed by contract between the parties, the mortgagor cannot redeem before the stipulated period, the principle being that redemption and foreclosure are co-extensive. Usufructuary mortgages are no exception to this principle. The mortgagee is entitled to insist on the term which provides for his enjoyment and the mortgagor cannot redeem before the expiration thereof (*q*). Cases in which it was held that the period operated only for the protection of the debtor are no longer law (*r*). But where in a usufructuary mortgage, a period was fixed with an option to the mortgagor to pay the amount at an earlier date and in default, the original period was to continue, a suit filed by the mortgagor subsequent to the option date but prior to the original period, was dismissed as premature (*s*).

(*m*) *Partab Bahdur v. Gajadhar Baksh* (1902) 24 All. 521, 29 I. A. 148.

(*n*) *Khuda Baksh v. Alim-un-nissa* (1905) 27 All. 313.

(*o*) *Partab Bahdur v. Gajadhar Baksh* (1902) 24 All. 521, 29 I. A. 148.

(*p*) *Jhunku Singh v. Chhotkan Singh* (1911) 31 All. 325.

(*q*) *Shubratn v. Dhanpat* (1932) 54 All. 1041; *Rangayya v. Basana*, A. I. R. (1926) Mad. 594; *Bakhtawar Begam v. Husaini Khanum*

(1914) 36 All. 195; 41 I. A. 84; *Bir Mohammad v. Nagoor Rowther* (1914) 27 M. L. J. 483.

(*r*) *Bhagwat Das v. Parshad Singh* (1888) 10 All. 602; *Rose Ammal v. Rajarathnam Ammal* (1900) 23 Mad. 33.

(*s*) *Aga Mahomedally Beg v. Venkatapayya* (1918) 35 M. L. J. 287; *Tirugnana v. Nallatambi* (1893) 16 Mad. 486; *Seshayya v. Lakshminarasimha*, A. I. R. (1930) Mad. 160.

Reduction of mortgage debt.—Notwithstanding the period, if a mortgagee keeps in his hands from the usufruct, a sum of money belonging to the mortgagor, he must apply the same in reduction of the mortgage debt (*t*).

Surplus receipts.—By the terms of a usufructuary mortgage, it was provided that the annual profits should be taken to be a certain fixed sum, which after payment of revenue, should be appropriated by the mortgagee towards interest, the mortgagor being entitled to redeem on payment of the mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest. The purchaser of the equity of redemption sued the mortgagor and mortgagee for possession by redemption, on the ground that the mortgagee failed to pay the revenue, which was paid by him and that the principal and interest had been worked off out of the usufruct and there was a surplus due to him. While holding that the purchaser of the equity of redemption was entitled to accounts with annual rests, the Court observed that irrespective of any statutory provisions and in consonance with the rules of equity established by a long series of decisions, it has been settled that even a special agreement to the effect that the mortgagee shall remain in possession until payment of the debt is made in one sum, does not prevent the mortgage from being at an end, whenever from the usufruct, the principal and interest has been realized by the mortgagee (*u*).

Clog.—The section entitles the mortgagor on payment of the mortgage amount, to recover possession. Now leases between mortgagor and mortgagee to last during the pendency of the mortgage, are not uncommon nor are they bad in themselves (*v*). But where in the case of a usufructuary mortgage, a lease is made which contemplates the mortgagee remaining in possession notwithstanding payment and provides for its continuance after discharge of the mortgage debt, though the mortgage and the lease may have been affected by two documents, such a provision is a fetter on the equity of redemption and the Court will refuse to enforce it (*w*). But an express covenant that redemption shall take place only after the debt is paid off by appropriation of the usufruct, is not a clog (*x*).

Remedies of a usufructuary mortgagor.—The right of the mortgagor to redeem is recognized by section 60 of the Transfer of Property Act. It does not necessarily mean that before a suit for redemption can be instituted, the amount must be tendered, for a tender would be obviously out of the question, where in the case of usufructuary mortgage, it is stated that the mortgage-money has been satisfied out of the usufruct (*y*). There are three remedies open to the mortgagor: (1) he may either deposit under section 83 and claim redemption, or (2) tender the amount to the mortgagee and recover possession from him, or (3) he may institute a suit for redemption and pray for a decree for possession on condition of his depositing in Court the amount found due on or before a day fixed by the Court. This section which applies to a mortgage which is purely and simply usufructuary, gives the mortgagor a right to recover possession when the mortgage-money has been realized, or is paid, tendered or deposited in Court (*z*).

(*t*) *Seshayya v. Lakshminarasimha*, A. I. R. (1930) Mad. 160; *Parker v. Jackson* (1936) 155 L. T. 104.

(*u*) *Jaijit Rai v. Gobind Tiwari* (1884) 6 All. 303.

(*v*) *Mahomed v. Ezekiel* (1905) 7 Bom. L. R. 772.

(*w*) *Ankinedu v. Subbiah* (1912) 35 Mad. 744.

(*x*) *Aga Mahomedally Beg. v. Venkatapayya* (1918) 35 M. L. J. 287.

(*y*) *Hetsingh v. Bihari Lal* (1921) 43 All. 95.

(*z*) *Panaganti Ramarayaningar v. Maharaja of Venkatagiri* (1927) 50 Mad. 180, 54 I. A. 68.

S. 63

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession to mort-
gaged property.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, *with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum.*

Accession acquired in
virtue of transferred
ownership.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Analysis of the section.—A mortgagor upon redemption is entitled to the accession :

- (a) When the mortgagee is in possession :
- (b) Has received it during the continuance of the mortgage
- (c) In the absence of a contract to the contrary

The mortgagee need not deliver an accession

- (1) acquired at his expense and
- (2) capable of separate possession and enjoyment without detriment to the principal property

Unless the mortgagor

- (i) desires to take the accession and
- (ii) pays the expense of acquiring it.

The mortgagee must deliver the accession

- (1) If such separate possession or enjoyment is not possible

Thereupon the mortgagor is liable

- (i) to pay the proper costs thereof

When such accession was made

- (i) for the preservation of the property from destruction, forfeiture, or sale, or
- (ii) with his assent.

Such costs are debited to the mortgagor by being added to the principal money at the same rate of interest or at 9% where no rate is fixed.

The profits arising from the accession are credited to the mortgagor and where the mortgage is usufructuary against interest on such costs, when the accession has been acquired at the expense of the mortgagee.

Amendments to the section.—The only addition to the section is the words, “at the same rate of interest” empowering the mortgagee to claim interest at the same rate as on the principal and where no rate is fixed at 9% per annum.

Section defective.—The last paragraph is defective. The word used is “expense” while a distinction is made in paragraph 2 between “expense” and “cost.” The former relates to accession capable of separate possession or enjoyment—the latter to accession not capable of separate possession or enjoyment. On the latter, interest is allowed, while on the former no interest is allowed. Further, a usufructuary mortgage may consist in the profits being appropriated towards interest alone or in payment of the mortgage-money or partly in lieu of interest or partly in payment of the mortgage-money, so that there may be a surplus left after payment of interest. As to what should be done with it, the Act is silent. Again it is not made clear that no interest is payable on expenses incurred for accretions capable of separate possession or enjoyment.

Retrospective effect.—The section is not retrospective (a).

When accession received.—The section requires the accretion to be made during the continuance of the mortgage. If made after the mortgaged property has been sold pursuant to a decree for sale, the accretions do not enure to the mortgagee or accretion purchaser, but belong to the mortgagor as the mortgage was extinguished at the time of accretions (b).

What are accessions.—The section deals with the rights and liabilities of the mortgagor and mortgagee *inter se* in the event of accretions to the mortgaged property, while the mortgagee is in possession. Sections 63 and 70 are correlative, for while the former deals with the increase in value of the mortgaged property consequent on such accretion, the latter deals with the enhancement of the security. The property retains its identity notwithstanding any casual increase or decrease and is as an aggregate, both a security to the mortgagee and subject to redemption by the mortgagor. Accessions are additions to the mortgaged property whether by natural causes or physical additions. The former has been dealt with in para 1 and the latter in para 2. No expenses are incurred in the case of natural acquisitions, whilst in the other case the mortgagee is put to expense. The first paragraph also includes additions to the mortgaged property made by the mortgagor at his expense. The mortgagee is given the choice to receive or reject the accretions in para 2, if capable of independent enjoyment and possession. If he elects to receive them, he is put on terms as to payment of expenses incurred

(a) See sec. 63 of Act 20 of 1929.

(b) *Kapniah Sivananjiah v. Sittay Goudar* (1921)

S. 63 in respect of the accretions. If the acquisitions are not capable of being independently enjoyed, the accessions follow the mortgaged property and the mortgagor is subjected to payment of expenses in case the acquisitions were necessary for the preservation of the property from destruction, forfeiture or sale or made with the mortgagor's consent. Again the mortgagor's right to accession in para 1 is in the absence of a contract to the contrary, while accessions in para 2 are not made subject to any such reservation. Accessions referred to in para 1 are further distinguished from those in para 2, in that the former are without the intervention of the mortgagee, while the latter are acquired by the mortgagee. The section comes into operation only when the mortgagee is in possession and the accretion is made during the subsistence of the mortgage. Sections 63 and 70 must be read together. The accession need not be made by the mortgagee as such. If he acquires the holdings of tenants, it will be an accession to the mortgaged estate. It is not open to a mortgagee to refuse to deliver the accession on any grounds. He is entitled to the costs incurred by him, if they are accessions within the meaning of section 63 of the Transfer of Property Act (c). An obligation in the nature of a trust is created, the mortgagee being obliged to hold the advantage for the benefit of the mortgagor (d), and it is within this latter rule that a mortgagor claiming acquisition made by the mortgagee for his benefit, must bring his case (e). No question arises under the section when the mortgagee is not in possession.

In the absence of a contract to the contrary.—The section applies where nothing is said in the mortgage deed.

Alluvion.—This is an imperceptible increase. According to Bengal Regulation, XI of 1825, land is said to be acquired by alluvion, when it is acquired so gradually that one cannot say how much is added at any particular moment of time. But if by the violence of a river or whatever may be the accident to which it is exposed, a portion is added to the adjoining land, the added portion continues to be the property of the original owner (f). The ordinary rule of acquisition by prescription does not apply in the case of gradual accession, but each accretion as it occurs, comes under the same title as that upon the land to which it is made, is held (g). Where land after submersion becomes a derelict, no title can be made against the true owner so long as it remains submerged (h). In Madras though there is no regulation similar to the Bengal Regulation, similar principles are made applicable (i).

Expense of mortgagee.—The mortgagee is entitled to his expenses incurred in respect of accessions within the meaning of this section (j). If the accessions are capable of separate possession or enjoyment and the mortgagor be desirous of taking them (k), no interest can be claimed on these expenses.

Capable of separate possession or enjoyment.—Section 63 does not contemplate Government waste land adjoining a mortgage holding and brought under cultivation, as coming within the category of accretions (l). Neither is an extension into adjoining Government land made by the mortgagee such an accretion (m), nor are large extensions made into waste and adjoining lands, accessions. But holdings of occupancy

(c) *Rahmatullah Beg v. Yusuf Ali* (1912) 10 A. L. J. 1124.

(d) Sec. 90, Indian Trust Act, II of 1882.

(e) *Sorabjee v. Dwarkadas* (1932) 34 Bom. L. R. 1310, 59 I. A. 366.

(f) *Rai Krishan Chandra v. Saidan Bibi* (1906) 28 All. 256; *Lopez v. Muddun Mohan Thakoor* (1870) 13 M. I. A. 467; *Harsuhai Singh v. Syud Loolf Ali* (1874) 14 Beng. L. R. 268, 2 I. A. 28.

(g) *Debi Bakhsh Singh v. Tribhovan Singh* (1897) 19 All. 238.

(h) *Secretary of State for India v. Krishnamoni Gupta* (1902) 29 Cal. 518.

(i) *Sri Balusu v. The Collector of Godavari District* (1899) 222, Mad. 464, 26 I. A. 107.

(j) *Rahmatullah Beg v. Yusuf Ali* (1912) 10 A. L. J. 124.

(k) *Musst. Ketki v. Dinabandhu Patnaik* (1909) 10 C. L. J. 83.

(l) *Maung Shwe On v. Ponniah Mudaliar*, A. I. R. (1923) Rang. 127.

(m) *Maung Shwe On v. N. K. R. P. Mudaliar* A. I. R. (1924) Rang. 131.

tenants ejected for arrears of rents, the mortgagee obtaining possession thereof; acquisition by co-owner in capacity as mortgagee (n); foreclosure of a conditional mortgage of a tenant's holding by a usufructuary mortgagee after his own mortgage (o), are accretions. The mortgagor may refuse to take these accessions but if he elects to take them, he must pay the expenses though without interest. But if he once fails to make a claim to these accessions and allows the mortgagee to remain in possession after redemption, he cannot subsequently come forward to make a claim (p). An Oudh Talukdar granted a usufructuary mortgage of a portion of his taluk, in respect of which, there existed certain subordinate birt tenures. The mortgagee having subsequently acquired these birt tenures by purchase, did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the taluk. The mortgagor many years after, brought a suit for redemption, when the question arose, whether upon repaying the sum expended by the mortgagee in the purchase of the birts, in addition to the amount due on the face of the mortgage deed, the plaintiff was entitled to the possession of the estate as then enjoyed by the mortgagee; or whether the latter was entitled to retain the birt rights and interests purchased by him as an absolute under-proprietory tenure in subordination to the talukdar, and to have a sub-settlement on that basis. Held that the plaintiff on repayment of the original mortgage debt, and on reimbursing the defendant the sum expended in purchasing the birts, was entitled to re-enter on the estate with all the rights and privileges enjoyed by the latter (q). The judgment reads: "Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms. It may well be that when the estate mortgaged is a zemindari in Lower Bengal, out of which *patni* tenure has been granted or one within the ambit of which there is an ancient *mokurari istimrari* tenure, a mortgagee of the zemindari, though in possession, might purchase with his own funds and keep alive for his own benefit that *patni* or *mokuraru*. In such cases the mortgagee can hardly be said to have derived from his mortgagor any particular means or facilities for making purchase, which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the *patni*, if the *patnidar* failed to fulfil his obligations, would not be resumable by the zemindar and the zemindari would always have been held subject to the *mokurari*."

The mortgagor desiring to take the accession.—Under this section the mortgagor becomes entitled to claim the accession upon redemption; that is to say, at the time of repayment, he must make a claim for the accretion and on expiration of the mortgage, tender to the mortgagee not only the amount payable under section 60 of the Transfer of Property Act but the expenses or costs, as the case may be, incurred by the mortgagee in making accessions. If the mortgagor never treated the land as accession nor made any claim thereto nor offered to pay to the mortgagee the expenses of acquiring the accessions but allowed the mortgagee to remain in possession of the land as occupancy *raiya*t, he cannot subsequently come forward and claim the accessions (r).

(n) *Ram Brich Narain Singh v. Ambika Prasad Singh* (1913) 17 C. W. N. 586; *Dildar v. Shukr-ullah* (1924) 46 All. 152.

(o) *Musst. Ketki v. Dinabandhu Patnaik* (1909) 10 C. L. J. 83.

(p) *Ram Lagan v. Mary Coffin*, A. I. R. (1926)

Pat. 572.

(q) *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1880) 5 Cal. 198, 6 I. A. 145.

(r) *Ram Lagan v. Mary Coffin*, A. I. R. (1926) Pat. 572.

S. 63

Separate possession or enjoyment is not possible.—The construction of a permanent well on the agricultural land in possession of a mortgagee, is not capable of separate enjoyment and when it was constructed without the assent of the mortgagor and was not necessary to preserve the property from destruction, the mortgagee was not liable for the costs (s). So when it was found that separate possession and enjoyment of a grove, planted by a usufructuary mortgagee, was not possible without detriment to the principal property, and the grove was not necessary to preserve the property from destruction, forfeiture or sale nor was it planted with the consent of the mortgagor, the latter was held entitled to obtain delivery without payment of the costs (t). The construction of a well made with the assent of the mortgagor required for the irrigation of the mortgaged land and which had been ruined by the inundation of a river, falls within the purview of the section (u).

Acquisition not necessary for the preservation of the property from destruction, forfeiture or sale.—Where separate enjoyment is not possible, the rule laid down by the section is that accession should be delivered with the property. The mortgagor is liable to pay costs in two cases only. First, for accession necessary for the preservation of the property, and secondly, when made with the mortgagor's assent. Fruit trees are not clearly capable of separate possession, apart from the land on which they stand (v). A mortgagee planted a mango-grove of 110 large trees of 30 years of age over an area of 1 bigha 8 biswas of mortgaged land during the continuance of the mortgage. The accession was not capable of separate enjoyment, as it was not practicable to remove the trees without detriment to the soil nor was the grove necessary for the preservation of the property from destruction, forfeiture or sale, or made with the consent of the mortgagor. It was held that the mortgagor on redemption was entitled to the grove without payment of compensation (w). In such a case it is open to the mortgagee to cut down and remove the trees (x), and so in the case of a guava grove (y). The question whether a grove is capable of separate enjoyment was approached from the point of view that there are two uses of the grove. A grove involves the right to maintain the trees on the spot. It also includes a right to remove the timber. One is capable of separate enjoyment, the other not. If the owner of the grove wants to enjoy it with the trees standing on the spot, he cannot enjoy the trees as apart from the land. On the other hand, if he wants to cut down the trees, he can separately enjoy the timber. The person occupying the grove may say that he will not enjoy it as a grove but will enjoy the timber. In the latter case, it would be open to the mortgagee to remove the timber, if the mortgagor is not willing to pay for the same (z). The construction of a permanent well by a mortgagee in possession of agricultural land without the consent, express or implied, of the mortgagor, and not necessary to preserve it from destruction or deterioration, but which has increased the value of the land, does not render the mortgagor liable to pay the costs of its construction (a). When a house has fallen down, it is impossible to preserve it from destruction (b).

(s) *Rajaram v. Vithal Rao* (1914) 10 Nag. L. R. 166.

(t) *Zubeda Bibi v. Sheo Charan* (1900) 22 All. 83.

(u) *Durga Singh v. Naurang Singh* (1895) 17 All. 282.

(v) *Nageshar Rai v. Nand Lal* (1926) 48 All. 70; *Ma E. v. Maung Po Ko*, A. I. R. (1930) Rang. 63.

(w) *Nageshar Rai v. Nand Lal* (1925) 23 A. L. J. 915; *Zubeda Bibi v. Sheo Sharan* (1900) 22

All. 83.

(x) *Ram Brichh Singh v. Chakauri Singh*, A. I. R. (1925) All. 748.

(y) *Ajodhya v. Indra*, A. I. R. (1929) All. 330.

(z) *Parmanand v. Mata Din* (1925) 47 All. 582; *Raghunandan Rai v. Raghunandan Pande* (1921) 43 All. 638.

(a) *Rajaram v. Vithal Rao* (1914) 10 Nag. L. R. 166.

(b) *Kallu v. Ganesh*, A. I. R. (1929) All. 348.

Made with his assent.—This implies that when the mortgagor's assent is obtained, it is not essential to prove that it was made for the purpose of preserving the property from destruction, forfeiture or sale. Assent, if obtained by a separate document, does not need registration. Mere consent to the work being done, would not make the mortgagor liable, unless given under circumstances making it equivalent to a promise to reimburse the costs to the mortgagee (c). Where the mortgagor has assented to the mortgagee planting a grove, the mortgagor must make compensation (d).

Proper costs thereof.—The section makes the mortgagor liable for the expense of accretions to the mortgaged property, if they are not capable of separate possession or enjoyment and the mortgagor desires to take them. Also for costs of accession not capable of separate possession or enjoyment, provided they were necessary to preserve the property from destruction, forfeiture or sale, or were made with the assent of the mortgagor (e). In allowing such costs, the Court must guard against extravagant and unfounded claims and should inquire strictly into the *bona-fides* and fairness of the claim in each particular case (f).

Interest.—The mortgagee is entitled to claim interest on costs incurred in respect of accretions made with the mortgagor's assent or necessary to preserve the property from destruction, forfeiture or sale (g). If the mortgage deed provides for compound interest, the mortgagee could not claim such under this section. The interest is what is fixed between the parties; otherwise 9% per annum. No interest is allowed on accretions capable of separate possession and enjoyment.

Profits, if any.—The rule, with regard to application of profits which the accession yields, is that it shall be credited to the mortgagor.

Rates and cesses.—If the amount spent be on accessions as defined by the section, the mortgagee is not only entitled to interest but also to rates and cesses paid by him therefor. These would be proper costs (h).

Usufructuary mortgage.—In the case of a usufructuary mortgage the rule is that the profits arising from accession, shall be set-off against interest, if any, payable on the moneys so expended; that is to say, under this rule, the mortgagee is entitled, in the case of accretions, to interest on moneys spent. The rule does not mean that profits should be set-off against any particular rate of interest, but that the whole shall be deemed to be taken for interest. It, however, says that the profits shall be set off against interest, if any, payable on the money so expended. The Act is silent as to what is to be done with the profits, if there be no interest payable or if the profits exceed the interest payable according to the mortgage deed.

Where the Transfer of Property Act does not apply.—After a village was mortgaged, additions were made to it by survey officers and the question for determination was whether on redemption, the mortgagor was entitled to obtain possession of the village with or without those additions. West J., held that the boundaries not having been precisely laid down by topographical references in the mortgage, the additions passed with the village (i). Trees purchased by mortgagee in possession are accretions (j).

(c) *Arunachella Chetti v. Sithayi Ammal* (1896) 19 Mad. 327; *Rajaram v. Vithal Rao* (1914) 10 Nag. L. R. 166.

(d) *Parmanand v. Mata Din* (1925) 47 All. 582.

(e) *Nijalingappa v. Chanbasawa* (1919) 43 Bom. 69; *Durga Singh v. Naurang Singh* (1893) 17 All. 282.

(f) *Nijalingappa v. Chanbasawa* (1919) 43 Bom. 69; *Qasim Bux v. Bhagwandeem*. A. I. R.

(1930) Oudh 337.

(g) *Rahmatullah Beg v. Yusuf Ali* (1912) 10 A. L. J. 124.

(h) *Rahmatullah Beg v. Yusuf Ali* (1912) 10 A. L. J. 124.

(i) *Sadashiv Anant v. Vithal Anant* (1874) 11 Bom. H. C. 32.

(j) *Bakshiram v. Darku* (1873) 10 Bom. H. C. R. 369.

S. 63

When the section does not apply.—The section has no application when there is a contract to the contrary. Again section 63 has no application where the accession has not been made by the mortgagee in his capacity as such. If therefore a mortgagee during the continuance of the mortgage, purchases an absolute occupancy tenure for himself, he is entitled to treat it as his separate property, for he acquires it just as any stranger or even the mortgagor himself could have acquired despite the mortgage. An acquisition, made during the continuance of the mortgage by the mortgagee, may be kept for his own benefit and distinct from the mortgaged property, though the mortgagee may have treated it as an accretion to the mortgaged property (*k*).

Mortgagee also co-owner.—The section applies when the mortgagee holds the property both as co-proprietor and as mortgagee. The plaintiff's share in a *mehal* was mortgaged to the co-proprietors, who during the subsistence of the mortgage, bought in some of the raiyati holdings of the *mehal* from the tenants, and obtained possession thereof and separated them from those in possession of the tenants. Held, on redemption the plaintiff was entitled to get *khas* possession of the lands to the extent of his share in the *mehal*, on payment of the proportionate share of the expenses incurred in acquiring them (*l*).

The appellants were mortgagees of certain shares in a *patti* of four annas. Subsequently, (it is not clear whether after or before redemption) the mortgagees purchased a small share (pies 6) out of the *patti*. The mortgages were redeemed. After the mortgage, the appellants obtained possession of certain plots of land. Presumably this possession was obtained as mortgagees and on behalf of the mortgagors. On redemption the mortgagees refused to give up the land of which they were in possession as mortgagees, on the ground that they were co-sharers in the land and were entitled to keep possession as co-sharers. This contention was not upheld. The mortgagees were bound to hand over the land of which they got possession in their capacity of mortgagees and in no other capacity, and a decree for joint possession was made (*m*).

Tenancy lands.—Acquired by mortgagee in possession by virtue of an ejectment decree are accession and the mortgagor is entitled to such lands on redemption on payment of the expenses of acquisition (*n*).

Temporary structure.—Such a structure is not an accession (*o*).

Auction purchaser.—Being a representative of the mortgagor, if he builds a house on the property, he comes within the rule in section 70 and not this section (*p*).

" Khoti " land.—Occupancy rights acquired by a mortgagee without the consent of the *khot* in lands, whether *khoti nisbat* or *khoti khasgi*, are accretions (*q*).

Mortgagee cutting down trees.—A mortgagee commits waste by cutting down trees on the mortgage property (*r*) but not if the trees were planted by him (*s*).

Planting of trees.—The Allahabad High Court has doubted whether the planting of trees is an accession within the meaning of the section, unless it be a step taken to preserve the property, for example, to prevent erosion by water (*t*).

(*k*) *Maheshwar Prasad v. Babu Ram*, A. I. R. (1921) Pat. 93.

(*l*) *Ram Brich Narain Singh v. Ambika Prasad Singh* (1913) 17 C. W. N. 586.

(*m*) *Dildar v. Shukr-Ullah* (1924) 46 All. 152.

(*n*) *Ram Rai v. Maheshwar Prasad*, A. I. R. (1925) Pat. 336.

(*o*) *Nannu Mal v. Ram Chandra* (1931) 53 All. 334.

(*p*) *Nannu Mal v. Ram Chandra* (1931) 53 All. 334.

(*q*) *Kondu Ramji v. Mahadev Gopal* (1932) 34 Bom. L. R. 855.

(*r*) *Raghunath v. Ashraf Husain* (1879) 2 All. 252, sec. 76 (e) of the Act.

(*s*) *Ramchandra v. Shripati* (1926) 50 Bom. 692.

(*t*) *Ajodhya v. Indra*, A. I. R. (1929) All. 330.

Sections 63 and 70.—The distinction between the two was discussed at length by a Full Bench of the Allahabad High Court (*u*). **Ss. 63-63A**

Sections 63 and 72.—Under section 63 the mortgagor is liable, in the case of acquisition necessary to preserve the property from destruction, forfeiture or sale, to pay the proper costs which shall be added to the principal money at the rate of interest payable on the principal, or when no rate is fixed, at the rate of 9% per annum. Section 72 empowers the mortgagee to spend money as is necessary under sub-clause (b) for the preservation of the mortgaged property from destruction, forfeiture or sale and to add such money to the principal money at the rate payable on the principal, and when no rate is mentioned at the rate of 9% per annum. So far both sections 63 and 72 are identical but proviso to section 72 enacts that the expenditure of money under sub-clause (b) shall not be deemed to be necessary, unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property. It is difficult to understand why this distinction has been made in section 72, when the two sections are otherwise identical. It seems that the mortgagee may escape liability under the proviso by relying on section 63.

Section 63 deals with the rights and liabilities of the parties when mortgagee is in possession. The latter part of paragraph 2 of section 63 gives the mortgagee right to claim costs unconditionally, where the acquisition was necessary to preserve the property from destruction, etc., while section 72 (b), which authorizes the mortgagee to spend such money as is necessary to preserve the property from destruction, etc., subjects the mortgage to a condition, as in proviso to section 72 to call upon the mortgagor to make the expenses.

Rebuilding by mortgagee.—Where the mortgagees put up a valuable building in place of a *katcha* house which had fallen on the site, it was held an accession capable of separate enjoyment without detriment to the principal property (*v*). In a later case the same Court held that section 63 only allows the mortgagee to recover the price of accession necessary to preserve the property. When a house has fallen down it is impossible to preserve it from destruction. The only remedy for the mortgagee is under section 68 (*w*).

63A. (1) *Where mortgaged property in possession of the mortgagee has during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.*

(2) *Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public*

(u) *Nannu Lal v. Ram Chandra* (1931) 53 All. 334.

(v) *Gobi Lal v. Abdul Hamid*, A. I. R. (1928) All.

381; *Rupan v. Champa* (1915) 37 All. 81.
(w) *Kallu v. Ganesh*, A. I. R. (1929) All. 348.

- S. 63A** *authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.*

Insertion of a new section.—This section has been added by the Amending Act, 20 of 1929, as there was no express provision in the Act allowing a mortgagee to make improvements on the mortgaged property. Absence of such a provision led to a conflict of judicial opinion.

Analysis of the section.—Improvements to mortgaged property :—

When mortgaged property is in possession of the mortgagee

The mortgagor is entitled upon redemption

In the absence of a contract to the contrary

To improvements made during the continuance of the mortgage.

The mortgagor is not liable for costs unless :

Such improvement was effected at the cost of the mortgagee and

(i) was necessary to preserve the property from destruction or deterioration or

(ii) was necessary to prevent the security from becoming insufficient, or

(iii) was made in compliance with the lawful order of any public servant or public authority.

Costs when allowed are to be added to the principal money at the same rate of interest or at 9% when no rate is fixed.

The profits accruing by reason thereof to be credited to the mortgagor.

Previous law.—Prior to the addition, the Courts disallowed charges for improvements as not provided for by the Act (x) unless the case came within either section 63 or section 72. The Bombay High Court, following the English cases (y), sanctioned them within narrow limits (z), holding that a mortgagee was entitled to reasonable and proper costs of lasting improvements, not extravagant but *bona fide* and fair (a), while the Allahabad High Court allowed it on the footing that it was incurred to retain income derived from the property (b). But where a mortgage, made by a certificated guardian of a minor without the order of a Court, was impeached by him on attaining majority, though the mortgage deed authorized improvements and new construction, which were so extravagantly made as to make redemption prohibitive, the same Court refused to apply either section 51 or 63 of the Transfer of Property Act or section 64 of the Contract Act. The mortgagee's conduct precluded the Court from granting equitable relief and he had to remove

(x) *Chammu Lal v. Bhajan Lal*, A. I. R. (1924) All. 47; *Rupan v. Champa* (1915) 37 All. 81; *Arunachella v. Sithayi* (1896) 19 Mad. 327; *Ramappa v. Yellappa* (1928) 52 Bom. 307.
(y) *Sandon v. Hooper* (1843) 6 Beav. 246, 49 E. R. 820; *Shepard v. Jones* (1882) 21 Ch. D. 469; *Henderson v. Astwood* (1894) A. C.

150.
(z) *Nijlingappa v. Chanbasawa* (1919) 43 Bom. 69; *Dnyanu v. Fakira* (1921) 45 Bom. 1301.
(a) *Nijlingappa v. Chanbasawa* (1919) 43 Bom. 69; *Dnyanu v. Fakira* (1921) 45 Bom. 1301.
(b) *Amba Prasad v. Wahid-ullah* (1922) 44 All. 708.

the materials (c). A mortgagee is not entitled to make improvements and thus to compensation for *kacha kotha* erected by him on the site (d). Ss. 63A-64

Present law.—Not desiring to leave it to the Courts to decide what improvements are reasonable in each case, the Indian Legislature has laid down a uniform and definite rule as to the circumstances under which a mortgagee can charge for improvements made by him.

In the absence of a contract to the contrary.—Throughout the section the right of private contract has been guarded. The parties usually stipulate that in the event of destruction of the property by fire, the policy moneys recovered should be utilized either in discharge of the debt or in reinstating the property at the option of the mortgagee.

English Law.—The three English cases, on which the present section is framed lay down that:—

1. A mortgagee will be allowed the cost of doing what is essential for the protection of the mortgagor's title but not for increasing the value of the property so as to make it utterly impossible to redeem, thus "improving the mortgagor out of his estate" (e).
2. The mortgagee is entitled, when he has reasonably expended money in permanent work (f).
3. The cost of improvements is allowed when it is admitted that they were lasting, necessary and proper and added to the value of the premises (g).

64. Where the mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagor upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Renewal of mortgaged lease.

For a term of years.—These words which appeared in the old section have been omitted by the Amending Act, 20 of 1929.

Sections 64 and 71.—Both these sections deal with leaseholds and not with the leasing of freeholds.

Sections 64 and 72 (e).—Section 64 deals with a mortgagee in possession. Section 72 (e) provides for expense of a renewal of a lease also. Section 64 says "mortgagor upon redemption" shall have the benefit, which means mortgagor is in possession. Section 72 (e) is confined to a renewable leasehold. There may be a lease not renewable and yet the mortgagee may obtain a renewal.

New term.—As between mortgagor and mortgagee each owes a duty to the other in respect of the mortgaged property; and in cases of one being able, by virtue of his position, to obtain a renewal of a mortgaged lease, there are obvious reasons why it should be held against him, at any rate as a rule, that the renewed lease should be treated as engrafted on the old lease and as forming part of the mortgaged

(c) *Bechu v. Bhabhuti* (1930) 52 All. 831.

(d) *Pal Singh v. Bhola Singh*, A. I. R. (1934) Lah. 242.

(e) *Sandon v. Hooper* (1843) 6 Beav. 246, 49

E. R. 820.

(f) *Shepard v. Jones* (1882) 21 Ch. D. 469.

(g) *Henderson v. Astwood* (1894) A. C. 150.

S. 64

security. In *Rakestraw v. Brewer* (h) the mortgagee of a renewable term procured from the original landlord a new term to commence from the expiration of the old one, and it was held that the additional term came from the old root and was of the same nature, subject to the same equity of redemption, "else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily as being possessed of one not expired and by that means worming out and oppressing a poor mortgagor." The Privy Council has observed that section 64 may be said to give statutory effect to the rule in the above case and express provisions are made to provide for this particular acquisition by a mortgagee instead of leaving it to the general provisions of section 90 of the Indian Trust Act (i). Treating acquisition by a mortgagee as accretions to the mortgaged property or substitutions for it, the same tribunal recognized the absolute right of a mortgagor to a renewed lease as distinguished from his qualified right to sub-tenures existing at the date of the mortgage on the ground mentioned in section 90 of the Indian Trust Act (j).

Presumption on renewal.—There are cases in which presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted as, for instance a trustee (k) or tenant for life towards those in remainder (l). But there is another class of cases in which there is no presumption of law but at most a rebuttable presumption of fact. In this case apparently are mortgagees (m), joint tenants (n), and partners (o). *Prima facie* a mortgagee cannot renew for himself. He cannot hold the accretions any more than he can hold the term itself, free from the right to redeem. As observed by Romer, L. J. in *re. Biss, Biss v. Biss* (1903) 2 Ch. 40, the principle underlying all the cases seems to be this: all persons interested in a lease have something in the nature of a special advantage over others, which the Court of Equity will recognize; and if one of those persons tries to avail himself of that interest by getting the benefit of a renewal for himself, the Court will say that he must hold it for the benefit of all. It may be laid down as a general rule, observed Lord Bathurst in *Rawe v. Chichester* (p), that whoever has a lease has an interest in the renewal. When renewed it is a continuation of the old lease. If trustees and mortgagees obtain renewal, the new lease is always subject to the trusts and limitations, of the old lease. The new lease is an "ingraftment" on the old. A person jointly interested with others in a lease cannot take to himself the benefit of a renewal to the exclusion of the others (q). There is no primary fiduciary relation between tenants in common nor between tenant for life and remainderman nor between mortgagor and mortgagee (r). The doctrine is founded on the fact that the renewal is an accretion or accession to the interest or property previously held. This equitable doctrine is not limited in its application to cases where the old lease was renewable by agreement or custom, or when the new lease was obtained by surrender or before the expiration of the old lease.

Fiduciary relation.—With regard to a person who occupies a fiduciary position in the matter including an executor, administrator, trustee or agent, no difficulty arises. It is contrary to public policy to allow him to rebut the presumption that

(h) (1729) 2 P. Wms. 511, 24 E. R. 839.

(i) *Sorabji v. Dwarkadas* (1932) 34 Bom. L. R. 1310.

(j) *Raja Kishendatt v. Raja Mumtaz Ali* (1880) 5 Cal. 198, 6 I. A. 145.

(k) *Keech v. Sandford* (1726) 2 Eq. Cas. Abr. 741, 25 E. R. 223.

(l) *Taster v. Marriott* (1768) Amb. 668, 27 E. R. 433; *Rawe v. Chichester* (1773) Amb. 715; *James v. Dean* (1805) 11 Ves. 383.

(m) *Rushworth's case* (1676) Freem. 13, 22 E. R. 1026.

(n) *Palmer v. Young* (1684), 1 Vern. 276, 23 E. R. 468.

(o) *Featherstonhaugh v. Fenwick* (1810) 17 Ves. 298, 34 E. R. 115.

(p) (1773) Amb. 719, 27 E. R. 463.

(q) *Clegg v. Fisherick* (1849) 1 Mac. & G. 294, 41 E. R. 1278.

(r) *Warner v. Jacob* (1882) 20 Ch. D. 220.

in obtaining a renewal he acted in the interest of all persons interested in the old lease.

Ss. 64-65

Constructive trust.—The cases which really demand full consideration are of those who do not occupy a fiduciary position. In such cases the person renewing is in the position of a constructive trustee provided he is under a duty, by reason of some special position he occupies under the old lease, towards those interested, for instance, partner, mortgagee and tenant for life, but if the person renewing has only a partial interest in the old lease he is not a constructive trustee of the new lease (s). On a renewal of the mortgaged lease the mortgagee, being a qualified owner is a trustee for those interested in the old lease (t), subject to repayment by such persons of their due share of the costs and expenses properly incurred (u), and to an indemnity by the same persons against liabilities properly incurred in gaining such advantage (v). The rule is strengthened when the new lease is obtained by fraud or contrivance. So where by arrangement between the mortgagee and the Forest Department, by which the former allowed assessment to fall into arrears and, therefore, the latter, pursuant to the arrangement, forfeited the mortgaged land, giving the mortgagee in exchange other land, it was held that the mortgagee, by fraud having lost the mortgagor the equity of redemption in the mortgage land, held the equity of redemption in the exchanged land as trustee for the mortgagor (w). On forfeiture of *inam* land the *inamdar* becomes liable to pay assessment to Government. His other rights are not affected (x). So that the relation of mortgagor and mortgagee existing prior to the resumption is not extinguished (y). This right is in the nature of a lease for ever rendering rent, and is clearly a valuable interest which can be made the subject of mortgage or sale by the party in possession (z). Where a building agreement was deposited and a lease subsequently obtained the lender was, by reason of the deposit, a mortgagee (a). The principle applicable to the case of one of several joint tenants obtaining a renewal of a lease is inapplicable to the case of a co-sharer in a *zemin-dari* buying it at a revenue sale, because all the joint tenants having an interest in the old lease, which forms the basis of the right to obtain a renewal, the benefit of a renewal obtained by any one of them is held to belong to all (b).

65. In the absence of a contract to the contrary,
Implied contracts by the mortgagor shall be deemed to contract
mortgagor. with the mortgagee—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;

(s) *Re. Biss, Biss v. Biss* (1908) 2 Ch. 40.
(t) Trust Act, II of 1882, sec. 90; Specific Relief Act, 1877, sec. 3, illus. (d), *Owen v. Williams* (1773) Amb. 736, 27 E. R. 474; *Lawrence v. Maggs* (1759) 1 Eden 453, 28 E. R. 760; *Taster v. Marriott* (1768) Amb. 668, 25 E. R. 223; *Rau v. Chichester* (1773) Amb. 715; *Picking v. Vowles* (1783) 1 Bro. C. C. 197, 28 E. R. 1080.
(u) *Rushworth's case* (1676) Freem. Ch. 13, 22 E. R. 1026; *Manlove v. Bale* (1688) 2 Vern. 84, 23 E. R. 664; *Hamilton v. Denny* (1809) 1 Ba. & Ba. 202; Trust Act, II of 1882, sec. 90 illus. (c) Transfer of Property Act, IV of 1882, sec. 72 (c).

(v) Trust Act, II of 1882, sec. 90.
(w) *Babaji v. Magniram* (1897) 21 Bom. 396.
(x) *Gangabai v. Kalapa Dasi Mukrya* (1885) 9 Bom. 419; *Vishnool Trimbak v. Tatia* (1863) 1 Bom. H. C. R. 22 followed.
(y) *Gubbasappa v. Rango Venkatesh* (1912) 36 Bom. 539; *Gangabai v. Kalapa Dasi Mukrya* (1885) 9 Bom. 419, followed.
(z) *Vishnool Trimbuck v. Tatia* (1863) 1 Bom. H. C. R. 22.
(a) *Sims v. Helling* (1851) 21 L. J. Ch. 76.
(b) *Doorga Singh v. Sheo Pershad Singh* (1889) 16 Cal. 194; *Ram Lall Mokerjee v. Jodunath Chatterjee* (1881) 9 C. L. R. 337.

S. 65

- (b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;
- (d) and, where the mortgaged property is a lease that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;
- (e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

* * * *

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Alterations in the section.—By section 29 of the Amending Act, 20 of 1929, the words “ for a term of years ” in clause (d) have been omitted and the penultimate paragraph reading : “ Nothing in clause (c) or in clause (d) so far as it relates to

payment of future rent applies in the case of a usufructuary mortgage " has also been omitted, on the ground, that there was no sufficient reason, why, in the case of a usufructuary mortgage when possession was not delivered to the mortgagee, the mortgagor should not be under a duty to pay the public charges and future rent.

S. 65

Contract to the contrary.—Provisions of this section only apply when nothing is said. It is, however, not necessary that the contract between the parties should necessarily be expressed so as to exclude the provisions of this section.

Mortgagor's covenants.—This section deals with what are known as implied covenants in a mortgage. The law imposes on a mortgagor certain obligations, which he is bound to discharge without anything being said in regard thereto. Unlike covenants in a conveyance which are qualified, covenants in a mortgage are absolute. The operation of covenants for title, absolute or qualified, is laid down in *Thackeray v. Wood* (c). In a mortgage, covenants for title are placed towards the end. Implied covenants in India are usually inserted though deeds are not found wanting when they are altogether omitted on the ground that section 65 is wide enough to cover them. Clause (a) may be deemed to include covenants for title, and freedom from encumbrances, and clause (b) covenants for quiet enjoyment and further assurance. Whilst in the case of leasehold property there is a further covenant implied by virtue of sub-section (d). In a second or subsequent mortgage of freehold, in addition to the covenants in clauses (a) and (b) a further covenant as in clause (e) is imported, while in a second mortgage or subsequent mortgage of leasehold all covenants in the section would be implied.

Distinction between implied covenant and a covenant in law.—A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, if they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate by those words already created; as if a man by deed demised land for years, the covenant lies upon the word "demise," which imports or makes a covenant in law for quiet enjoyment; or if he grant land by feoffment, covenant will lie upon the word "dedi." It cannot be argued that where a covenant can only be gathered and collected from the clause of warranty it must of necessity be ranked amongst implied covenants; and that, being an implied covenant only, it must be considered as a covenant in law; as if there was some rule or principle, that all implied covenants were covenants in law. In every case it is always a matter of construction to discover what is the sense and meaning implied by the parties to the deed. The legal aspect of operation of the covenant, whether framed in express terms, or whether the covenant be a matter of inference and argument, is precisely the same (d); a covenant in law shall not be extended to make one do more than he can (e).

Clause (a).—According to this clause the mortgagor impliedly contracts with the mortgagee that he has an interest in the property to the extent he proposes to transfer to the mortgagee and that he is not hampered in any way from transferring such interest to the mortgagee (f), his title to the property being good to that extent. On a conveyance by sale a similar covenant is implied, subject to the proviso, that where the vendor conveys in a fiduciary character, the covenant is limited to the

(c) (1865) 6 B. & S. 766, 122 E. R. 1376.
(d) *Williams v. Burrell* (1845) 1 C. B. 402, 135 E. R. 596.

(e) *Bragg v. Wiseman* (1689) 1 Brown & Golds 23, 123 E. R. 640.
(f) *Achhaibai v. Rajmaji* (1929) 51 All. 802.

S. 65 acts of the grantor (*g*). In a mortgage, however, this covenant is absolute and not qualified according to the Act, but it is submitted that where the mortgagor is in a fiduciary character or a limited owner, he can insist on this covenant being qualified. Under ordinary rules of construction a man is presumed to mortgage his entire right in the property and not a lesser interest unless such is specified. An implied covenant must be something which is not expressed. There are implied covenants known to the law but the moment you say anything in the nature of an express covenant, the implied covenant is gone (*h*).

The implied covenant as to title has not the effect of enhancing the mortgagee's security, for instance, if he chooses to take an estate which he knows to be inalienable beyond the lifetime of the incumbent, but it is subsequently enlarged so as to be alienable in the lifetime of the holder, the mortgagee cannot as against the heir of the mortgagor claim to retain the property in virtue of the mortgage after the death of the mortgagor (*i*). The reason is that he cannot base his title on estoppel under which an enlarged estate coming to the mortgagor subsequent to the mortgage would inure for the benefit of the mortgagee, for a title by estoppel rests upon representations made by the grantor and acted upon by the grantee (*j*). But it is otherwise when the interest acquired is not other than the interest which the mortgagor purported to convey. In such circumstances the grantor, when once the incompetence is removed, could be compelled to make good to the grantee the interest which he purported to grant (*k*). Upon the same principle a *vatandar* not competent without the sanction of Government to mortgage his *vatan* land has been held estopped as against the mortgagee from denying his title to the mortgage (*l*) and an occupancy tenant incompetent to transfer without the consent of the *khot* has been estopped from contending that the consent has not been obtained (*m*). In case it turns out that the mortgagor had no interest whatever, the mortgagee would be entitled to a decree on his mortgage (*n*). This covenant binds the transferee of the equity of redemption (*o*).

How transmutation of security affects the covenant.—A person taking a mortgage of joint property from one co-sharer takes it subject to the rights of the other co-sharers (*p*). A mortgagee of one of the co-sharers of joint property, who is not made a party to the partition suit, brought by the sharers amongst themselves, cannot be ousted from his possession of any portion of the mortgage security, unless his debt is fully paid off. No arrangement between the sharers which ignores his mortgage can adversely affect his rights. As held by their Lordships of the Privy Council in *Byjnath Lall v. Ramoodeen Chowdhry* (*q*), where the owner of an undivided share in a joint estate mortgages his undivided share, he cannot by so doing affect the rights of the other sharers. It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgage share on partition, unless such partition is tainted with fraud or unfairness. The effect of the partition is simply to substitute a definite and separate part for an undivided share in the joint whole,

(*g*) See. 55 (2) of Transfer of Property Act.
 (*h*) *Re. Cadogan and Hans Place Estate, Ltd., ex-parte Willis* (1895) 73 L. T. 387.
 (*i*) *Gangabai v. Baswant Bin Balappa* (1910) 34 Bom. 175.
 (*j*) *Mt. Uday Kunwar v. Mt. Ladu* (1870) 8 Beng. L. R. 283, 291 P. C., see notes to sec. 43.
 (*k*) *Holroyd v. Marshall* (1862) 10 H. L. C. 191, 211; *Magniram v. Bakubai* (1912) 36 Bom. 510.

(*l*) *Narayan Khandu v. Kalgaunda Birdar Patel* (1890) 14 Bom. 404.
 (*m*) *Hillaya Subbaya v. Narayanappa Timmaya* (1912) 36 Bom. 185.
 (*n*) *Sri Raja Bommadevara Venkata Narsimha Naidu Bahadur v. Gundu Sastrulu* (1910) 9 M. L. T. 365.
 (*o*) *Achhaibai v. Rajmati* (1929) 51 All. 802.
 (*p*) *Byjnath Lall v. Ramoodeen* (1873) 1 I. A. 106.
 (*q*) (1873) 1 I. A. 106.

and thereby to transfer the loan to that portion, which the mortgagor has obtained in substitution of what he had mortgaged. Hence after partition the substituted security takes the place of the original security in the absence of fraud or unfairness. The above principle is illustrated by numerous cases amongst which are (r). It is immaterial whether the partition was made by the Revenue authorities or by the Civil Court or by arbitration or by private arrangement and it is not necessary that the mortgagee should have been a party to the partition. Similarly, when property is sold under a decree obtained by the first mortgagee, the right of the puisne encumbrancers to follow the surplus sale proceeds after the decree-holder's claim is satisfied, is an equitable right (s). This principle is recognized and constantly acted upon.

Mortgagee-purchaser finding mortgagor's title defective.—Where at a Court sale the mortgagee purchased his mortgaged property and afterwards discovered that the mortgagor had no title to a portion, he is entitled to recover the excess price paid by him under clause (a) of section 65. There is a distinction between the interest of an auction purchaser who buys property at a sale in execution of money decree, and when the sale is in execution of a mortgage decree. In the former case the purchaser obtains the interest of the judgment debtor only, while in the latter case he purchases the interest both of the mortgagor and of the mortgagee (t). This distinction is pointed out in *Madonlal v. Shakra Girdhar* (u).

Defence of "jus tertii."—It is settled law that the Court never allows a mortgagor to set up against his mortgagee the title of a third person (v), and the fact that the mortgagor was acting in a public capacity makes no difference (w).

Clause (b).—This clause deals with covenants for quiet enjoyment and further assurance. In a mortgage deed the mortgagor stipulates with the mortgagee that if default shall be made in payment of the principal sum on the agreed date of the interest thereof or any part thereof on the dates fixed by the mortgage, it shall be lawful for the mortgagee at any time thereafter to enter into and upon the mortgaged hereditaments and premises and thenceforth quietly possess and enjoy the same and receive the rents and profits without any eviction, interruption, claim or demand from any person or persons whomsoever. It will be observed that this covenant does not come into operation until default. It cannot, however, be, that in the meantime, although the mortgagee has full power to enter and enjoy the land, he must content himself with his own title against interruption by strangers. A Court of Equity never interferes to prevent a mortgagee from taking possession whenever he chooses (x). There is a further covenant by the mortgagor to protect him when he enters into possession which is known as the covenant for further assurance, whereby the mortgagor covenants until foreclosure or sale, at his own cost, and afterwards of the person requiring the same, to do and execute all such acts and things, for more perfectly assuring the mortgaged premises to the use of the mortgagee as shall or

(r) *Bukhtawar Lal v. Baru Mal* (1907) 4 A. L. J. 492; *Hem Chunder v. Thanko Muni* (1893) 20 Cal. 533; *Amolak Ram v. Chandan Singh* (1902) 24 All. 483; *Sham Das v. Battul Bibi* (1902) 24 All. 538; *Joy Sankari v. Bharat Chandra* (1899) 26 Cal. 434; *Venkatrama Iyer v. Esumsa Rowthan* (1915) 38 Mad. 429; *Muthia Raja v. Appala Raja* (1911) 34 Mad. 175; *Shahebzada v. Hills* (1908) 35 Cal. 388; *Hakim Lal v. Ram Lal* (1907) 6 C. L. J. 46; *Bhup Singh v. Chedda Singh* (1920) 42 All. 596.
(s) *Berhamdeo v. Tara Chand* (1905) 33 Cal. 92 on appeal to the Privy Council (1914) 41

Cal. 654; *Gosto Behari Payne v. Shib Nati Dut* (1892) 20 Cal. 241.
(t) *Debendra Nath Sen v. Mirza Abdul Samad* (1909) 10 C. L. J. 150; *Ma Gin v. Mg. Lu Gale*, A. I. R. (1925) Rang. 130.
(u) (1898) 22 Bom. 945.
(v) *Doe d Bristow v. Pegge* (1785) 4 Doug. K. B. 309, 99 E. R. 1362; *Doe d Ogle v. Vickers* (1836) 4 Ad. & El. 782, 111 E. R. 977.
(w) *Doe d Levy v. Horne* (1842) 3 Q. B. 757, 114 E. R. 698; *Mahamaya Debi v. Haridas Haldar* (1915) 42 Cal. 455.
(x) *Cholmondley v. Clinton* (1817) 1 Mer. 171, 35 E. R. 905.

S. 65 may be reasonably required. It is the duty of the mortgagor to protect his title against all claims that may be made in order that the security of the mortgagee may not be lost, the mortgagee's remedy being under section 68 if the security be lost or reduced. This clause is based on section 76 of the Law of Property Act, 1925, sub-section 1 (c) which is modelled on section (c) of the Conveyancing Act of 1881. So long, therefore, as the equity of redemption remains with the mortgagor, he is under an obligation, by virtue of this clause, to protect his title at his own costs and indemnify the estate against the expenses incurred (y). According to section 72 (c) a mortgagee is entitled to spend such money as is necessary for supporting the mortgagor's title to the property. A covenant to bear all expenses of litigation is binding on the mortgagor under this clause.

Clause (c).—This clause deals with the payment of public charges to which the mortgaged property is liable. There is an implied obligation on the part of the mortgagor under this section to pay all public charges so long as he is in possession. According to section 76 (c) the mortgagee is liable, on taking possession, to pay charges of a public nature. Section 73 (1) gives the mortgagee a right to proceed against the sale proceeds where the property has been sold for failure to pay charges of a public nature, provided the failure did not arise from his default. The Madras High Court has construed that the covenant created by this clause is a personal covenant affecting the person in possession under the contract (z). Unlike the other covenants which arise at the moment of execution of the mortgage, this covenant arises subsequent to its execution, while the covenant for quiet enjoyment arises upon default.

In a usufructuary mortgage there is an implied contract for quiet possession and this implies a contract to pay Government revenue (a). The words "accruing due" indicate that the public charges referred to in the clause are future and not those already in existence at the date of the mortgage. Further, public charges are levied under certain acts of the Legislature which provide that they shall be a charge upon the property. A mortgagee paying public charges cannot recover them from a subsequent mortgagee (b). On resumption or sale of land by Government for failure to pay revenue, the mortgage continues to attach where the mortgagor purchases the property from the purchaser (c). And where mortgaged lands were sold by the Collector free from all encumbrances for payment of land revenue, a mortgage decree declaring a lien on the mortgaged properties covered the sale proceeds, because these moneys between the mortgagee and the attaching creditors must be taken to represent the mortgaged properties. To the same effect is section 73 of the Act, subject to the proviso that the failure to pay revenue was not occasioned by the default of the mortgagee (d). The implied covenant on the part of the mortgagor under clause (c) does not extend to the purchaser of the equity of redemption from the mortgagor. The failure on the part of such purchaser to discharge this obligation is no breach of the covenant nor is he a constructive trustee under section 90 of the Trust Act. But this would be decided otherwise in view of section 59A (e). The Bombay High Court has held that the mortgagor's responsibility comes to an end with the extinction of the equity of redemption by the Court

(y) *Damodar Gangadar v. Vamanrao Lakshman* (1885) 9 Bom. 435; (case before the Act)
 (z) *Subbiah v. Rami Reddi* (1916) 39 Mad. 959;
Dewar v. Goodman (1909) A. C. 72.
 (a) *Ram Sewak v. Sheo Naik* (1923) 45 All. 388.
 (b) *Ebrahim v. Arumugathace* (1915) 38 Mad. 18.
 (c) *Sanagapally v. Intoory Bolla* (1903) 26 Mad. 385.

(d) *Kristodass v. Ramkant* (1879) 6 Cal. 142;
Gosto Behary v. Shib Nath (1893) 20 Cal. 241; *Hem Chunder v. Thako Moni* (1893) 20 Cal. 533; *Berhamdeo v. Tara Chand* (1905) 33 Cal. 92 (111).
 (e) *Srinivasa Chari v. Gnanaprakasa Mudaliar* (1907) 30 Mad. 67.

sale, on the ground that the obligation to pay Government revenue on the land is at all times annexed to the land (f). Property mortgaged under two different mortgages was sold for arrears of Government revenue. The surplus, instead of being paid by the Collector to the person whose property was sold, was distributed by the Collector between the two mortgagees, in spite of the Act (N. W. P. Land Revenue Act) that it should not be paid to any creditor without an order of the Civil Court. The mortgagee paid in full by the Collector was a subsequent mortgagee. In a suit by the prior mortgagee who had not received his claim in full, it was held that the suit was not maintainable. The Collector's act was in disregard of the Act and hence amounted to a voluntary payment by him which gave no cause of action (g).

Original mortgagor purchasing from revenue sale purchaser.—It is the duty of a mortgagor under clause (c) to pay the revenue, and when on account of his failure to do so the property is sold and the revenue sale purchaser sells the property to the son of the original mortgagor, the latter being dead, the mortgage is not extinguished (h). It may be observed that this principle also underlies section 65 of the Trust Act in case of trust property.

Clause (d).—On a mortgage of leaseholds

I. The mortgagor covenants that :

- (a) the rent payable under the lease,
- (b) the conditions contained therein, and
- (c) the contracts binding on the lessee (mortgagor)

have been down to the commencement of the mortgage

(1) Paid

(2) Performed and

(3) Observed

II. And that the mortgagor will

(a) So long as the security exists and

(b) the mortgagee is not in possession of the mortgaged property

(1) Pay the rent reserved by the lease or if the lease be renewed the renewed lease.

(2) Perform the conditions, and

(3) Observe the contract binding on the lessee, and

(4) Indemnify the mortgagee against claims sustained by reason of

(i) non-payment of rent, or

(ii) non-performance of the conditions, or

(iii) non-observance of the contracts.

Clause (d).—Under this clause the mortgagor of leasehold premises is deemed to covenant as analysed above. In a leasehold mortgage this is not the only covenant which is to be implied, but this covenant is to be read as imported in the mortgage in addition to the covenants mentioned in sub-clauses (a), (b) and (c). The clause is borrowed from the latter part of the Conveyancing Act, section 7, clause (1), sub-clause (b) which is re-enacted with modifications in the Law of Property Act, 1925, section 76 of sub-section (1) to the aforesaid Act. It is to be observed

(f) *Balkrishna v. Vishvanath* (1895) 19 Bom. 528.
(g) *Kunj Behari Lal v. Parsolam Narain* (1899)
21 All. 137.

(h) *Sanagapally Lakshmayya v. Intoory Bolla*
(1903) 26 Mad. 385.

S. 65

that Part IV of the schedule to the latter Act deals with the validity of the lease and the mortgagor is deemed to contract with the mortgagee that the lease for which the land is held, is a good, valid and effectual lease and is in full force, non-forfeited, unsurrendered and has in no wise become void or voidable. This part of the Act is omitted from clause (d) in view of sub-clauses (a) and (b). The mortgagee has a right to spend such money as is necessary when the mortgaged property is a renewable leasehold for the renewal of the lease (i) and when he takes possession he is under a liability, to manage as a prudent owner would if the property were his own (j). The lessee on a mortgage does not cease to be subject to any of the liabilities attaching to the lease (k).

Liability of the mortgagee to the lessor.—Under clause (d) the burden is shifted to the mortgagee when he takes possession. The Madras High Court, dissenting from an earlier view of the same Court, has held that the liability of the assignee, that is the mortgagee, arises from the date of the assignment, and not from the date when he obtains possession (l). The Calcutta High Court, however, has taken a different view, namely, that the liability arises from the date of occupation and not from the date of assignment (m). Similar is the view of the Bombay High Court (n). Moreover, the section makes it clear that the mortgagor covenants to pay rent and perform the conditions and observe the contracts contained in the lease so long as the mortgagee has not taken possession. In *Kunhanujan v. Anjche* (o), it was held that the transferee is liable to the lessor, who at the same time may sue the lessee upon his express covenant, and the transferee upon the privity of estate, although he can have execution against one only. It is to be remarked here that the covenant to pay rent is one that runs with the land. A mortgage by a tenant does not entitle the landlord of that tenant to hold the mortgagee liable for rent. To create such a right in the landlord there must be something in the nature of a privity of contract between him and the mortgagee, and an assignment of his rights by the tenant by way of mortgage does indeed operate to create such privity between that tenant's landlord and his mortgagee (p). A mortgage of leaseholds may be by assignment or demise and when the mortgagee is put into possession under circumstances which amount to an assignment or transfer of leasehold interest, the mortgagee as a rule becomes liable to pay the rent not as mortgagee but owing to the privity of estate which arises as the assignor's interest vests in him when the mortgagee's name is entered in the landlord's books (q), or has collected rents from the ryots (r), or has put himself into possession (s). In this connection a distinction must be observed between leasehold premises themselves and the goods and chattels in and upon them. So that on an assignment of the latter the lease does not pass to the mortgagee nor is the mortgagee deemed to be in possession because he put a durwan and a clerk on the premises, not to take possession but to look after the chattels assigned to him by way of mortgage, and even if the mortgagee took possession of the premises, it would not alter the position so as to constitute the relation of landlord and tenant between the lessor and the mortgagee (t).

(i) Sec. 72 (e), Transfer of Property Act.
 (j) Sec. 76 (a), Transfer of Property Act.
 (k) Sec. 108, Transfer of Property Act.
 (l) *Monikar v. Subraya* (1907) 30 Mad. 411;
Kamala Nayak v. Ranga Rao (1862) 1 Mad.
 H. C. R. 24, dissented from.
 (m) *Macnaghten v. Lala Mewa Lall* (1879) 3 Cal.
 L. R. 285.
 (n) *Vithal v. Shriram* (1905) 29 Bom. 391.
 (o) (1894) 17 Mad. 296. *Monica Kitheria v.*

Subraya Hebbara (1907) 30 Mad. 410.
 (p) *Govind v. Shamtaya* (1903) 5 Bom. L. R. 118.
 (q) *Kannaye Loll Sett v. Nistoriny* (1883) 10 Cal.
 443; *Lala Bharab Chandra v. Lalit Mohun*
Singh (1885) 12, Cal. 185.
 (r) *Macnaghten v. Bhekaree Singh* (1878) 2 C. L. R.
 323.
 (s) *Vithal v. Shriram* (1905) 29 Bom. 391.
 (t) *Madhubmoney Dassee v. Nunde Lal Gupta*
 (1899) 26 Cal. 338.

Clause (e).—Where the mortgage is a second or subsequent encumbrance, the mortgagor covenants that the principal and interest on each prior mortgage shall be discharged at the proper time. This covenant shall be deemed to be a covenant with each severally in respect of the distinct sum secured to each of the mortgagees. The puisne mortgagee is entitled to enforce this covenant (u). Failure on the part of the mortgagor to disclose the existence of a prior encumbrance is "wrongful default" within the meaning of clauses (b) and (c) of section 68 in which case the mortgagee is not bound to wait till the expiration of the stipulated period (v). And a breach of this covenant, whether express or implied, would equally be a default within the meaning of section 68 so as to give the subsequent mortgagee a right to sue the mortgagor on whose failure to discharge the principal money due on the prior encumbrance, the property is sold by the prior encumbrancer (w). On the principle underlying the clause, it has been held that when a mortgagor has deposited moneys with the mortgagee to redeem a prior mortgage, any excess paid by the mortgagee must be made good by the mortgagor (x).

Devolution of benefit of implied contracts.—It is provided by the last paragraph of the section that not only the mortgagee but all persons in whom the interest of the mortgagee is vested, whether in whole or in part, shall be entitled to the benefit of the contract mentioned in the section. This clause has been borrowed from the Conveyancing Act of 1881, section 7, now re-enacted into section 76, and sub-section (6) of the Law of Property Act, 1925. It is difficult to understand why this clause remains. Its place in the English statutes is explained by reason of the distinction which prevails in English Law between real and personal property which influences the devolution of a mortgagee's interest. Such a distinction does not obtain in this country. Further, this clause seems to be superfluous in view of the insertion in the Act of section 59A. The suggestion that it leads to the inference that the person claiming under a mortgagor is not liable under the covenants, seems to be without foundation for the person entitled under the equity of redemption is equally liable as a mortgagor on the covenants (y). Further, the suggestion that this para declares that the implied covenants run with the land is, it is submitted, erroneous. No such declaration is needed. A similar provision is found in case of vendor and purchaser (z) and lessor and lessee (a), but in the chapters dealing with those subjects a like provision as in 59A is not made. They too are borrowed from the English statute above-mentioned.

Breach of implied covenants.—On deprivation of his security on breach of an implied covenant, the remedy of the mortgagee lies under section 68 of the Act. The statutory right given on breach of the covenant cannot be taken away except by a release or a presumption of release arising from conduct (b).

65A. (1) *Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.*

Mortgagor's power to lease.

- (u) *Ali Jan v. Mariam Bibi* (1904) 26 All. 93.
- (v) *Radha Churn v. Parbutee Churn* (1876) 25 W. R. 51.
- (w) *Singjee v. Tiruvengadam* (1890) 13 Mad. 192.
- (x) *Gauri Shanker v. Bhairon Pershad*, A. I. R. (1926) Oudh 207.
- (y) *Achhaibar v. Rajmati* (1929) 51 All. 802.

- Renga Srinivasa v. Gnanaprakasa* (1906) 30 Mad. 67; (contra already discussed).
- (z) Section 55 (2).
- (a) Section 108 (c).
- (b) *Thekkamannengath Raman v. Kakkaseeri* (1915) 28 M. L. J. 184.

S. 65A

(2) (a) *Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.*

(b) *Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.*

(c) *No such lease shall contain a covenant for renewal.*

(d) *Every such lease shall take effect from a date not later than six months from the date on which it is made.*

(e) *In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.*

(3) *The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section (2) may be varied or extended by the mortgage deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.*

Mortgagor's power to lease.—In the absence of a contract to the contrary a mortgagor may lease the mortgaged property when in lawful possession and the lease shall bind the mortgagee provided it conforms to the following rules:—

- (a) The lease is made in the course of management according to any local law, custom or usage.
- (b) The best rent is obtained, no premium paid or promised and no rent made payable in advance.
- (c) There is no covenant for renewal.
- (d) The lease term begins within six months from date.
- (e) In case of building leased with or without land the period does not exceed three years with a covenant for payment of rent and in default within a time specified, a right of re-entry.

The above terms may be varied or extended by the mortgage deed.

The new section.—It remains to be seen how the new section works in view of the limits placed on the power of the mortgagor to lease, in that the lease should be in the ordinary course of management and in accordance with any local law,

custom or usage. There can hardly be leases of the type mentioned beyond agricultural leases and residential leases from month to month or year to year.

S. 65A

Retrospective effect.—The section is not retrospective (c).

Generally.—The possession held by the mortgagor is a precarious one and held at the mere will of the mortgagee (d). If without the concurrence of the mortgagee, he grants a lease of property in his possession, the lessee has a precarious title, for the paramount title of the mortgagee may be asserted against both the lessee and the mortgagor (e). Any lease, granted by the mortgagor after the mortgage, is void as against the mortgagee (f). But as against the tenant who cannot dispute his landlord, the mortgagor's, title, such a lease, though void, is binding on him until the mortgagee interferes (g). Upon interference by the mortgagee by attempting to evict the lessee, the latter can redeem the former (h). As to a lease made before the mortgage, the mortgagor is a receiver of the rent for the mortgagee who may at any time countermand the implied authority by giving notice not to pay the rent to him any longer (i). Advance payment by a tenant of rent to the mortgagor is not protected if the tenancy is created after the mortgage (j). Payments made by tenants to a mortgagor after a mortgage, but before notice of it, must in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due after notice of the mortgage. But where a lessee has prepaid to the lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee, who neglects to make proper inquiry of the lessee, who is in possession, the mortgagee cannot recover any part of the rent reserved by the lease (k). But where soon after the commencement of the term a lump sum was paid in satisfaction of the rent reserved during the term and the lessor then mortgaged and the mortgagee knew nothing of the payment in advance and had made no inquiry of the lessee, it was held that he was bound by the arrangement (l).

Leasing powers of mortgagor in possession.—Prior to the enactment permanent leases granted by mortgagors were considered permanently injurious rendering the security insufficient (m). But a lease for a term was held by the Oudh Court not to be an act of waste (n). The Bombay High Court had taken a contrary view (o). By virtue of this section, which is founded on section 18 of the Conveyancing and Law of Property Act, 1881, c. 41, a mortgagor in possession has power to give leases without the concurrence of the mortgagee. The mortgagee is entitled to enforce the covenants and conditions of the lease on giving notice to the lessee and going into possession (p). On the other hand, in a building lease, the lease is binding on the mortgagee as if he had joined in it, so as to enable the lessee to enforce his rights against any obstruction caused by the mortgagee in derogation of the lessee's rights (q).

(c) *Dasani Sahu v. Ramdulari*, A. I. R. (1931) Pat. 210.

(d) *Keech v. Hall* (1778) 1 Doug. 21.

(e) *Corbett v. Plowden* (1884) 25 Ch. D. 678 ;
Macelod v. Kissan (1906) 30 Bom. 250 ;
Beni Prasad v. Gangoo Singh (1928) A. I. R. Pat. 372 ; *Rustomji v. Keshavji* (1926) 28 Bom. L. R. 1162.

(f) *Pope v. Biggs* (1829) 9 B. & C. 245, 109 E. R. 91.

(g) *Trent v. Hunt* (1853) 9 Ex. 14.

(h) *Tarn v. Turner* (1888) 39 Ch. D. 456.

(i) *Moos v. Gallimore* (1779) 1 Doug. K. B. 279, 99 E. R. 182.

(j) *De Nicholls v. Saunders* (1870) 22 L. T. 661 ;

Cook v. Guerra (1872) 7 C. P. 132 ; *Ashburton v. Nocton* (1915) 1 Ch. 274.

(k) *Kiran Chandra v. Dutt & Co.*, A. I. R. (1925) Cal. 251.

(l) *Green v. Rheinberg* (1911) 104 L. T. 149.

(m) *Bank of Upper India, Ltd. v. Jaggan*, A. I. R. (1927) Oudh 148.

(n) *Thakur Chholey Singh v. Thacker Baldev Bux Singh*, A. I. R. (1925) Oudh, 542.

(o) *Rustomji v. Keshavji* (1926) 28 Bom. L. R. 1162.

(p) *Municipal Permanent Investment Building Society v. Smith* (1888) 22 Q. B. D. 70 ;
Robins v. Whyte (1906) 1 K. B. 125.

(q) *Wilson v. Queen's Club* (1891) 3 Ch. 522.

S. 65A

Option to determine.—A lease made by a mortgagor in possession is valid against the mortgagee notwithstanding that it contains an option for the lessee to determine the lease before the determination of the term (*r*).

Lease including land other than mortgaged land.—If the demised premises included land other than the mortgaged land and one inclusive rent only is reserved, the lease is invalid as against the mortgagee. A deed of apportionment subsequently executed between the mortgagor and the lessee, apportioning the rent as between the several parcels, does not validate the lease as against the mortgagee (*s*).

Lease by mortgagor and mortgagee jointly.—If in such a lease, the covenant for rents and repairs is only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for breach of these covenants, because they are collateral to his grantor's interest in the land and, therefore, do not run with it (*t*). Again, in a lease by mortgagor and mortgagee a covenant by mortgagor only for quiet enjoyment does not imply a covenant by both (*u*).

Lease prior to the mortgage.—If a lease be granted by a mortgagor prior to a mortgage, the mortgagee has the same rights against the lessee as the mortgagor. If the lease is subsequent to the mortgage, the mortgagee may treat the lessee as a wrong-doer. If the tenant chooses to pay the rent and the mortgagee accepts it, a relation of landlord and tenant is created and the mortgagee's remedy will depend upon the particular circumstances of each case. No notice is necessary to be given by the mortgagee in case of a lease subsequent to his mortgage, as the tenant is a wrong-doer (*v*). When a mortgagor is in possession and makes a lease after the mortgage, notice by the mortgagee calling upon the tenant to pay the rent will not by itself make him a tenant to the mortgagee, but the old tenancy created must be put an end to and a new tenancy created by the mortgagee receiving rent from the tenant (*w*). The mere fact that a tenant continues to remain in possession after notice of payment to the mortgagee of the rent, is no evidence of an agreement that he should become tenant to the mortgagee (*x*).

A mortgagor granted a lease of the property to the defendant, at a rent of £125 a year, and covenanted to pay all rates and taxes and insurance and to maintain the roofs, drains and structural work, and told the defendant, his son-in-law, that he intended to put the property in a suitable state for his residence, which he did at a cost of about £300. The property was not worth more than £125 a year at the date of the lease. The mortgagees by this action claimed that it did not bind them, on the ground that, being made by a mortgagor in possession, it did not comply with section 99 of the Law of Property Act, 1925, the best rent that could reasonably be obtained not being reserved. Held, that the rent must be considered in the light of the value of the property at the date of the lease. In the absence of an express covenant by the mortgagor to improve the property, so as to increase the rateable value, his covenant to pay rates, taxes and insurance could not be construed as shewing that the best rent had not been reserved (*y*).

(*r*) *King v. Bird* (1909) 1 K. B. 837.
 (*s*) *King v. Bird* (1909) 1 K. B. 837.
 (*t*) *Webb v. Russell* (1789) 3 Term. Rep. 393, 100 E. R. 639.
 (*u*) *Smith v. Pocklington* (1831) 1 Cr. & J. 445, 148 E. R. 1497.
 (*v*) *Rogers v. Humphreys* (1835) 4 Ad. & El. 299,

111 E. R. 799.
 (*w*) *Partington v. Woodcock* (1837) 6 Ad. & El. 690, 112 E. R. 266.
 (*x*) *Towerson v. Jackson* (1891) 2 Q. B. 484.
 (*y*) *Coutts & Co. v. Somerville* (1935) 153 L. T. 216.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Protection of mortgaged security.—Immediately on execution of the mortgage, the creditor is entitled to see that his security is not rendered deficient by any acts of the mortgagor in possession. This section defines the acts which a mortgagee is entitled to regard as diminishing the value of his security. For allowing the property to deteriorate there is no liability, but the mortgagor must not commit any acts which are destructive or permanently injurious to the security, the value of which is in consequence not maintained, as provided in the explanation. Acts of waste become actionable only when the limit set forth in the explanation is violated.

Acts of waste.—The mortgagee is entitled to maintain an action for any act done by the mortgagor or under his authority which diminishes the value of his security. Such acts may be the cutting of timber (z), removal of valuable fixtures (a) tearing down houses (b), reduction of tolls (c), which form the subject-matter of the security, and involving the security into litigation (d).

Deterioration of mortgagor's interest by act of co-tenant.—On a mortgage of interest in tenancy in common by one of two co-tenants, a deterioration of mortgagor's interest by act of the other co-tenant gives the mortgagee a right of action for the protection of his security as to its value (e).

Explanation.—The section requires that the mortgagor must not commit any act which is destructive or permanently injurious to the security, if the value of the security is thereby rendered insufficient. The explanation defines when a security is said to be insufficient. The same standard is laid down by the Trust Act, II of 1882, section 20, as regards 10 of the Easements Act, V of 1882, dealing with imposition of an easement by the mortgagor.

The remedy of the mortgagee.—In all cases of acts of waste by mortgagor in possession, the mortgagee's remedy is to file a suit under section 68 and apply for an injunction restraining the mortgagor from committing acts which lessen the value of the security or obtain a receiver. After foreclosure decree, an injunction

(z) *Aiyappa Reddi v. Kuppusami Reddi* (1905) 28 Mad. 208; *Usborne v. Usborne* (1740) 1 Dick. 75, 21 E. R. 196.

(a) *Ellis v. Glover & Holson, Ltd.* (1908) 1 K. B. 388.

(b) *Leon v. Hunt* (1843) 1 L. T. O. S. 408; *Goodman v. Kine* (1845) 8 Beav. 379, 50 E. R.

149.

(c) *Creo (Lord) v. Edleston* (1857) 1 De. G. & J. 93, 44 E. R. 657.

(d) *Blake's v. Dent* (1867) 15 W. R. 663.

(e) *Aiyappa Reddi v. Kuppusami Reddi* (1905) 28 Mad. 208.

Ss. 66-67 restraining mortgagor from committing waste was granted though not prayed for (f).

The Punjab.—The principles embodied in this section are adopted in the Punjab though the Act does not apply.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become *due* to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a *decree* that the mortgagor shall be absolutely debarred of his right to redeem the property, or a *decree* that the property be sold.

Right to foreclosure
or sale.

A suit to obtain a *decree* that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed :—

- (a) *to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or a usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale ; or*
- (b) *to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure ; or*
- (c) *to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or*
- (d) *to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property,*

(f) *Goosman v. Kine* (1845) 8 Beav. 379, 50 E. R. 149.

unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage. S. 67

Amendment of section by substitution.—This section has been amended by the Amending Act, 20 of 1929, whereby in the first paragraph the word “due” was substituted for the word “payable.” Also the words “a decree,” were substituted for the words “an order” in the first and second paragraphs. Clause (a) has been altered. Foreclosure is confined to a mortgage by conditional sale or an anomalous mortgage when expressly stipulated. In all other cases, foreclosure is disallowed.

Remedy of foreclosure.—Strict foreclosure gave the mortgagee an absolute title. Owing to the severity with which it acted on the mortgagee's equity of redemption, the granting of foreclosure decrees became less common both in England and in America. By the Amending Act the Legislature has thought fit to follow the practice now in vogue and has done away with foreclosure decrees except in the case of a mortgage by conditional sale or an anomalous mortgage where by the express terms of the deed, foreclosure is permitted. Foreclosure proceedings are governed by the Code of Civil Procedure, 1908, Order 34, rules 2 and 3. There are always two decrees.

“To foreclose” is to extinguish the equity of redemption by judicial process by a mortgagee.

“Foreclosure” is extinguishment of the equity of redemption by a mortgagee by means of judicial proceedings.

A foreclosure suit is not a suit for recovery of money though that is the indirect result of it. In effect it is a suit to obtain the equity of redemption, which equity regards as an estate (g). Nor is it an action for recovery of land (h). A suit by a mortgagee to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the mortgaged property, is called a “suit for foreclosure.” When the decree is obtained, the mortgage is said to be “foreclosed” and the property vests in the mortgagee who becomes the absolute owner.

Sale.—Under this section the mortgagee has a right to take judicial proceedings and bring the property to sale. Sale proceedings are regulated by the Code of Civil Procedure, 1908, Order 34, rules 4 and 5. There are always two decrees.

Effect of the amendment.—Whereas foreclosure decrees can be obtained by a mortgagee by conditional sale and an anomalous mortgagee whose contract entitles him to do so, in no other form of mortgage can a foreclosure decree be passed, where the form of the decree should be one of sale except in the case of usufructuary mortgages and mortgages by conditional sale. The result is that prior to the amendment, foreclosure was denied to a simple mortgagee, as also to a usufructuary mortgagee, while it was allowed in the case of other mortgagees. After the amendment, foreclosure is denied to a simple, usufructuary, English and equitable mortgagees and allowed only to a mortgagee by way of conditional sale and mortgagee of an anomalous mortgage, provided that the terms of the mortgage in the last two cases entitle them to do so. As to the remedy by sale, as the law stood prior to the amendment, it was denied in the case of a usufructuary mortgagee and a mortgagee by conditional sale, while allowed to all others, whereas after the amendment, sale

(g) *Wrixon v. Vize* (1842) 3 Dr. & War. 104—Ir. | (h) *Towell v. Slate & Co.* (1876) 3 Ch. D. 629.

S. 67 is the remedy allowed to all mortgagees except a usufructuary mortgagee and a mortgagee by way of conditional sale.

In the absence of a contract to the contrary.—The remedies provided by this section are enforceable only when the contract does not provide otherwise. The parties cannot contract themselves out of the section in every case. The words “nothing in this section shall be deemed” followed by the four clauses, control the words “in the absence of a contract to the contrary.” Consequently cases which come under clauses (a) to (d) would nevertheless be regulated by the provisions of section 67.

Mortgage-money has become due.—In section 60 the words used are “principal money has become due.” Section 58 (a) defines mortgage-money as being “the principal money and interest, of which payment is secured for the time being.” But when the sections reach the stage of payment or tender, the words “mortgage-money” are used in both. The difference is as to time. A mortgagor’s suit for redemption can never be brought before the expiration of the stipulated time, while a mortgagee’s suit for foreclosure or sale may in certain events, lie before the stipulated time, in which case interest on the principal sum for the unexpired period falls due with the principal sum and thus both together constitute mortgage-money. This is rendered clear by reading sections 60 and 67 with section 68 and by reference to mortgages made between contracting parties, where provisions are made entitling a mortgagee to call for the mortgage-money before due date.

Paid or deposited.—Paid is “payment or tender” in section 60. Deposited is deposit made under section 83. For commentaries see the relative sections.

Personal remedy.—This section confers no personal remedy against the mortgagor. The mortgagee’s right is to demand foreclosure or sale of the mortgaged property. The personal remedy is conferred by section 68.

Clause (a).—The remedies of the several mortgages classified under section 58 are dealt with in the commentaries to those sections under each of the different mortgages.

Clause (b).—Exception (b) provides for a case where a man is both mortgagor and mortgagee in different capacities, so that if as a mortgagor happens to become a trustee or executor for the mortgagee, he cannot exercise his full rights in each capacity and, therefore, as mortgagee he loses his right of foreclosure where he has an alternative right of sale. The principle is that in such cases he is placed in a position, which the Court invariably controls, of a person whose title and interest are entirely conflicting. Where one of several executors was indebted to the testator and had given a security by way of mortgage upon his estate, if the co-executors were apprehensive that his estate might prove a deficient security, it would be improper to bring a suit for foreclosure because the testator having made him an executor, gave him an interest in the mortgage (i) During the subsistence of a mortgage, the relationship of trustee and *cestui que trustee* does not arise. But a mortgage may be in a form whereby the mortgagor becomes a trustee. Although the Act does not say so, a mortgagee who is also a trustee or a trustee who has been given a charge on the trust property, will not be allowed to foreclose. This is on the broad principle that the trustee is in a position in which it is impossible for him, if a foreclosure is granted, to make performance of his duty coincide with his interest and, therefore, the Court would be bound, even if the deed gave him power of

(i) *Lucas v. Seale* (1740) 2 Atk. 58, 26 E. R. 431.

foreclosure, to say that it was impossible to allow him to foreclose when his duty was to take every possible step for the saving of the estate (*j*).

S. 67

Clause (c).—This restriction is founded on the inconvenience of granting either a sale or foreclosure whereby the benefit of a public undertaking might be lost to the public (*k*). This clause follows the principles laid down in England where it is conclusively established that the undertaking of a railway company duly sanctioned by the Legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the company (*l*). The rule thus settled appears to rest upon this consideration, that inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties and obligations from a railway corporation to any other person, whether individual or corporate, it would be contrary to the policy of the Legislature as disclosed in the Railway statutes and special Acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or prevent its completion. In *Legg v. Mathieson* (*m*), the security was not a “floating” one, but the same result followed, where a company issued debentures by which they charged their undertaking and the whole of their property, present and future, including uncalled capital, as a first charge which was to be a “floating security” (*n*). In the latter case nothing was due at the time of the application in respect of the debentures, yet the Court protected the plaintiff’s security by the appointment of a receiver, because several actions brought by other creditors against the company were pending and in one of them execution had been levied by the Sheriff on goods and chattels of the company comprised in the debentures (*o*). And also a manager was appointed, but with great hesitation (*p*). So also in case of a tramway company, a receiver was appointed of the undertaking of the company and the net earnings thereof, but no order for the sale of the undertaking or for the appointment of a manager was made (*q*).

Other work.—“Other work” in this clause means completed work, that is, the work from which the company can earn and not the materials or the component parts, out of which the work is completed. Hence there can be neither sale nor foreclosure in the case of a public undertaking which has been mortgaged. But where railway debentures were granted, by which the “undertaking and all the tolls and sums of money arising by virtue of the Act, and all the estate, right and interest of the company in the same” were assigned to the debenture creditors and subsequently other creditors obtained judgment against the company and afterwards by authority of an Act of Parliament, the railway was sold and the funds deposited in Court, the debentures were entitled to be satisfied out of these funds and were given priority over the judgments as against the purchase-money, for to hold otherwise would be to decide that the debentures were worth nothing (*r*). The debenture-holders are entitled to priority over the execution creditor (*s*).

(*j*) *Tennant v. Trenchard* (1869) 4 Ch. App. 537.

(*k*) *Furness v. Caterham Railway Co.* (1858) 24 Beav. 614, 53 E. R. 771.

(*l*) *Legg v. Mathieson* (1860) 2 Giff. 71; *Gardner v. London Chatham & Dover Railway Co.* (1867) 2 Ch. App. 201.

(*m*) (1860) 2 Giff. 71.

(*n*) *Edwards v. Standard Rolling Stock Syndicate* (1893) 1 Ch. 574.

(*o*) *Edwards v. Standard Rolling Stock Syndicate* (1893) 1 Ch. 574; *Wildy v. Mid-Hants Railway Company* (1868) 16 W. R. 409.

(*p*) *Edwards v. Standard Rolling Stock Syndicate*

(1893) 1 Ch. 574; *Mackins v. Percy Ibolson & Sons* (1891) 1 Ch. 133.

(*q*) *Marshall v. South Staffordshire Tramways Co.* (1895) 2 Ch. 36. There it was decided that the rule laid down as to a railway company in *Gardner’s* case applies to a tramway company, also, overruling certain decisions to the contrary effect.

(*r*) *Furness v. Caterham Railway Co.* (1858) 27 Beav. 358, 54 E. R. 140.

(*s*) *In re Opera Ltd.* (1891) 3 Ch. 260; *In re Standard Manufacturing Co.* (1891) 1 Ch. 627.

S. 67

Clause (d).—Yet another exception is created by this clause, by which one of several mortgagees is precluded from adopting proceedings under this section. Just as there is an exception to section 60 whereby one of several mortgagors cannot redeem, by this clause, one of several mortgagees cannot by the intervention of judicial proceedings foreclose or sell the equity of redemption, the principle being that there shall be neither redemption, foreclosure nor sale piecemeal, for every one of the mortgagors is interested in the payment of that money. So that a mortgagee cannot compel a mortgagor either to pay a part of the mortgage debt or to stand foreclosed as to a part (t). The prohibition in this clause is as to the frame of the suit and not as to the person who institutes the suit. What the section says is that a mortgagee interested in a part of the mortgaged property, should not institute a suit relating only to a corresponding part of the mortgaged property. The converse case, therefore, of a person interested in a part instituting a suit to recover his share, by framing a suit relating to the whole of the mortgaged property, is not within the prohibition. The obstacle disappears when the suit is made to operate upon the whole of the property (u). When there is a mortgage for one entire sum of property held in certain shares and redeemable upon payment of an entire sum, every one of the mortgagors interested in the payment of the money and the redemption of the estate, must be before the Court (v). Foreclosure proceedings are irregular, when a sum paid by one of the mortgagors is treated as made on his account and thus to exempt him and his share and proceed against the other mortgagors (w). Where the contracting parties are ranged on either side, sub-clause (d) does not preclude a mortgagee realizing his security from a part only of the mortgaged property (x).

Form of suit by one mortgagee to enforce his share of mortgage.—The principle of this clause is that on a mortgage made to two or more mortgagees, it is not a mortgage to each, of a divided share in any particular proportion, but a conveyance to them of the whole property, unless with the consent of the mortgagors there is a severance of their interest, as when separate sums are secured to each. Whether the remedy pursued is for foreclosure or for sale, the mortgagee must join the co-mortgagees as plaintiffs, in order to realize the security and to obtain payment of the debt. If consent of the co-mortgagee cannot be obtained, the latter must be added as defendant to the suit and the plaintiff should ask for a proper mortgage decree, providing for all necessary accounts and payments except that there should be no decree for money entered as between mortgagor and the mortgagees who are made defendants (y). An exemption has been engrafted on this exception in the case of a severance by the mortgagees of their interests with the consent of the mortgagor, so that the debt becomes distributable over different portions of the mortgaged property or where the mortgagors effect a partition of the estate and apportion their liability, in which the mortgagee acquiesces and some of them pay their debt, the mortgagee may proceed to recover the remainder from the share of

- (t) *Nilakant v. Suresh Chandra* (1885) 12 Cal. 414, 12 I. A. 171; *Bishan Lal v. Manni Ram* (1876) 1 All. 297; *Parsotam v. Mulu* (1887) 9 All. 68; *Lalji v. Janki Lal* (1887) A. W. N. 233.
 (u) *Bansiram v. Naga Ayyar*, A. I. R. (1930) Mad. 985.
 (v) *Norender v. Dwarka Lal* (1878) 3 Cal. 397, 5 I. A. 18.
 (w) *Chandika Singh v. Pohkar Singh* (1880) 2 All. 906.
 (x) *Bansiram v. Naga Ayyar*, A. I. R. (1930) Mad. 985 (whole property included for

- part); *Ghasi Khan v. Thakur Kishor*, A. I. R. (1929) All. 380; (two properties jointly mortgaged); *Sanwal Singh v. Ganesh Lal* (1913) 35 All. 441 (joint mortgage by separate owners); *Sheo Tahal v. Shevdan Rai* (1906) 28 All. 174 (exempting portion of mortgaged property); *Lachmi Narain v. Babu Ram* (1935) All. 391.
 (y) *Sunitibala Debi v. Dhara Sundari* (1920) 47 Cal. 175, 46 I. A. 272; *Ray Satindra v. Ray Jalindra* (1925) 31 C. W. N. 374; *Haidar Ali v. Mohammad Shajiuddin*, A. I. R. (1932) Cal. 34.

the mortgagor co-sharer (2). And it can make no difference that the partition is effected, not by mutual consent, but by decree of the Court.

S. 67

In a mortgage the debt and the lien can always be split up by consent and on such splitting, the mortgagee is entitled to sue the mortgagor for nothing more than a proportionate share of the mortgage debt, provided the burden on him is not in any way increased (a). Certain property was mortgaged by K. to B. and J. Then other property was mortgaged by G. (K.'s brother), also to B. and J. Subsequently K. and G. made a usufructuary mortgage of both properties in favour of B. alone, ostensibly in lieu of the former mortgages, and B. purported to give the mortgagors a discharge of those mortgages. Held that in these circumstances it was competent to J. to sue the mortgagors for the recovery of his share in the mortgage debts due in respect of the two earlier mortgages, the action taken by B. amounting in law to a severance of the interests of the mortgagees with the consent of the mortgagors (b). But where one of two co-mortgagees accepted a smaller amount than what was due in full satisfaction of the debt, and the other not consenting, sued to enforce his share against the whole property, the suit was held maintainable (c). The principle of the rule in clause (d) is applicable where the severance of the mortgagee's interest is effected by a decree of the Court binding on the mortgagor (d). It has been seen in the commentaries to section 60, that a purchaser of a part of the equity of redemption cannot redeem his share only on payment of his proportionate share, except in the case where a mortgagee or where there are more mortgagees than one, all of them has or have acquired in full or part the share of a mortgagor (e). As with redemption so with foreclosure, where, acquisition obtained by a mortgagee, or when there are more mortgagees than one, by all the mortgagees of the equity of redemption, has been treated as amounting to consent, bringing the case within the exception. Such acquisition has the effect of discharging and extinguishing a portion of the mortgage debt which is chargeable to the property acquired (f). The value is to be calculated in accordance with section 82 of the Act (g). A mortgagor died leaving him surviving a brother, two daughters and an illegitimate son. The four sons of the brother took an assignment of the mortgage from the mortgagee, and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor, and, inasmuch as they were themselves owners of part of the mortgaged property, framed their suit as one for the recovery of specific shares of the mortgage-money from the portions of the property in the possession of each of the defendants. They obtained in this suit an *ex-parte* decree which, however, was set aside as against one of the daughters, upon the ground that she was a minor and not properly represented therein. Held that the plaintiffs were not precluded from maintaining a fresh suit against this defendant for the recovery of a share in the mortgage debt proportionate to her share in the property (h).

(a) *Mahadaji v. Ganpatshet* (1891) 15 Bom. 257; *Hari Kissen v. Velial Hossein* (1903) 30 Cal. 755; *Venkatachella v. Srinivasa* (1905) 28 Mad. 555.

(b) *H. V. Low & Co., Ltd. v. Pulinbiharilal Singha* (1932) 59 Cal. 1372; *Lakshuman v. Madhab Krishna* (1890) 15 Bom. 186; *Mahadaji v. Ganpatshet* (1890) 15 Bom. 257; *Venkatachella Chetty v. Srinivasa Varada* (1905) 28 Mad. 555; *Sheo Tahal v. Sheodan Rai* (1905) 28 All. 174; *Hari Kissen v. Velial Hossein* (1903) 30 Cal. 755.

(c) *Jauhari Singh v. Ganga Sahai* (1919) 41 All. 631.

(d) *Arunachalam v. Ramasamy*, A. I. R. (1928) Mad. 933.

(e) *Vijayabhushanammal v. Evalappa* (1916)

39 Mad. 17; *Sarju Kumar v. Thakur Prasad* (1920) 42 All. 544.

(f) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7, 19; *Jugmohan v. Hanbans Singh*, A. I. R. (1925) Oudh 609; see commentaries on section 60.

(g) *Krishnachandra v. Paba Model Company, Ltd.* (1932) 59 Cal 76; *Bisheshur Dial v. Ram Sarup* (1900) 22 All. 284; *Dina Nath v. Lachmi Narain* (1903) 25 All. 446; *Shib Lal v. Bhawani Shankar* (1904) 26 All. 72; *Mully Lal v. Nandu Lal* (1908) 12 C. W. N. 745.

(h) *Shib Lal v. Bhawani Shankar* (1904) 26 All. 72.

(i) *Rashid-un-nissa v. Muhammad Ismail Khan* (1912) 34 All. 474.

Ss. 67-67A A contrary view was taken, where part of the mortgaged property was purchased by one of the mortgagees. In a suit by others to recover their share of the mortgage debt by sale of the whole property in satisfaction of their share of the mortgage debt which was one-half, it was held that the plaintiffs were only entitled to bring to sale a portion of the property corresponding to what was found as a fact to be the share of the mortgage debt, to which they were entitled (i). At a sale in execution of a final decree upon a mortgage, part of the mortgaged property was purchased by M. Subsequently to this purchase, M. also obtained from the mortgagee an assignment of the mortgage decree itself. Held, on application being made for further execution of the decree, that the effect of M.'s purchase was to discharge the mortgage debt *pro tanto*, that is to say, in the ratio in which the property purchased bore to the rest of the property mortgaged, and the decree could only be executed for the balance (j). When mortgaged property is transferred to various hands, as on a partition, but the mortgagee has not been a party to the destruction of the integrity of the mortgage, he is entitled to realize the whole debt from any portion of the mortgaged property (k) unless he has acquiesced in the partition (l). A severance of interest, as when separate sums are secured to each, has been construed as effected by consent of the mortgagor (m). A mortgagee may exonerate an item of mortgaged property and realize the amount due to him from another (n). The liability for contribution under section 82 of the Act is not lost by exoneration and the released portion continues to remain liable for contribution notwithstanding the release by the mortgagee (o).

Security bond.—A security bond, executed by a judgment debtor for the purpose of removing an attachment before judgment, may be enforced in the course of execution. To such transactions, the section has no application (p).

67A. *A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.*

Mortgagee when bound to bring one suit on several mortgages.

A mortgagee cannot sue on any one mortgage.—

- (a) where he holds from the same mortgagor
 - (b) two or more mortgages in respect of each of which
 - (c) he has a right to obtain the same kind of decree under section 67
- Unless there is a contract to the contrary.

(i) *Mohan Lal v. Prasadi Lal* (1923) 45 All. 46.
 (j) *Sarju Kumar v. Thakur Prasad* (1920) 42 All. 544.
 (k) *Soti Suraj v. Than Singh* (1922) 44 All. 146.
 (l) *Venkalachella Chetty v. Srinivasa* (1905) 28 Mad. 555; *Mahadaji v. Ganpatshet* (1891) 15 Bom. 257.
 (m) *Lachmi Narain v. Babu Ram*, A. I. R. (1935) All. 391; *H. V. Low & Co., Ltd. v. Pulin-beharilal* (1932) 59 Cal. 1372.
 (n) *Perumal Pillai v. Raman Chettiar* (1917) 40 Mad. 968; *Jagal Kishore v. Kedar Nath* (1912) 34 All. 606; *Ghasi Khan v. Kishore*, A. I. R. (1929) All. 380; *Samual Singh v.*

Ganeshi Lal (1913) 35 All. 441; *Sheo Prasad v. Behari Lal* (1903) 25 All. 79; *Sheo Tahal v. Sheodan Rai* (1906) 28 All. 174.
 (o) *Perumal Pillai v. Raman Chettiar* (1917) 40 Mad. 968.
 (p) *Rajenderachandra v. Bipinchandra* (1933) 60 Cal. 1298; *Jyoti Prakash v. Mukti Prakash* (1923) 51 Cal. 150; *Raja Raghobar v. Jai Indra* (1919) 42 All. 158, 46 I. A. 228; *Tala Iron & Steel Co., Ltd., v. Charles Joseph Smith* (1929) 8 Pat. 801; *Subramanian v. Raja of Ramnad* (1918) 41 Mad. 327; *Shyam Sundar v. Bajpai* (1903) 30 Cal. 1060.

New section.—This section has been added by the Amending Act, 20 of 1929. **Ss. 67A-68** It reintroduces consolidation which has been abrogated as to mortgagors. The section has been added to avoid difficulties which have arisen, where a mortgagee holds several mortgages in respect of the same or different properties, as it was prejudicial to the mortgagor whether the remedy pursued was foreclosure or sale. In the former case the mortgagor may lose the whole property in satisfaction of one debt, which may be less than the real value of the property and be liable for a personal decree in satisfaction of debts under the other mortgages; while in case of a sale, the property never realizes its fair and true value when sold subject to another mortgage. The Calcutta High Court took an intermediate course by holding that the property should be sold free of both charges, whether in execution of the decree on the first mortgage or a decree under the second mortgage, and the balance of sale proceeds after payment of incidental expenses, should be applied in discharge of the dues under the first mortgage and the second mortgage one after the other and the residue credited to the holder of the equity of redemption, a course which though equitable, was not warranted by any provisions of the Act or Order 34 of the Code of Civil Procedure (q). It sets at rest divergence of judicial opinion on this question. One line of decisions was for the mortgagee instituting separate suits on the different mortgages as the contracts were distinct (r), the other line was against (s).

Same or different properties.—This section was intended to apply to the case of more than one mortgage on the same property, but is wide enough to include mortgages on different properties which are liable only to sale. Presumably intended to benefit a mortgagee, it is difficult to appreciate how it can benefit him to meet demands in respect of several obligations at one and the same time. It restricts the rights of mortgagees and must, therefore, be construed strictly. It seems to have been thrust in the Act without due consideration as to its effect upon other sections, for example, section 100.

Jurisdiction.—The section is limited to mortgages which the Court has jurisdiction to enforce (s¹).

Retrospective effect.—The section is not retrospective (t).

Statutory charge.—The section does not apply to securities created by operation of law and in particular to statutory charges created under the provisions of section 205 of the Calcutta Municipal Act (u).

68. (1) *The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:—*

(a) *Where the mortgagor binds himself to repay the same;*

(b) *where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged*

(q) *Nilu v. Asirbad Mandal* (1920) 25 C. W. N. 19.

(r) *Sundar Singh v. Bhalu* (1898) 20 All. 322; *Govind Prosad v. Tek Narain* (1911) 38 Cal. 60.

(s) *Keshavram v. Ranchhod* (1906) 30 Bom. 156; *Daluchand v. Appi* (1921) 45 Bom. 55; *Nathu Krishnama v. Annangara* (1907) 30

Mad. 353.

(s¹) *Premasukh v. Mangal Chand* (1937) 41 C. W. N. 854.

(t) *V. B. S. Chettiar Firm v. Ya Ya, A. I. R.* (1933) Rang. 377; *Bhau v. Revappa* (1938) 40 Bom. L. R. 109.

(u) *Corporation of Calcutta v. Arunchandra* (1934) 61 Cal. 1047, reversing (1933) 60 Cal. 1470.

S. 68

property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

- (c) *where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;*
- (d) *where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor ;*

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) *Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfers the mortgaged property.*

Amendment.—The section has been amended by Act 20 of 1929. In clauses (a), (b), (c), there are no alterations. The original clause (a) is retained. The original clause (b) is new clause (c). The latter part of original clause (c) is new clause (b), the former part being new clause (d), to which has been added " claiming under a title superior to that of the mortgagor " to exclude disturbance of the mortgagee's possession by a trespasser or a third person with whom the mortgagor is not in collusion. The proviso, which is new, exempts an assignee of the equity of redemption from liability under clause (a). Sub-clause (2) has been added to prevent the hardship on the mortgagor by the mortgagee resorting to the personal covenant before exhausting his remedy against the mortgaged property.

Right to sue for mortgage-money.—In no cases, except the four mentioned below, has the mortgagee a right to sue the mortgagor for the mortgage-money.

- (a) Where the mortgagor binds himself to repay the same
- (b) Whereby any cause other than the wrongful act or default of the mortgagor or mortgagee

- (1) The mortgaged property is wholly or partially destroyed or,
- (2) The security is rendered insufficient within the meaning of section 66 and
 - (i) The mortgagee has given a reasonable opportunity to the mortgagor of providing further security enough to render the whole security sufficient and
 - (ii) the mortgagor has failed to do so
- (c) Where in consequence of the wrongful act or default of the mortgagor, the mortgagee is deprived of the whole or part of his security.
- (d) Where the mortgagee being entitled to possession :
 - (i) the mortgagor fails to deliver, or
 - (ii) to secure possession without disturbance
 - (1) by the mortgagor, or
 - (2) person claiming under a superior title to him.

Proviso.—Clause (a) shall not apply to a transferee

- (1) from the mortgagor or
- (2) from the legal representative of the mortgagor.

Exception.—Notwithstanding any contract to the contrary

- (1) The Court may in its discretion stay a suit brought under clause (a) or clause (b) and all proceedings in the suit
 - (a) Until the mortgagee exhausts all his remedies against the property or what remains of it unless
 - (b) the mortgagee abandons his security and if necessary retransfers the mortgaged property.

Charge.—The principles of the section are made applicable to charges by the amendment of section 100 by Act 20 of 1929, the Transfer of Property Amendment Act.

Himself.—The use of this word in clause (a) makes it clear that the covenant is a personal one and that neither the legal representative of the mortgagor nor his transferee is liable.

What is a covenant.—A covenant may be defined to be an agreement between two or more persons, by an instrument in writing, sealed and delivered, whereby some of the parties engage, or one of them engages with the other or others of them, that some act hath or hath not already been done ; or for the performance or non-performance of some specified duty (*v*). Usually a covenant is created by instrument. The party making the covenant is called a covenantor and the other is called a covenantee. Implied covenants depend on their existence on the intent and construction of law. There are some words which of themselves do not import an express covenant, yet being made use of in certain contracts, have a similar operation and are called covenants in law ; and are as effectually binding on the parties, as if expressed in the most unequivocal terms. The distinction between express and implied covenants is not merely technical, but in many instances, its consequences are of considerable moment. In construction, expressed covenants are regarded with greater strictness than those which are implied ; and, without

(v) Platt on Covenants, p. 3.

S. 68

any consideration a man may enter into an express covenant (*w*). A covenant personal relates only to matters personal, and is distinct from real, and is binding on the covenantor during his life, and on his personal representatives, after his decease, in respect of assets. A covenant may also be personal in a sense, where it is to be performed personally by the covenantor only (*x*). One of the principal differences between a real and personal covenant is, that the former may run with the land and charge an unnamed assignee; but the latter never can, nor can an assignee even where expressly named, be bound by, nor avail himself of any benefit under such covenant (*y*).

Section 68, Clause (a).

Personal liability to pay.—In considering this question it must be borne in mind (i) that a loan *prima facie* involves a personal liability, (ii) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (iii) that the nature and terms of such security may negative any personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under the section (*z*). In England every mortgage imports a debt, and a personal covenant is implied in every mortgage. There is on the part of the mortgagor a personal obligation to repay the debt. In India, it is not so in every mortgage (*a*). This clause gives the mortgagee a right to sue the mortgagor personally unless on the construction of the mortgage deed or by express contract between the parties the liability is displaced (*b*). Such liability is not displaced by the absence of provision in a decree for sale (*c*). A bond was deemed to contain a personal covenant to pay where the transaction was referred to as a loan (*d*). A mortgage transaction fixing a date for repayment and in default foreclosure, does not create an obligation to repay the money within the meaning of this clause (*e*). This is in each case a question of construction of the deed. Where an instrument was a mortgage of the estate and nothing else, it was held to be a mere contract to pay out of the hypothecated estate (*f*). This case was followed by the High Court of Calcutta where the stipulation was that if the money advanced were not repaid at a specified date, the mortgaged property might be sold, or if the property were sold for failure to pay Government revenue, the amount could be recovered by execution against the person of the mortgagor, and that no sale having taken place, the mortgagee could only obtain a decree against the mortgaged property (*g*). The simultaneous execution of the hypothecation by the mortgagor in favour of the mortgagee, and a lease in favour of the husband of the mortgagee, was similarly construed (*h*).

No prayer in the plaint.—Although there be no specific prayer, the Court is bound to give relief if plaintiff is otherwise entitled to it (*i*).

(*w*) Platt on Covenants, p. 40.

(*x*) Platt on Covenants, pp. 66 and 67.

(*y*) Platt on Covenants, p. 69.

(*z*) *Ram Narayan Singh v. Adhindra Nath Mukherji* (1917) 44 Cal. 388; *D. B. Seth Jivandas v. Mt. Jankji*, A. I. R. (1922) Nag. 98; *Gopikisan v. Mt. Mankuar*, A. I. R. (1924) Nag. 97.

(*a*) *Pell v. Gregory* (1925) 52 Cal. 828, 843.

(*b*) *Pell v. Gregory* (1925) 52 Cal. 828, 861.

(*c*) *Gopikisan v. Mankuar*, A. I. R. (1924) Nag. 97.

(*d*) *Rajagopalachariar v. Thiagraya Mudali*,

A. I. R. (1925) Mad. 991.

(*e*) *Harlalsa v. Shaikh Rahim*, A. I. R. (1924) Nag. 53; *Govind v. Jagannath* (1916) 12 Nag. L. R. 19.

(*f*) *Narotam Das v. Sheo Pargash* (1884) 10 Cal. 740, 11 I. A. 83.

(*g*) *Bunseedhur v. Sujaat Ali* (1890) 16 Cal. 540.

(*h*) *Gopal Row v. Narshimha Row* (1904) 27 Mad. 86.

(*i*) *Abbakee Heggadthi v. Kerihamma Shetty* (1906) 29 Mad. 491; *Gopi Narain Khauna v. Bansidhar* (1905) 27 All. 325.

Appeal Court.—A personal decree may be made even at the appellate stage against the mortgagor (j).

S. 68

Personal covenant when implied.—Under section 65 (e) the mortgagor impliedly covenants to pay interest on the prior encumbrance, and at the proper time to discharge the principal money on such prior encumbrance. Such a breach of covenant is a default within the meaning of section 68, so as to give the mortgagee a right to sue the mortgagor for the mortgage money (k). It is implied in the statement that the principal has been received (l).

Conditional promise.—Where the person or other property of the mortgagor is made liable on the happening of certain events, the mortgagor is not liable nor is his other estate liable, unless the contingencies contemplated happen (m).

Mortgage by person not owner.—An adopted son, subsequent to whose adoption the adoptive mothers had mortgaged the property, in spite of a promise to his mother, but not to the mortgagee, to redeem, is not liable (n).

Covenant in favour of two or more joint mortgagees.—This would be governed by section 45 of the Indian Contract Act, IX of 1872. The mortgagees should therefore sue jointly (o).

Necessity for demand.—Demand is not considered to be a condition precedent to the bringing of the action. The principal in such a case becomes payable immediately it is advanced (p), unless the covenant requires that the demand should be in writing (q).

Principal payable by instalments.—Agreement to advance moneys by instalments over a period of two years by equal quarterly sums, implies a covenant not to sue during the two years (r). The covenant may be modified by a proviso, that in the event of default of payment of the stipulated instalment, the whole debt shall become payable immediately on demand. A provision of this kind is not penal and is binding on the mortgagor (s). These cases are governed by the express terms of the mortgage deed (t). A decree may be obtained and in execution thereof a sufficient portion of the mortgaged property may be sold. Such a proceeding however, would be under the Code of Civil Procedure, 1908, and not under section 68.

Qualifying the personal covenant.—The personal covenant, though usually absolute, may be qualified in two ways, either by restricting it to a particular fund, or by express declaration excluding the personal liability, particularly so, when the mortgagor is in a fiduciary capacity. In the latter case, the mortgaged deed generally contains a clause negating such personal liability of the borrower or his estate

(j) *Askaran v. Gobordhan* (1922) 26 C. W. N. 318.

(k) *Kandasami v. Akkammal* (1890) 13 Mad. 192.

(l) *Yashvant Narayan v. Vithal Divakar* (1897) 21 Bom. 267; *Musaheb Zaman Khan v. Inayat-ul-lah* (1892) 14 All. 513; *Sutton v. Sutton* (1882) 22 Ch. D. 511; *Sivakami v. Gopala* (1899) 17 Mad. 131; *Madappa Hedge v. Ram Krishna* (1911) 35 Bom. 327; *Sri Pell v. Gregory* (1925) 52 Cal. 828; *Parbati Charan Roy v. Gobinda Chandra Kundu* (1906) 4 C. L. J. 246; *Ram Krishna Gir v. Suraj Deo Prasad* (1914) 26 M. L. J. 47.

(m) *Rogers & Co. v. British and Colonial Colliery Supply Association* (1898) 68 L. J. Ch. Q. B. 14; *Bunseedhur v. Sujaat Ali* (1889) 16 Cal. 540.

(n) *Shiddeshwar v. Ramchandrarav* (1882) 6 Bom. 463; *Wilson v. Tumman* (1843) 6 M. & G.

236, 134 E. R. 879.

(o) *Hopkinson v. Lee* (1845) 6 Q. B. 964, 115 E. R. 363; *Dular Chand v. Balram Das* (1879) 1 All. 453; *Kalidas v. Nathu Bhagwan* (1883) 7 Bom. 217; *Imam-ud-din v. Lilad-dar* (1892) 14 All. 524.

(p) *Re. J. Browns Estate, Brown v. Brown* (1893) 2 Ch. 300.

(q) *Re. J. Browns, Estate, Brown v. Brown* (1893) 2 Ch. 300.

(r) *Curteis v. Fenning* (1872) 41 L. J. Ch. 791.

(s) *Protector Loan Co. v. Grice* (1880) 5 Q. B. D. 592; *Walthingford v. Mutual Society* (1880) 5 A. C. 685.

(t) *Setrucharlu Ramabhadra Raju Bahadur v. Maharaja of Jeypore* (1915) 42 Cal. 813 P.C.; *Madappa Hedge v. Ramkrishna Narayan* (1911) 35 Bom. 327 P.C.

S. 68 in respect of any principal money or interest thereby secured (*u*). A person who contracts "as receiver" is personally liable on the contract (*v*). So, too, a person who contracts "as executor" (*w*). The words "as such trustees" in a covenant of this kind, have no effect at all. A covenant by a person "as trustees" does not render his trust estate liable, it is a covenant by himself (*x*).

Tenant for life.—Where a tenant for life joins in a mortgage with a trustee, he does not undertake to be personally liable for the loan, though it is usual for him to agree to keep down the interest (*y*).

Rate of interest under the personal covenant.—As this liability arises after decree absolute, the mortgagee can only get 6% interest, notwithstanding anything to the contrary in the mortgage deed (*z*).

Proviso at variance with the personal covenant.—A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void (*a*), but a proviso only limiting the personal liability without destroying it, is valid (*b*).

When a date is fixed in the mortgage.—No right of action arises when a date is fixed for repayment, till the expiration of such date (*c*).

Public undertakings.—A mortgagee of a railway canal or other work in the maintenance of which the public are interested, is precluded by section 67 of the Transfer of Property Act from instituting a suit for foreclosure or sale, nor can the proprietors of such undertaking be sued personally except where a corporation is created for certain purposes, with power to sue and be sued, to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument, which on its face imports a covenant for repayment; if money be so borrowed and so secured, an action *prima facie* may be maintained against the corporation on breach of the covenant (*d*). The cases of railways, market tolls and so forth are quite different, for there the borrowers have a profit to receive. It would be the ruin of undertakings of this sort if the proprietors were to be personally liable (*e*).

Void mortgages.—With regard to this question, viz., that when a mortgage deed is void and unenforceable for want of attestation and other causes, whether the mortgagee can enforce his claim under his personal covenant, there have been conflicting decisions. The question arose before the Privy Council but it was not decided. They observed that the position of the mortgagor under this section could not by reason of the non-attestation of the deed, be better than it would have been, if the mortgage had been duly attested (*f*). The Madras High Court held that section 68 does not entitle a usufructuary mortgagee, whose mortgage is invalid for want of attestation, and who is deprived of possession by title paramount, and not by an act of the mortgagor, to sue for the mortgage-money (*g*). In a later case the

(*u*) Encyclopædia of Forms and Precedents, 1st Ed., Vol. 8, p. 559.

(*v*) *Burt, Boulton & Hayward v. Bull* (1895) 1 Q. B. 276.

(*w*) *Farhall v. Farhall* (1871) L. R. 7 Ch. 123; *Owen v. Delamere* (1872) L. R. 15 Eq. 134.

(*x*) *Farhall v. Farhall* (1871) 7 Ch. 123; *Walling v. Lewis* (1911) 1 Ch. D. 414.

(*y*) Encyclopædia of Forms, 1st Ed., Vol. 8, p. 567.

(*z*) *Jagannath Prasad v. Surajmal* (1927) 54 Cal. 161, 54 I. A. 1.

(*a*) *Furnivall v. Coombes* (1843) 5 Man. & G. 736, 134 E. R. 756.

(*b*) *Williams v. Hathaway* (1877) 6 Ch. D. 544; *Walling v. Lewis* (1911) 1 Ch. 414; *Furnivall v. Coombes* (1843) 5 Man. & G. 736, 134 E. R. 756.

(*c*) *Bolton v. Buckenham* (1891) 1 Q. B. 278; *Re. Turkesbury Gas Co. Tysoe v. The Co.* (1912) 1 Ch. 1 C. A.

(*d*) *Eastern Union Railway Co. v. Hart* (1852) 8 Ex. 116, 155 E. R. 1283.

(*e*) *Pontet v. The Basingstoke Canal Co.* (1835) 3 Bing. (N. C.) 433, 132 E. R. 477.

(*f*) *Ram Narain Singh v. Adhindra Nath Mukerji* (1917) 44 Cal. 388, 44 I. A. 87.

(*g*) *Kuppier v. Periakaruppa* (1919) 42 Mad. 578.

same Court held that such a personal covenant could be enforced (*h*). The Allahabad High Court has taken a contrary view (*i*). The same principle was followed in the cases mentioned below (*j*) which related to transactions of sale.

Personal covenant in an invalid mortgage.—A distinction was, however, made where the mortgage-money had been paid through the mortgagor's fraud. Such a suit was not based on the transaction. It would be based upon the fraud of the defendant and bound to succeed (*k*). The conclusion that the mortgagee cannot recover on the personal covenant when the mortgage is discovered to be void, is contrary to section 65 of the Indian Contract Act, 1872.

Costs and expenses not included.—Costs and expenses properly incurred by a mortgagee in relation to the mortgaged property, and which the mortgagor will be compelled to pay as a condition of being allowed to redeem the property, do not constitute a debt in respect of which an action can be maintained by the mortgagee against the mortgagor (*l*). It is said that the mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs.

Mortgagee suing after purchase with leave of Court.—He is not precluded from suing the mortgagor upon his personal covenant for the deficiency. It is not material that he has resold the property at a profit (*m*).

Mortgagee contracting to buy from the mortgagor another estate.—A contract to buy from the mortgagor another estate from the purchase-money, for which the mortgage-debt is to be deducted, is not a ground for restraining the mortgagee from suing on the personal covenant (*n*).

Punjab Alienation of Land Act, XIII of 1900, s. 16.—The defendants entered into an oral mortgage with plaintiff for Rs. 10,000 the terms of which were stated by the parties before the *patwari* in mutation proceedings, and were recorded by him, whereby it was agreed that possession should be with the mortgagee, that interest and produce were to counter-balance each other and that the mortgage-money would be paid on the 15th December 1927, when the land would be redeemed. Held, that the mortgage was an anomalous mortgage and not a purely usufructuary one, and that, therefore, under section 68 (a) of the Transfer of Property Act, the mortgagee had a right to sue for the mortgage-money, the mortgagors having bound themselves to repay the same. Held further, that as under the provisions of section 16 of the Punjab Land Alienation Act, the land could not be sold, the mortgagee was entitled to a simple money decree, as prayed for by him (*o*).

Loss of right to sue on the personal covenant.—If having improperly made away with his security he is unable to return it to his debtor, he cannot have judgment for his debt (*p*).

Right to protection of security.—A mortgagee, who advances a loan on the security of immoveable property, is entitled to the full benefit of his security as regards the value thereof, the general principle being, that the mortgagee is entitled

(*h*) *Rajagopalachariar v. Thiagaraya Mudali*, A. I. R. (1925) Mad. 991.

(*i*) *Tulshi Ram v. Sat Narain* (1921) 43 All. 81; *Har Prasad v. Sheo Gobind* (1922) 44 All. 486.

(*j*) *Murlidhar v. Pem Raj* (1900) 22 All. 205 (F. B.); *Bhawani Prasad v. Ghulam Muhammad* (1896) 18 All. 121.

(*k*) *Shahzad Singh v. Narain Kurmi*, A. I. R. (1927) All. 190.

(*l*) *Ex-parte Feavings, In re Sneyd* (1883) 25 Ch. D. 339.

(*m*) *Gordon Grant & Co., Ltd. v. F. L. Boos* (1926) A. C. 781.

(*n*) *Pell v. Stephens* (1833) 2 My. & K. 334, 47 E. R. 94.

(*o*) *Qadir Parast Khan v. Nur Muhammad* (1935) 16 Lah. 612.

(*p*) *Lockhart v. Hardy* (1846) 9 Beav. 349, 50 E. R. 378; *Palmer v. Hendrie* (1859) 27 Beav. 349, 54 E. R. 136; *Kinnaird v. Trollope* (1888) 39 Ch. D. 636; *Ellis & Co.'s Trustees v. Dixon-Johnson* (1925) A. C. 489.

S. 68

to see that his security is not impaired, from which it follows, that the mortgagor must not do anything whereby the security may be diminished in value. This clause, however, provides for cases where without any act or default of either party to the contract of mortgage, the value of the property has diminished. Under this clause the mortgagee has the option to require additional security on the happening of any of the three contingencies, viz., partial destruction of the security, entire destruction of the security, or where the security becomes insufficient, within the meaning of section 66 of the Transfer of Property Act (*q*), and on the mortgagor's failure to furnish the required security, the mortgagee is entitled to sue the mortgagor, but before doing so, it is incumbent upon the mortgagee to make a demand for such additional security and to wait for a reasonable time after the demand has been made. On the mortgagor's failure to comply with the mortgagee's demand within a reasonable time, the right to sue accrues immediately (*r*). The events, entitling the mortgagee to seek protection of this clause being other than the wrongful act or default of the parties, usually arise when the pledge has perished by accident, and without negligence on his part, giving him right to proceed against the debtor for the recovery of the debt (*s*). For example, when the property is destroyed by fire (*t*), by flood or inundation (*u*), or is submerged (*v*), or having been held in a usufructuary lease, is lost by diluvion (*w*). But the clause does not include cases of compulsory acquisition of the mortgaged land under section 73 (d) of the Transfer of Property Act. The mortgaged property is not deemed to be destroyed within the meaning of clause (b). The only effect of the acquisition is to change the nature of the security, that is, to transfer the mortgagee's lien to the compensation moneys (*x*). In such a case clause (c) cannot apply, because no default is charged and clause (d) cannot apply because the mortgagee is not entitled to possession (*y*), so that where part of the security was acquired, and the mortgagee received compensation, he could not claim interest for the residue unexpired of the period of the mortgage, but, it would have been otherwise if under clause (b) he had demanded additional security (*z*). So also where the mortgagee fails to put in his claim for compensation under section 9 of the Land Acquisition Act and the assessment of compensation was made in favour of the mortgagor, it was held that the remedy of the mortgagee was to proceed against the remaining mortgaged property and recover the balance under O. 34, r.6 of the Code of Civil Procedure (*a*). But this is no longer law in view of the amendments to the Act (*b*). There are cases, however, which have decided that a sale of the property under the Land Acquisition Act is a destruction under the meaning of this clause. This view, however, it is submitted, does not appear to be sound. Claim under this clause will be maintainable, when the mortgaged land was sold by revenue authorities, for failure of the mortgagor to pay the assessment due on them (*c*). The value of the property depends to a large extent upon the income obtainable from it (*d*). If the mortgagee

(*q*) *Bhawani v. Jung Bahadur* (1910) 7 A. L. J. 391.

(*r*) *Bhawani v. Jung Bahadur* (1910) 7 A. L. J. 391.

(*s*) *Vitoba v. Chhottalal* (1870) 7 B. H. C. R. 116; *Ram Sewak v. Sheo Naik* (1923) 45 All. 388; *Bhawani v. Jung Bahadur* (1910) 7 A. L. J. 391; *Venkateshwara v. Kesava Shetti* (1879) 2 Mad. 187.

(*t*) *Vitoba v. Chhottalal* (1870) 7 B. H. C. R. 116; *Venkateshwara Keshava Shetti* (1879) 2 Mad. 187.

(*u*) *Ram Jewan Miser v. Jagannath Pershad Singh* (1898) 25 Cal. 240.

(*v*) *Bhawani v. Jung Bahadur Singh* (1910) 7 A. L. J. 391; *Ram Sewak v. Sheo Naik*

(1923) 45 All. 388; *Raghunath Meghu Mundu*, A. I. R. (1933) Pat. 693.

(*w*) *Sheo Goam Singh v. Roy Dinker Dyal* (1874) 12 W. R. 215; *Ram Sewak v. Sheo Naik* (1923) 45 All. 388.

(*x*) *Jotoni Chowdharani v. Amor Krishna* (1909) 13 C. W. N. 350.

(*y*) *Arumugam v. Sivagnana* (1890) 13 Mad. 321.

(*z*) *Prokash Chandra Ghose v. Hasan Banu Bibi* (1915) 42 Cal. 1146.

(*a*) *Basa Mal v. Tajammal* (1894) 16 All. 78.

(*b*) Section 73 (2).

(*c*) *Sawaba Khandapa v. Abaji Jotiram* (1887) 11 Bom. 475 (before the Act).

(*d*) *Fateh Din v. Kishen Lal*, A. I. R. (1923) All. 584.

makes a demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the residue of the term (e). Nor can a notice requiring payment within the term, be withdrawn without the consent of the mortgagor (f). But when the destruction takes place through the wrongful act of the mortgagee no additional security can be demanded (g). Where a mortgage property stood on Government leasehold land and the Government terminated the lease, allowing the mortgagor compensation with lease of another site, the mortgagee cannot demand additional security under this clause as the circumstances do not constitute a case of transmutation, but the mortgagee's only remedy is to sue the mortgagor personally for the debt (h). Where mortgagee is deprived of his security by a stranger, he ought to call upon the mortgagor to furnish some other security equivalent to the one of which he was dispossessed, before suing the mortgagor for the money (i).

Certificate of administration.—A suit upon a usufructuary mortgage by the mortgagee's heirs is maintainable without a succession certificate (j).

Defect in title.—It seems more than doubtful whether the alleged discovery of a defect in title, is a rendering of the security insufficient within the meaning of the section (k).

Section 68, Clause (c).

Clause (c) generally.—This clause provides against cases where the deprivation of the security is caused by the wrongful conduct of the mortgagor. The right of the mortgagee to proceed arises on both a partial as well as an entire destruction of his security. It differs from clause (b) inasmuch as under that clause the mortgagee's right to sue arises without any default of the mortgagor. Like clause (b), however, it is necessary that the mortgagee should not be guilty of any wrongful act or default causing or contributing to the loss or diminution in value of the security. Unlike clause (b) it is not necessary to make a preliminary demand and wait for a reasonable time. The right conferred by clause (c) of this section exists independently of and is not taken away by any personal covenant to repay in the instrument, and that, notwithstanding the fact that the remedy on the personal covenant is barred (l). Again, clause (c) differs from clause (b) inasmuch as the personal remedy and the remedy under clause (c) may be pursued concurrently, whereas in the other case the remedy under clause (b) should be first exhausted or the security held, be abandoned before suing on the personal covenant. The default referred to in this clause must be anterior to the deprivation of possession. The failure to get back lost possession is not within the clause (m). In this case a Division Bench of the Madras High Court distinguished a case decided by the Judicial Committee (n). There the mortgagor had taken active steps to deprive the mortgagee of his possession on the ground that to such a state of affairs and circumstances clause (c) would apply, provided the mortgage was otherwise enforceable, but that

(e) *Prokash Chandra Ghose v. Hasan Banu Bibi* (1915) 42 Cal. 1146; *Letts v. Hutchins* (1871) L. R. 13 Eq. 176; *In re Moss* (1885) 31 Ch. D. 90; *Smith v. Smith* (1891) 3 Ch. 550.
(f) *Prokash Chandra Ghose v. Hasan Banu Bibi* (1915) 42 Cal. 1146; *Santley v. Wilde* (1899) 1 Ch. 747.
(g) *Babaji v. Magniram* (1897) 21 Bom. 396; *Palma v. Hendrie* (1859) 27 Beav. 349, 54 E. R. 136; *Kinnaird v. Trollope* (1888) 39 Ch. D. 636; *Ellis & Co.'s Trustees v. Dixon Johnson* (1925) A. C. 489.
(h) *Palanappa Chetty v. Ma Shine* (1909) 14

Bur. L. R. 159.
(i) *Kuppier v. Periakaruppa Kavundan* (1919) 42 Mad. 578.
(j) *Umesh Chandra Pramanick v. Mothura Kohan Haldar* (1901) 28 Cal. 246.
(k) *Amir-ul-lah v. Rasul Baksh* (1919) 17 A. L. J. 474.
(l) *Appasami Thevan v. Virappa Thevan* (1906) 29 Mad. 362.
(m) *Kuppier v. Periakaruppa Kavundan* (1919) 42 Mad. 578.
(n) *Ram Narayan Singh v. Abhindra Nath Mukherji* (1917) 44 Cal. 388. 44 I. A. 87.

S. 68 the Bench was not prepared to extend the reasoning of the decision to a case where the mortgagor had done no act to deprive the mortgagee of his possession. When mortgaged property is lost owing to the default of the mortgagee the latter sues on the personal covenant (*o*). Where in a usufructuary mortgage the mortgagor binds himself to repay the money, but there are reciprocal promises, and the mortgagee by his own default (allowing the mortgaged property to be sold for failure to pay arrears of Government revenue undertaken by him to be paid) precludes himself from fulfilling his part of the contract for restoration of the property on satisfaction of the debt, the mortgagee cannot compel the mortgagor under clause (a) of section 68 to fulfil his promise of repayment (*p*). Clause (c) of section 68 provides for relief when the mortgagee is deprived of his security otherwise than by his own default (*q*).

Examples of wrongful act or default.—Sale to a *bona fide* purchaser for value without notice after execution of an unregistered mortgage (*r*). Failure to follow property mortgaged by two of several co-sharers by reason of opposition of those who had not joined in the mortgage after representation by the mortgagors that they would not defend (*s*) acts of waste (*t*). Mortgagor knowing that he was mortgaging an estate not transferable by law and the mortgagee believing that it was a tenure of a transferable character (*u*). Non-payment of the amount due on the first mortgage which led to the sale of the mortgaged property arising from a breach of the covenant, whether express or implied, under clause (e) of section 65 of the Transfer of Property Act (*v*). Discovery of a prior encumbrance not previously known to the mortgagee (*w*) are wrongful acts or default. So also when the mortgaged land was sold by the Revenue authorities for arrears of assessment due from the mortgagor for lands other than those mortgaged (*x*). Ejectment of a tenant under the Madras Rent Recovery Act operates as an extinguishment of all mesne encumbrances and subordinate interests created by a tenant, and so the mortgagee is entitled to sue for such default (*y*).

Not a wrongful act.—A sale by a mortgagor of his equity of redemption (*z*), attachment of mortgaged premises and sale of the equity of redemption through the Court (*a*), or where the mortgagee is deprived of possession by a third party claiming under a purchaser, are not wrongful acts or defaults (*b*).

Heir of a mortgagor.—Heir of a mortgagor is liable when he commits waste to the prejudice of the security (*c*).

Charge.—The provisions of the section as to the liability of a mortgagor who commits waste, apply to a person creating a charge (*d*).

Section 68, Clause (d).

Amendment.—The amendment has been made because this clause, being a covenant for quiet enjoyment, is an assurance against defective title and disturbance consequent thereupon, so that in case of a trespasser, the mortgagee is left to his

- (o) *Chitkali Koer v. Mathuralal* (1906) 3 C. L. J. 220.
- (p) *Chitkali Koer v. Mathuralal* (1906) 3 C. L. J. 220.
- (q) *Chitkali Koer v. Mathuralal* (1906) 3 C. L. J. 220; *Hamad Yar Khan v. Shankar Das*, A. I. R. (1923) Lah. 357.
- (r) *Appasami Thevan v. Virappa Thevan* (1906) 29 Mad. 362.
- (s) *Bhugwan Acharjee v. Gobind Sahoo* (1882) 9 Cal. 234.
- (t) *Ramakrishnama Chetty v. Vuvvali Chengar Aiyar* (1914) 27 M. L. J. 494.
- (u) *Ganesh Singh v. Singhari Kuar* (1888) 10 All. 47.

- (v) *Singjee v. Tiruvengadam* (1890) 13 Mad. 192.
- (w) *Radha Churn Shaha v. Parbuttee Churn Dutt* (1874) 25 W. R. 51.
- (x) *Sawaba Khandapa v. Abaji Jotirav* (1887) 11 Bom. 475.
- (y) *Ekambara Ayyar v. Meenatchi Ammal* (1904) 27 Mad. 401.
- (z) *Jhabba Ram v. Girdhari Singh* (1884) 6 All. 298.
- (a) *Gopalasami v. Arunachella* (1892) 15 Mad. 304.
- (b) *Gokal v. Shrimal* (1904) 6 Bom. L. R. 288.
- (c) *Ramakrishnama Chetty v. Vuvvali Chengar Aiyar* (1914) 27 M. L. J. 494.
- (d) *Ramakrishnama Chetty v. Vuvvali Chengar Aiyar* (1914) 27 M. L. J. 494.

remedy against the wrong-doer, for the following reasons, as only lawful molestations would be included. First, because it would be unreasonable that a man should covenant against the tortious acts of strangers. Secondly, the covenantor, although innocent, might be charged when the mortgagee had his remedy against the wrong-doer. Thirdly, the mortgagee would have a double remedy for the same injury against the covenantor and also against the wrong-doer. Fourthly, a way would be opened to damage a third person (that is the covenantor) by undiscoverable practice between the mortgagee and a stranger (e). But a covenant against the acts of a particular person by name, will be restrained for disturbance of title: for the covenantor is presumed to know the individual against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance by him, whether by lawful title or otherwise (f).

Quiet enjoyment.—This clause is similar to the covenant for quiet enjoyment implied in a conveyance by way of mortgage (g) and confers on the mortgagee a personal remedy (h). As the Judicial Committee observed, in *Ram Narain Singh v. Adhindra Nath Mukherji* (i), "it must also be borne in mind that if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (c) or (d) of the Transfer of Property Act."

The clause may be sub-divided into two parts, one relating to delivery of possession and the other to securing quiet and undisturbed possession after delivery has once been made. The clause is wide enough to include every instance of failure by the mortgagor to secure a mortgagee in undisturbed possession at any time during the period for which the mortgagee was entitled to remain in possession (j). So that on failure to deliver possession the mortgagee may either sue for possession (k) or sue for the mortgage-money, although there is no personal covenant to pay the mortgage-money (l). The liability under the clause is statutory (m). It does not apply to a mortgage by conditional sale (n). A temporary suspension of the mortgagee's possession does not bring the case within the meaning of this clause (o), nor when interference is caused by acts of the Legislature (p). The clause does not create a charge on the mortgaged property (q). The remedy is not exclusive but alternative (r); but the aid of the clause can only be invoked when the deprivation is caused otherwise than by the mortgagee's default (s). If his suit for possession is dismissed, a subsequent suit by him for the recovery of the money is under O. 2, r. 2 of the Code of Civil Procedure, barred (t).

(e) Platt on Covenants, p. 315.

(f) Platt on Covenants, p. 317.

(g) Sec. 7, sub-sec. 1 (c) of the Conveyancing Act, 44 & 45 Vict., c. 41.

(h) *Saravana v. Chinnammal* (1892) 15 Mad. 65; *Vayalil v. Udaya* (1865) 2 M. H. C. 315; *Linga Reddi v. Samarao* (1894) 17 Mad. 469; *Manesh Singh v. Chauharja* (1882) 4 All. 245; *Oodit Parkash v. Martindell* (1849) 4 M. I. A. 444; *Dip Narain v. Nageshar* (1930) 52 All. 338.

(i) (1917) 44 Cal. 388, 44 I. A. 87.

(j) *Thabhu Ram v. Girdhari Singh* (1884) 6 All. 298; *Hira Lal v. Ghasit* (1894) 16 All. 318.

(k) *Ishan Chandra v. Sujan Bibi* (1871) 7 Beng. L. R. 14; *Ganesh Singh v. Sujari* (1888) 10 All. 47.

(l) *Linga Reddi v. Sama Rau* (1894) 17 Mad. 469; *Saravana Chinnammal* (1892) 15 Mad. 65; *Manesh Singh v. Chauharja* (1882) 4 All. 245; *Oodit Parkash v. Martindell* (1849) 4 M. I. A. 444; *Vayalil v. Udaya* (1865) 2 M. H. C. 315; *Ram Narain Singh v.*

Adhindra Nath Mukherji (1917) 44 Cal. 388, 44 I. A. 87.

(m) *Unichaman v. Ahmed Kutti Kayi* (1898) 21 Mad. 242.

(n) *Badri Das v. Besa*, A. I. R. (1933) Lah. 174.

(o) *K. V. Kuniraman Menon v. M. T. Avuthala Kutli* (1910) 8 M. L. T. 223.

(p) *Merwanji Muncherji Cama v. Syed Sirdar Ali Khan* (1899) 23 Bom. 510; *Neoby v. Sharpe* (1878) 8 Ch. D. 39.

(q) *Perianna Servaigaran v. Marudainayagam Pillai* (1899) 22 Mad. 332; *Arunachalam Chetti v. Ayyavayyan* (1898) 21 Mad. 476.

(r) *Linga Reddi v. Sama Rau* (1894) 17 Mad. 469; *Kirti Narayan v. Surendra Mohan*, A. I. R. (1934) Pat. 624; *Arunachalam Chetti v. Ayyavayyan* (1898) 21 Mad. 476.

(s) *Chitkali Koer v. Mathuralal* (1906) 3 C. L. J. 220; *Kashi Lal v. Shaikh Nurul* (1929) 8 Pat. 569.

(t) *Udairaj Singh v. Ram Udit Tewari*, A. I. R. (1924) Oudh 147.

S. 68

Failure of mortgagor to deliver possession.—In a case where the mortgage contained no covenant to pay the Privy Council in *Ram Narain Singh v. Adhindra Nath Mukerji* (u) observed, “it must also be borne in mind that if the mortgagor be in the first instance not personally liable, such liability may arise under section 68 (c) or (d) of the Transfer of Property Act.” If a mortgagee who has taken possession demands additional security and the mortgagor deprives him of possession, he is entitled to sue under clause (d) of section 68 (v). The subsequent dispossession after once possession is delivered, is a failure to secure possession (w). Hence a usufructuary mortgagee is entitled to sue for the mortgage amount when the mortgagor fails to secure him in quiet and undisturbed possession (x). And where the mortgaged property was leased to the mortgagor by the usufructuary mortgagee, and the former having failed to perform the conditions and observe the covenants of the lease, the mortgagee demanded possession which was withheld, he was held entitled to sue (y). So dispossession by a mortgagor’s co-sharer, who got the mortgaged property on partition, entitles the mortgagee to sue (z). Any admission in the course of the trial, that a usufructuary mortgagee was not in possession of the mortgaged land, entitles him to a decree on the mortgage still outstanding (a). Relief was granted to a usufructuary mortgagee when the mortgagor fraudulently suppressed the fact that there was outstanding against the mortgaged property a decree for sale on a prior mortgage, and this decree was subsequently put into execution (b). If the mortgagee is kept out of possession by the mortgagor’s indirect conduct, it makes no difference, as when a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to the mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession (c), and where the mortgagor by falsely alleging tender of interest, kept the mortgagee out of possession, the mortgagee was held entitled under this clause to sue for the mortgage amount (d). When rents are reduced, the security is diminished and the mortgagee is entitled to demand additional security and on the mortgagor’s failure, to sue for mortgage-money (e).

Claim under a title superior to that of the mortgagor.—This clause also protects the mortgagee, who loses his security by or in consequence of a claim made by a person having a title paramount to that of the mortgagor. A usufructuary mortgagee, who is deprived of his possession by a person claiming title adversely to the mortgagor, is entitled to sue for the mortgage-money (f). Disturbance by a third person with whom the mortgagor was not in collusion, for example, a purchaser of the equity of redemption (g), or a person claiming under such purchaser (h), or by a trespasser (i), does not entitle the mortgagee to this right as the disturbance must be by a person claiming under a title superior to that of the mortgagor (j). A co-sharer of the mortgagor who has received the mortgaged share on partition,

- (u) 44 Cal. 388, 44 I. A. 87.
- (v) *Pargan Pandey v. Mahatom Mahato* (1907) 6 C. L. J. 143.
- (w) *Pargan Pandey v. Mahatom Mahato* (1907) 6 C. L. J. 143.
- (x) *Abdul Iasalam v. Mt. Rafiat* (1905) 2 C. L. J. 493; *Pinto v. Narayan* (1932) 34 Bom. L. R. 984.
- (y) *Hiralal v. Ghasit* (1894) 16 All. 318.
- (z) *Talik Singh v. Jalal Singh* (1910) 11 C. L. J. 136; *Ramnandan v. Deni Sahi*, A. I. R. (1924) Pat. 91.
- (a) *Sadhu Saran Rai v. Burhamdeo Lall*, A. I. R. (1927) Pat. 230.
- (b) *Ahmad-ul-lah Khan v. Salar Bakhsh* (1905) 27 All. 488.
- (c) *Linga Reddi v. Sama Rau* (1894) 17 Mad. 469.

- (d) *Saravana v. Chinnammal* (1892) 15 Mad. 65.
- (e) *Fateh Din v. Kishen Lal*, A. I. R. (1923) All. 584.
- (f) *Maung Po Kiu v. Maung Kyauk Ye*, A. I. R. (1924) Rang. 143.
- (g) *Jhabhu Ram v. Girdhari Singh* (1884) 6 All. 298.
- (h) *Gokul v. Shrimal* (1904) 6 Bom. L. R. 288.
- (i) *Nakchedi Ram v. Ram Charitar Rai* (1897) 19 All. 191; *Bechu Sahu v. Arjun Sahu* (1918) 3 Pat. L. J. 162; *Gopalasami v. Arunachella* (1892) 15 Mad. 304.
- (j) *Gopalasami v. Arunachella* (1892) 15 Mad. 304; *Nakchedi Ram v. Ram Charitar Rai* (1897) 19 All. 191; *Kuppier v. Periakaruppa Kavundan* (1919) 42 Mad. 578; *Ram Sural Misra v. Gur Prasad* (1921) 43 All. 484.

is not a person claiming under a superior title (*k*). If in a suit by a subsequent mortgagee, a usufructuary mortgagee fails to take a defence which would have preserved the security, he is not entitled to sue for the mortgage-money under this section (*l*). And where through default of the mortgagee some items of mortgaged property cannot be reconveyed, he is not debarred from suing; the proper course is to debit him with the value.

Covenant of possession in lieu of interest.—A usufructuary mortgagee, who under the terms of the mortgage deed, is entitled to receive the interest of the money advanced by him out of the profits of the property mortgaged, has not succeeded in obtaining possession of either the whole or a portion of it, cannot claim interest on his money at the time of redemption, unless the mortgage deed expressly provided that the mortgagor was to pay to the mortgagee at the time of redemption (*m*). It is also a well-established principle that if a mortgagee does not succeed in getting possession over the entire property mortgaged, there being a failure on the part of the mortgagor to deliver possession of a portion of the property mortgaged, the mortgagee cannot claim interest in lieu of the rent and profits of the property aforesaid. The mortgagee, if he does not bring the necessary suit in time, would be deemed in law to have acquiesced in his diminished security. This principle was laid down by their Lordships of the Privy Council (*n*) and followed in a number of cases (*o*).

Except for one year during the period of the mortgage, the mortgagee in spite of his efforts was wrongly kept out of possession by the mortgagors. There was no waiver or acquiescence as in the Allahabad case (*p*). It was held that the mortgagee was entitled to some interest and that 12% was not excessive (*q*). In a similar mortgage with covenant for possession, possession having been withheld, interest at 12% was allowed without any question being raised (*r*). The case *Pargan Pandey v. Mahatam Mahto* (*s*) may be cited, though in that case it was expressly agreed that in case of dispossession interest should run at the rate of 15% per annum. It is a settled rule of law which has been consistently followed in the province of Oudh, that if he gets possession of a major portion of the property mortgaged and chooses not to take any further remedy, he must be deemed to have acquiesced in the possession of a portion, and at the time of redemption he should not be heard in support of his claim as to loss of interest on that account (*t*). There is nothing in section 58, 67 and 68 of the Transfer of Property Act which enables a mortgagee to make a claim to interest which is not given to him by the mortgage bond (*u*).

English mortgage.—In an English mortgage there is usually a covenant for quiet enjoyment, which entitles the mortgagee upon default in payment of the principal sum or the interest thereof or any part thereof, on the stipulated days, to

(*k*) *Talik Singh v. Jalal Singh* (1910) 11 C. L. J. 136.

(*l*) *Dunia Lal Chowdhury v. Musammal Nowratan Koer* (1917) 2 Pat. L. J. 490.

(*m*) *Mahadaji v. Joti* (1893) 17 Bom. 425, when the mortgagee never took trouble to obtain possession; *Jhunker Singh v. Chhotkhan Singh* (1909) 31 All. 325; *Sheo Shankar v. Raj Jah*, A. I. R. (1927) Oudh 594.

(*n*) *Partap Bahadur Singh v. Gajadhar Singh* (1902) 24 All. 521, 29 I. A. 148.

(*o*) *Mahadeo Tewari v. Silla Bakhsh Singh*, A. I. R. (1922) Oudh 102; *Khuda Bakhsh v. Alum-un-nissa* (1905) 27 All. 313; *Jhunku Singh v. Chhotkhan Singh* (1909) 31 All. 325; *Prasanna Kumar Halder v. Girish Chandra*, A. I. R. (1934) Cal. 149; *Pranpati*

v. Harihar, A. I. R. (1932) Oudh 57; *Dubri v. Ram Naresh Singh*, A. I. R. (1926) Oudh 224.

(*p*) *Pratap Bahadur Singh v. Gajadhar Bakhsh* (1902) 24 All. 521, 29 I. A. 148.

(*q*) *Sita Nath Gosh v. Thakurdas Chakravarty* (1919) 46 Cal. 448.

(*r*) *Raja Oodit Purkash v. Martindell* (1849) 4 M. I. A. 444.

(*s*) (1907) 6 C. L. J. 143.

(*t*) *Sheo Shankar Pande v. Raj Jas Lal*, A. I. R. (1927) Oudh 594; *Dubri v. Ram Naresh Singh*, A. I. R. (1926) Oudh 224; *Pratap Bahadur Singh v. Gajadhar Bakhsh Singh* (1902) 24 All. 521, 29 I. A. 148.

(*u*) *Manickchand v. Rangappa* (1921) 45 Bom. 523.

S. 68

enter into and upon the mortgaged premises, and thenceforth to quietly possess and enjoy the mortgaged premises, and receive the rents and profits thereof without any interruption, claim or demand from any person or persons whomsoever. This clause enables the mortgagee to take possession upon such default as is contemplated as aforesaid being made. Under such a covenant, it seems that before default, the mortgagee must depend upon his own title as against interruptions by third persons. The limitation for the mortgagee's action on the mortgage runs from the date of the mortgage. Introduction of such a clause does not make it run from the date of default in payment (v).

Defective title.—Under section 65 of the Transfer of Property Act the mortgagor is deemed to contract that he has the interest which he professes to have in the mortgaged property and further, under section 68 (d) of the Act, whenever the mortgagor fails to deliver possession of the property to the usufructuary mortgagee, the latter is entitled to sue for his mortgage-money (w).

Heirs of a deceased mortgagor.—A decree under this section can be executed against any property of the deceased mortgagor in the hands of such heirs, including the property which was once the subject of the mortgage. The bar of O. 34, r.14 of the Code of Civil Procedure, 1908, does not apply (x).

Void mortgage.—A mortgage of a recognized sub-division of a *bhag* is void under the Bhagdari Act, section 3. But if there is a covenant for quiet enjoyment in such a deed, the mortgagee would be entitled to recover compensation for the disturbance under the covenant (y). There is no right to sue for mortgage-money where the mortgage is void as being illegal and opposed to the provisions of the Punjab Colonization of Government Lands Act.

Right of mortgagee to sue for sale or foreclosure.—A Full Bench of the Madras High Court has held that the right to sue for sale is not to be found in section 68 of the Transfer of Property Act without doing violence to the language of the section (z). The Bombay High Court, in a case before the Transfer of Property Act, held the opposite view (a). The Allahabad High Court allowed a usufructuary mortgagee who could not get possession, to sue for and obtain a decree for sale (b). When once a mortgage becomes payable under any clause in section 68, there can be no reason for refusing to give effect to section 67, which allows a suit for foreclosure or for sale at any time after the mortgage-money had become due. On the happening of events in section 68 the mortgage-money becomes due, and therefore there is no reason why section 67 should not be appealed to where there is a default under section 68 (c).

Lesser amount paid.—A mortgagor cannot escape the consequences of section 68 if the real consideration for the loan is larger than the actual amount paid (d).

Sub-mortgage.—The provisions of this section apply to a sub-mortgage (e).

- (v) *Roylance v. Lightfoot* (1841) 8 M. & W. 553, 151 E. R. 1158.
 (w) *Gatch Din v. Kishen Lal*, A. I. R. (1923) All. 584.
 (x) *Chedi Lal v. Saadat-un-nissa Bibi* (1917) 39 All. 36.
 (y) *Javerbhat v. Gordhan* (1915) 17 Bom. L. R. 259.
 (z) *Arunachalam v. Ayyavayyan* (1898) 21 Mad. 476.

- (a) *Venkatarao v. Mahableshwar* (1902) 26 Bom. 241.
 (b) *Narpat v. Ram Saran Das* (1906) 30 All. 163; *Jafar Husan v. Ranjit Singh* (1899) 21 All. 4.
 (c) *Subbamma v. Narayya* (1923) 46 Mad. 259.
 (d) *Balbhadar Prasad v. Dhanpat Dayal*, A. I. R. (1924) O. 193.
 (e) *Ram Sarup Chaube v. Ram Dolar Pande*, A. I. R. (1925) All. 736.

Limitation.—For suits under the section the period is six years under article 116 or article 120 (f). Under article 120 the *terminus a quo* is “when the right to sue accrues.” It has been held by the Judicial Committee that there can be no “right to sue” until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted (g).

Liability of purchaser on covenant after assignment of the equity of redemption.—The covenant being a personal one, cannot bind the assigns, but in view of the introduction of section 59-A in the Transfer of Property Act by the Amending Act, it has become necessary to make it clear, that in case of liability under clause (a) the mortgagee is restricted to his rights against the mortgagor personally and cannot proceed against his transferee. Therefore the proviso has been added. The covenant for payment of the mortgage debt does not run with the land so as to bind a purchaser of the equity of redemption, (h) though such a covenant is, in the absence of express agreement, implied, on the purchaser of the equity of redemption covenanting to indemnify the mortgagor against the debt (i). If a man purchases the equity of redemption and covenants with the vendor that the latter shall be indemnified, it is not the purchaser's debt to be paid out of his own estate, but it remains a debt on that estate only, and if nothing more has been done to take the debt upon himself, for instance, no communication with the mortgagee, it is not the personal debt of the purchaser (j) nor is such a liability to be inferred by the assignee paying interest to the transferee of the mortgage (k), or undertaking to discharge the mortgage debt out of a portion of the consideration left with him for the purpose. But if the purchaser enters into a new contract with the mortgagee, as for different times and modes of payment, etc., he renders himself liable (l). Such a liability was adjudged when there was an equity of redemption altogether different from the first equity of redemption and the interest reserved being also different (m).

Section 68, Sub-section 2.

Sub-section 2.—The personal remedy declared by clause (a) of the section being additional to the property which is really the security for the loan, mortgagees have gone against the mortgagor personally before proceeding against the mortgaged property or the security. This practice having led to hardship on the mortgagor, the Legislature has thought fit to amend by providing that in case of clauses (a) and (b), the mortgagee should exhaust all his available remedies against the mortgaged

- (f) *Dinkar v. Chaganlal* (1914) 38 Bom. 177 (mortgage bond); *Ratnasabapathy v. Devasingamony* (1929) 52 Mad. 105 (insufficiency of sale proceeds); *Ram Raghbir v. United Refineries* (1933) 35 Bom. L. R. 753, 60 I. A. 183; *Tricumdas Cooverji v. Gopinath* (1917) 19 Bom. L. R. 450, 44 I. A. 65; *Shambhu Dat v. Shiam Narain*, A. I. R. (1934) Oudh 415 (security diminished); *Lalla Singh v. Mathura*, A. I. R. (1931) Oudh 5 (mortgagee not obtaining possession); *Maung Yan v. Maung Po Ka*, A. I. R. (1925) Rang. 223 (security deprived); *Ram Jewan v. Jagarnath* (1897) 25 Cal. 450 (destruction by deluvion); *Unichamar v. Ahmad* (1897) 21 Mad. 242 (possession disturbed); *Sri Ganesh Lal v. Khetramohan* (1926) 5 Pat. 585, 53 I. A. 134.
- (g) *Bolo v. Kolan* (1930) 32 Bom. L. R. 1596 (P.C.)
- (h) *Oxford (Earl of) v. Rodney (Lady)* (1808) 14 Ves. 417, 33 E. R. 581; *Butler v. Butler*

- (1800) 5 Ves. 534, 31 E. R. 724; *Woods v. Huntingford* (1796) 3 Ves. 128, 30 E. R. 930; *Jamna Das v. Ram Aular Pande* (1912) 34 All. 63, 30 I. C. 785, 39 I. A. 7; *Nanku Prasad v. Kamla Prasad* (1923) 26 C. W. N. 771; *Tare Chand v. Brojo Gopal* (1913) 17 C. L. J. 120.
- (i) *Dodson v. Downey* (1901) 2 Ch. 620; *Janki Saran Syed Mahammad*, A. I. R. (1932) Pat. 273; *Ram Barai v. Sheodeni* (1912) 16 C. W. N. 1040; *Izzat-un-nissa v. Kunwar Pertab* (1909) 31 All. 583, 36 I. A. 203.
- (j) *Butler v. Butler* (1752) 5 Ves. Jun. 724, 31 E. R. 724; *Tweddell v. Tweddell* (1787) 2 Bro. C. C. 101, 152.
- (k) *Re. Errington, ex-parte Mason* (1894) 1 Q. B. 11.
- (l) *Oxford (the Earl of) v. Rodney (Lady)* 14 Ves. Jun. 417, 33 E. R. 581.
- (m) *Barham v. Thanet (Earl of)* (1834) 3 L. J. Ch. N. S. 228, 40 E. R. 231; *Bagot v. Bagot* (1864) 34 Beav. 134, 55 E. R. 585.

Ss. 68-69

property or what remains of it, before he seeks the personal remedy against the mortgagor. It is, however, left to the discretion of the Court to stay such a suit and all proceedings thereon notwithstanding any contract to the contrary in the mortgage deed, so that unless the mortgagee has exhausted all his other remedies to recover his loan, the Court may stay his suit against the mortgagor personally, his remedy being to recover the loan out of the mortgage property or what remains of it. But it is, however, open to the mortgagee to give up his security and then pursue the personal remedy given under clauses (a) and (b) of the section, but he cannot relinquish only a portion of the security so as to increase the burden on the remaining portion (n). To effect abandonment of the security, it is necessary that the transaction should be evidenced by a registered deed. In cases falling under clauses (c) and (d) of the section, such a restriction on the rights of the mortgagee is not called for. The provisions of this sub-section are not in any way inconsistent under O. 34, r. 6 of the Code of Civil Procedure, 1908, because that rule applies to mortgage suits, whilst the present section relates to suits in which the mortgagee can only obtain a decree for payment of money (o). The provisions of O. 34, r. 14 of the Civil Procedure Code, 1908, do not bar the operation of this sub-section, as the mortgagee is required to exhaust his remedy against the mortgaged property first.

Concurrent remedies.—The rights of the mortgagee to pursue his remedies concurrently are not fettered in the case of clauses (c) and (d) by sub-section 2, so that it is not necessary, where the case falls under clause (c) and clause (d), to exhaust his available remedies against the mortgaged property before he seeks to pursue the personal remedy against the mortgagor. If he sues on the covenant and does not get fully paid, he may still go on and foreclose the mortgage. But after he has once been paid in full under the covenant he cannot touch the estate. A mortgagee who has obtained a judgment for foreclosure absolute cannot sue upon the personal covenant without re-opening the foreclosure (p). When he has foreclosed no one can tell what it is really worth, and it is for this reason that he is precluded from suing at law, because it cannot be ascertained that there is any residue due to him. The estate which he has taken under his foreclosure may be equal in value to, or even greater in value than, his debt. Where, however, the mortgagee has brought the property to a judicial sale, he can sue on the personal covenant for any difference between the sums due and the amount realized (q). That is clearly implied, though not expressly stated, in *In re Barker's Claim* (r) and *Worthington & Co. v. Abbott* (s).

Deficiency in interest.—Deficiency in interest may be realized from the mortgagor personally as well as from the mortgaged property (t).

69. (1) *Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866, a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property,*

(n) *Chand Mall v. Ban Behari* (1923) 50 Cal. 718.
 (o) *Appasami v. Veerappa* (1906) 29 Mad. 362.
 (p) *Perry v. Barker* (1803) 8 Ves. 527, (1806) 13 Ves. 198; *Lockhart v. Hardy* (1846) 9 Beav. 349; *Palmer v. Hendrie* (1859) 27 Beav. 349 (1869) 28 Beav. 341.
 (q) *Perry v. Barker* (1806) 13 Ves. 198, 205;

Rudge v. Richens (1873) L. R. 8 C. P. 358;
Ellis & Co.'s Trustee v. Dixon Johnson (1925) A. C. 489.
 (r) (1894) 3 Ch. 290.
 (s) (1910) 1 Ch. 588.
 (t) *Chintaman v. Dulai* (1911) 33 All. 107.

or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely :—

S. 69

- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local official *Gazette* ;
- (b) *where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Secretary of State for India in Council ;*
- (c) *where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property or any part thereof, was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town or area which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf.*

(2) No such power shall be exercised unless and until :—

- (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or
- (b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to

S. 69 authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale ; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage ; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(5) *Nothing in this section or in section 69A applies to powers conferred before the 1st day of July 1882.*

Changes in the section.—Section 69 has been considerably altered. Before the amendment, clause (a) entitled the mortgagee to sell, if the mortgage deed was in English form and conferred on him a power to sell or concur in selling in default of payment of mortgage-money. Similarly, the last clause which also applied to English mortgages gave him statutory power under the Trustees and Mortgagees Act, XXVIII of 1866, to sell, it not being necessary under the Trustees and Mortgagees Act to have express power in the mortgage deed. Moreover, the power of sale under clause (a) was to be exercised, on the fulfilment of conditions prescribed by the section, whilst under the Trustees and Mortgagees' Powers Act, the powers and provisions contained in sections 6 to 11 of that Act applied. The procedure in the one differed from that prescribed in the other. Act XXVIII of 1866 was founded on Lord Crabworth's Act, 1881 (41 & 42 Vict., c 41). The provisions of section 6 to 9 of the Act, XXVIII of 1866, being open to certain defects, it was thought proper to revise, and so in the Amending Act, it is provided that all English mortgages, whether they contain an express power of sale or not, shall be governed by the provisions of paras 2 to 4 of section 69, which are based on sections 19 to 21 of the Conveyancing Act of 1881, corresponding to sections 101 to 108 of the English Property Act of 1925. Further, according to the old section it was necessary that in all three cases mentioned in (a) (b) and (c) of sub-section 1, the power of sale should be conferred by the mortgage deed on the mortgagee. Now it is not necessary in case of clause (a) dealing with English mortgages, but the old requirements have been retained in cases (b) and (c). The different paras have been numbered into different sub-sections. The words of the Conveyancing Act, 1881, that the

power shall become exercisable "when the mortgage-money has become due" do not find a place in our Act though the same principle applies. S. 69

Who may exercise the power.—Under the Trustees' and Mortgagees' Powers Act, the power is exercisable by the person to whom the principal money secured or charged by the deed on any immoveable property or any interest therein, shall for the time being be payable or his executors, administrators and assigns, so that even on a transfer of the mortgage, the transferee could exercise the right. Under section 69 however, it is provided that the power is exercisable by the mortgagee or any person on his behalf. So that if the word "assigns" be not used in the mortgage deed, it was formerly open to question whether a transferee could exercise the right. This difficulty, however, has now been surmounted by the introduction of section 59A. The power is also exercisable by any person on behalf of the mortgagee. These words shall include a person entitled under a power of attorney, giving him a specific right to do so and to receive and give a discharge for money arising from the sale; but a general power to sell property and to receive proceeds is insufficient (*u*). The power may be exercisable by the mortgagee alone or with the concurrence of the mortgagor.

Where mortgagees *bona fide* believing themselves to be absolute owners sold the mortgaged property, they were not precluded from defending themselves on the ground of power of sale which they were entitled to exercise (*v*). In case of joint mortgagees, all must exercise the power jointly, as section 59 A does not include one of two or more joint mortgagees. The survivor of joint mortgagees may exercise the power where mortgage-money has been advanced on a joint account (*w*). But if the mortgagee be a partnership firm, one of the partners has no authority to exercise the power of sale (*x*).

Statutory power of sale.—Prior to the Amending Act, 20 of 1929, this power was conferred on the mortgagee by the Trustees' and Mortgagees' Powers Act, XXVIII of 1866, sections 6 to 11, the conditions upon which the power is exercisable being somewhat different from those imposed under section 69. By the last para of the Act as it stood before the Amendment, these sections were made applicable to all English mortgages, wherever in British India the mortgaged property might be situate, where neither the mortgagor nor the mortgagee belonged to a race or class mentioned in the clause. The result was that in all English mortgages, irrespective of the situation of the property, the mortgagee had, under the Trustees' and Mortgagees' Powers Act, a power to sell on the due fulfilment of conditions required by section 6, provided the mortgagor and the mortgagee belonged to a race or tribe not excluded from the operation of the statute. By the amendment, however, the powers conferred by the Trustees' and Mortgagees' Powers Act of 1866 have been considerably curtailed and the powers conferred by the original section 69 have been enlarged. In many ways the statutory power is inferior to the power conferred on the mortgagee by deed. The section makes a distinction between statutory power of sale and an express power of sale, clause (a) dealing with the former and clauses (b) and (c) with the latter. In either case, however, the conditions and restrictions imposed by the sub-sections which follow, apply.

(u) *Re. Dowson and Jenkins Contract* (1904) 2 Ch. 219.

(v) *Daverges v. Sandeman Clark & Co.* (1902) 1 Ch. 579

(w) *Hind v. Poole* (1855) 1 Jur. N. S. 371, 69 E. R. 507.

(x) *Warr v. Jones* 1876) 24 W. R. 695.

S. 69

In default of payment of the mortgage-money.—The powers conferred by this section cannot be exercised unless and until there is default, that is, either the due date of repayment has expired or there is some lapse on the part of the mortgagor, which amounts to a breach of any of the conditions of his contract with the mortgagee, on the breach of which it is stipulated that the mortgagee shall be entitled to recall his loan. The mortgage-money includes principal and interest. Clause (1) refers to mortgage-money whilst the two provisos refer to the principal money and interest respectively. In section 58 of the Act, mortgage-money includes interest due.

English mortgage.—This is defined by section 58 (e) of the Act. Unless the mortgage is in this form and neither the mortgagor nor the mortgagee belongs to the class or race mentioned, the statutory power conferred by clause (a) cannot be exercised. Even if the mortgaged property is wholly outside the towns mentioned in sub-clause (c), this power can be exercised.

Express power of sale.—As opposed to the statutory power of sale, which can be exercised as provided in clause (a), the mortgagee has a right to secure to himself such a power by express contract. This contract for exercising the power of sale is, as stated above, limited to the two cases mentioned in the section, viz., default in payment of principal money and failure to pay interest. But it is open to the parties to contract that the principal money shall become immediately payable or earlier than the stipulated period, in the event of certain contingencies mentioned in the mortgage deed and that upon such principal money becoming due, the mortgagee shall be entitled to exercise his power of sale. For it must be remembered that no power of sale can be exercised unless and until the principal money has become due and payable. Hence in a mortgage where the stipulated period is long, the proper course is to provide a shorter period for redemption coupled with a proviso that if the interest be regularly paid and the covenants and conditions duly observed and performed, the mortgagee shall not call in the principal moneys and also a covenant on the part of the mortgagor that such a provision shall not entitle the mortgagor to redeem before the expiration of the stipulated period. Where a mortgage is prepared under a power, the donee has a right to give the mortgagee a power of sale in case of default, as it is now regarded that the power of sale is an ordinary incident to a mortgage (y). The section requires that the power of sale must be expressly conferred on the mortgagee by the mortgage deed. Hence the words "all rights conferred upon him by the Act" were held not to include a power (z).

Secretary of State for India in Council.—When the Secretary of State for India in Council is the mortgagee and the mortgage deed contains an express power of sale without the intervention of the Court, such power can be exercised irrespective of the nature of the instrument or the nationality of the mortgagor or the situation of the mortgaged property. But like other mortgagees he is subject to the other provisions of the section.

The mortgaged property or any part thereof is situate.—In the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab and such other places as the local Government may notify, the power is exercisable provided the mortgage deed contains an express power of sale. It is necessary that the mortgaged property or, at any rate, a part of it at the date of execution must be situate

(y) *Bridges v. Longman* (1857) 24 Beav. 27, 53 E. R. 267; *Cook v. Dawson* (1861) 29 Beav. 123, 54 E. R. 573.

(z) *Mataprasad v. Kunnon Devi*, A. I. R. (1928) Rang. 128.

in any one of the named towns. If the mortgaged property be wholly outside these towns, then the power of sale would be governed by clauses (a) and (b) if the other requirements of those sub-clauses exist. Suppose two properties, A and B, of the value of Rs. 500 and Rs. 50,000 are mortgaged, the former within one of the towns mentioned and the latter outside, the power of sale would be valid and the property outside the town mentioned could be sold. Further notified areas in the Bombay Presidency are Bandra, Kurla and Ghatkoper-Kirol (a).

Town of Bombay, limits of.—Mortgaged property at Mahim which is within the local limits of the ordinary original civil jurisdiction of the Bombay High Court is situate within the town of Bombay as understood in this section (b).

The Punjab.—A power of sale without the intervention of the Court is not invalid, for there is no positive enactment prohibiting the provision being annexed to a mortgage, as section 69 does not apply to the Punjab (c).

Power of sale generally.—Usually the power of sale is by public auction or private treaty. Often, however, a provision is inserted for sale by public auction and in that case alone a sale by private treaty would be invalid (d). In the former case it is the mortgagee's choice to adopt either (e) or both methods of sale.

Advertisement.—A mortgagee exercising his power of sale is not bound to advertise before proceeding to a sale (f).

Price.—A power of sale casts a duty upon the mortgagee to find a purchaser and to use his exertion to obtain the best price (g). He is not bound to wait till a more advantageous time (h). If he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even though more might have been obtained if the sale had been postponed (i).

Liability for loss on sale by lapse of common agent.—A loss occasioned by the insolvency of the auctioneer with whom the deposit was made by the purchaser, pursuant to conditions, must be borne by the mortgagee (j). On a sale by a subsequent mortgagee for the loss of deposit with a solicitor, who absconded, the first mortgagee was held not liable though he joined in the sale and signed the conveyance and the receipt. It is immaterial that the solicitor acted as agent also for the first mortgagee (k).

Power of sale when property twice mortgaged.—Where property is twice mortgaged and both the first and the second mortgagees have a power of sale and power to give receipts, they could combine together and sell and give a good discharge for the purchase-money (l). In such a case the first mortgagee may sell irrespective of the fact whether the purchase-money was sufficient to pay the second mortgagee. Likewise the second mortgagee may sell subject to the first mortgage (m). Where there are distinct mortgages, the mortgagees may sell the different estates or different interests in the same property jointly. Where a mortgage was made of a life estate and then of a remainder by distinct mortgages, it was held that the sale of the fee

(a) See *Gazette of India* (1924) Part 1, p. 1064.

(b) *Trimbak Gangadhar v. Bhagwandas Mulchand* (1899) 23 Bom. 348.

(c) *Kanhaya Lal v. National Bank of India, Ltd.* (1923) 4 Lah. 484, 50 I. A. 162.

(d) *Bronard v. Dumaresque* (1841) 3 Moo. P. C. L. 457.

(e) *Davey v. Durrant, Smith v. Durrant* (1857) 6 W. R. 405.

(f) *Davey v. Durrant, Smith v. Durrant* (1857) 6 W. R. 405.

(g) *Orme v. Wright* (1839) 3 Jur. 972.

(h) *Davey v. Durrant, Smith v. Durrant* (1857) 6 W. R. 405.

(i) *Farrar v. Farrars, Ltd.* (1888) 40 Ch. D. 395; *Hodson v. Deans* (1903) 2 Ch. 647.

(j) *Rowe v. May* (1854) 18 Beav. 613, 52 E. R. 241.

(k) *Barrow v. White* (1862) 2 John & H. 580.

(l) *M'Carogher v. Whieldon* (1864) 34 Beav. 107, 55 E. R. 574.

(m) *Manser v. Dix* (1857) 3 Jur. N. S. 2 44 E. R. 561.

S. 69 simple was valid but in such a case the apportionment must be made before completion by their own valuers and the purchaser is not in any way prejudiced unless he has notice that the apportionment is an improper one (*n*).

Acceptance of cheque in lieu of cash for the deposit.—Acceptance of a cheque by an auctioneer with the concurrence of the mortgagee would not amount to default or negligence on the part of the mortgagee or amount to unreasonable conduct, so as to deprive him of his costs of the abortive sale, if the cheque be dishonoured, but he may add the same to the mortgage debt (*o*).

Section 69, Sub-section 2.

No such power shall be exercised.—The exercise of power of sale without the intervention of the Court conferred on the mortgagee, is subject to the two provisos mentioned. It is not necessary that both conditions mentioned in the sub-section should be complied with. The first proviso relates to default in payment of principal which has become due. The second clause relates to default in payment of interest which has become due. It is not necessary that the mortgage deed should contain qualifying clauses added to the power of sale. Even without such qualification, the mortgagor would be protected against exercise of power of sale in violation of these clauses (*p*). These provisos are adapted from the Conveyancing Act, 1884, section 20 (*q*) of which first sub-clause is similar to proviso (1) while the other sub-clauses are different.

Notice.—This sub-section is founded on section 20, sub-sections (1) and (2) of the Conveyancing Act, 1882 (*r*). The power of sale can be exercised by the mortgagee in two cases only and these two cases are mentioned in sub-section (2). Notice, however, is required only in the first case, viz., where the mortgagee has become entitled to call for the principal money. It is necessary that the notice should require payment of the principal money and default should have been made in payment for three months after service. The three months should be from the date of receipt or service of the notice upon the mortgagor and not from the time the notice is dated. It is not open to the parties to contract themselves out of the provision of this section and dispense with the notice, though the mortgagor may waive it (*s*). It is provided for the benefit of the mortgagor, as giving him an opportunity to redeem. After the principal money has become due, the notice may be given at any time and it is not controlled by the interest dates fixed in the mortgage deed (*t*). Nor is a notice invalid merely because it required payment of the money within three months from the date of the notice. The fact of the notice announcing the sale within the period prescribed by the statute reckoned not from the service of notice but from its date, did not invalidate the notice and the sale could not be impeached on that ground (*u*). In spite of irregularity in the notice, in the absence of fraud the Court will not set aside a purchase, when the purchaser has entered and expended money (*v*). Similarly by section 4 it is provided that the purchaser's title shall not be impeachable on the ground that due notice was not given (*w*). Failure on the part of a mortgagee solicitor lending money to his client, to insert in the mortgage deed a clause as to exercise of power after due notice, is a breach of duty. If he exercises the power under such an instrument without notice, he is liable in damages as for an

(*n*) *In re Cooper & Allen's Contract for sale to Harlech*, 4 Ch. D. 802; *Hiatt v. Hilman* (1871) 19 W. R. 694.
 (*o*) *Farrer v. Lacy, Hartland & Co.* (1885) 31 Ch. D. 42.
 (*p*) *Madras Deposit and Benefit Society v. Passanha* (1888) 11 Mad. 201.

(*q*) 44 & 45 Vict., c. 41.
 (*r*) 43 & 45 Vict., c. 41.
 (*s*) *Re Thompson and Holt* (1890) 44 Ch. D. 492.
 (*t*) *Brown v. Hartill* (1848) 2 Exch. 434.
 (*u*) *Mellers v. Brown* (1863) 9 Jur. N. S. 958.
 (*v*) *Mellers v. Brown* (1863) 9 Jur. N. S. 958.
 (*w*) *Mellers v. Brown* (1863) 9 Jur. N. S. 958.

improper sale (x). There is no distinction between a case in which there is no provision as to the length of notice to be given and a case in which the notice to be given is insufficient in law. In both cases section 69, sub-section (1) of the Transfer of Property Act should be read as if it formed part of the contract. The proviso in regard to notice is not a condition which either suspends or defeats the power to sell, but contains only a direction in regard to its exercise, the infringement of which affords a ground for damages, if any, to the person or persons damnified by the sale. Nothing can be clearer than the terms of the proviso which express an intent to protect the purchaser and to confine the remedy of the mortgagor to a suit for damages where due notice, is not given. The words "such a power" in clause 2 of section 69 do not mean a power exercised after three months' notice. They refer simply to the power of sale mentioned in sub-section (1) and have no reference whatever to the period for which notice of sale is to be given. So a provision in a mortgage-deed which provides for 15 days' notice to be given before sale, though invalid, does not vitiate the sale (y). If the mortgagor or subsequent mortgagees had in effect waived notice, they could not object to the sale for want of notice (z). It is not necessary, however, that the amount claimed should be stated with accuracy, although a mistake as to amount due may destroy the effect of the notice as between pledgor and pledgee (a). This is not the law as between a mortgagor and mortgagee. In order to restrain the mortgagee from selling, it is not sufficient to contest the amount due on the mortgage. The mortgagor must pay into Court or tender to the mortgagee the amount claimed to be due.

Fresh notice.—No notice need be given to any person who had not at the time any interest in the equity of redemption. An assign must take things in the state in which he finds them (b). But if the notice be rescinded, a fresh notice would be required. There must be an actual withdrawal of the notice. A long delay in the actual sale does not make a fresh notice necessary (c), nor does postponing or even stopping a sale effect a withdrawal of the notice, under which the sale is about to take place.

Mode of service of notice.—Usually in an English mortgage the mode of service of notice is provided. Provisions are made in sections 102 and 103. The notice must be in writing. When notice was required to be given of the exercise of power of sale to the "mortgagor, his heirs, executors or administrators, or any or either of them," notice was not necessary to be given to the devisee of the mortgagor (d), though damages were awarded in such a case for failure to give notice to the assigns of the equity of redemption (e).

Default has been made in payment of the principal money.—So long as the principal remains unpaid, there is a default within the meaning of this section. As to payment and tender, see notes to section 60 under such headings. Mere payment of interest will not stop the mortgagee from exercising his power. It is the principal that should be paid to stop the sale.

Or a part thereof.—This contemplates a case where the principal money is payable by instalments. Sub-section (2) is intended to make a notice necessary not only where there has been a default in payment of part of the total sum but also when there has been default in payment of a part of the mortgage debt. Hence

(x) *Cockburn v. Edwards* (1881) 18 Ch. D. 449;
Craddock v. Rogers (1884) 53 L. J. Ch. 968.

(y) *The Madras Deposit and Benefit Society v. Passanha* (1888) 11. Mad. 201.

(z) *In re Thompson & Holt* (1890) 44 Ch. D. 492.

(a) *Pigot v. Cubley* (1864) 15 C. B. (N. S.) 701.

(b) *Muncherji Furdoonji v. Noor Mahomedbhoy Jairajbhoy Peerbhoy* (1893) 17 Bom. 711.

(c) *Metters v. Brown* (1863) 33 L. J. Ch. 97.

(d) *Gill v. Newton* (1866) 12 Jur. N. S. 220.

(e) *Hoole v. Smith* (1881) 17 Ch. D. 434.

S. 69 the mortgagee may exercise his power of sale before the stipulated period, if the power is given to pay the principal by instalments and it has become due as provided in the mortgage (f).

Three months.—The notice need not specify this period. It is sufficient if the mortgagee does not exercise his power for three months after service.

Contract of sale before expiration of notice.—Where a mortgagee gave notice demanding payment, and before the expiration of the three months' notice entered into a contract for sale of the property, the contract was held valid (g).

Sale without notice.—A Court of Equity will not restrain a sale at the instance of a mortgagee who has failed to give the required notice, if there be a provision in the mortgage deed for the protection both of the purchaser and of the mortgagor, to the effect that the purchaser should not be affected by the absence of such notice and that the remedy of the mortgagor should be by an action for damages (h).

In default of payment of interest.—The power to sell under the second clause arises in the event of interest falling into arrears and amounting to Rs. 500 and remaining unpaid for three months. But this power can only be exercised if the principal has become due and payable. Sub-section 2 (b) is ineffective, unless the principal has become due. It is open to the parties to contract specifically that if interest remains unpaid for three months, the whole of the principal should become payable and that thereupon the mortgagee might exercise his power of sale. But if the parties refrain from expressly contracting to that effect and there is nothing in the mortgage from which it can be presumed, apart from the express contract, that the principal became payable as soon as interest fell into arrears for three months, the mortgagee cannot exercise the power of sale. Default in payment of interest for three months does not amount to default in payment of the mortgage-money, that is to say, principal and interest (i).

Selling power of mortgagee for interest in arrears after notice demanding the principal and interest.—It is not competent to a mortgagee who has given notice calling in principal and interest and for a sale in default of payment, to exercise the power of sale for interest in arrears before the expiry of three months from the service of that notice (j). And where a mortgagor tenders the amount after the expiration of the period and before the sale, the mortgagee cannot insist on three months' notice or three months' interest in lieu of notice.

Section 69, Sub-section 3.

Sub-section 3.—This is identical with section 21, sub-section 2 of the Conveyancing Act of 1881 (k), except that the word "conveyance" is used there instead of "sale" as in the present Act.

Professed exercise of such a power.—The validity of a sale held by a mortgagee in the exercise of his power of sale after satisfaction of the mortgage debt was considered in a case where the terms of the proviso in a mortgage were similar to those of sub-section (3). The Master of the Rolls, in delivering judgment dismissing the suit, exhaustively analysed the proviso, to which reference may be made in (l). From

(f) *Payne v. Cardiff Rural District Council* (1932) 1 K. B. 241; dicta in *Tottenham Local Board of Health v. Rowell* (1880), 15 Ch. D. 378 applied.
(g) *Major v. Ward* (1847) 12 Jur. 473.
(h) *Prichard v. Wilson* (1864) 10 Jur. N. S. 330.
(i) *Jerup Teja & Co. v. Peerbhoy* (1921) 23 Bom.

L. R. 1241.
(j) *Doolabhdas v. Chabildas* (1899) 1 Bom. L. R. 273.
(k) 44 & 45 Vict., c. 41; see sec. 104 (2), Law of Property Act, 1925.
(l) *Dicker v. Angerstein* (1876) 3 Ch. D. 600.

this sub-section it follows that the right to sell is absolutely vested in the mortgagee, so as to give a good title to a *bona fide* purchaser, leaving the mortgagor to his remedy against the mortgagee in damages, which is an efficient protection. And it makes no difference whether the mortgage has been paid off wholly (*m*) or in part (*n*). That which cuts down the exercise of the power of sale in the case of no money being due, is the implication which is attached by the Court of equity to all mortgages, of their being intended as security for money only; where the security is at an end no power can be given (*o*).

Depreciatory condition of sale.—A mortgagor can call in question the propriety of a sale held under a depreciatory condition unnecessarily used and not adapted to the state of the title and so restrictive as to narrow the number of bidders or lessen the price. Where a condition, not merely imposes on the purchaser the obligation to take such title as the vendors can give, but goes on to provide that the purchaser shall not raise any question or objection to title, it is depreciatory (*p*). The Court cannot inquire whether a particular condition has in fact had a depreciatory effect (*q*); if it had a depreciatory tendency, it is enough. A condition which tends to deter bidders is depreciatory (*r*). This raises the next question, what is the effect of such a sale. The mortgage deed usually contains a protection clause protecting the purchaser from the consequences of any irregularity. But the power to sell under special conditions does not entitle the mortgagee needlessly to use depreciatory conditions. The protection afforded to a purchaser is qualified by the condition that he must not have purchased with notice or with the knowledge of any irregularity which cannot have been waived (*s*). In relation to a somewhat similar clause in a mortgage deed, it has been the view in England that a purchaser with notice cannot claim its protection (*t*). To uphold the title of such a purchaser would be to convert the provisions of the statute into an instrument of fraud (*u*). A purchaser signing the conditions of sale must be taken to be aware of the contents though he was not present when they were read out or was unaware of their contents when he was bidding. The knowledge of his agent must be imputed to him, as though it were his own knowledge (*v*) unless the case came within the doctrine of *Kennedy v. Green* (*w*).

Conduct of mortgagee at sale inducing bidders to leave.—A sale by a mortgagee under a power of sale would be invalidated, if the seller stopped the sale under circumstances as naturally to lead the bidders to suppose that the sale was over, at least for that occasion, and to go from the place of auction and in consequence thereof they did go away. The purchaser at such sale being present, must be deemed to have seen and heard what passed and would be affected with notice of the impropriety of the alleged sale, and is protected neither by proviso in the mortgage deed protecting him against impropriety or irregularity in the conduct of sale or by the provisions of section 69 of the Transfer of Property Act (*x*).

- (*m*) *Dicker v. Angerstein* (1876) 3 Ch. D. 600; *Madras Deposit & Benefit Society v. Passanha* (1888) 11 Mad. 201.
- (*n*) *Ramakrishna Mudali v. Official Assignee* (1922) 45 Mad. 774.
- (*o*) *Dicker v. Angerstein* (1876) 3 Ch. D. 600.
- (*p*) *Chabildas v. Dayal Mowji* (1904) 6 Bom. L. R. 557.
- (*q*) *Danez v. Goldingham* (1873) 8 Ch. 902.
- (*r*) *Chabildas v. Dayal Mowji* (1904) 6 Bom. L. R. 557; *Falkner v. Equitable Reversionary Society* (1858) 4 Drew. 356, 62 E. R. 136.
- (*s*) *Selwyn v. Garfit* (1888) 38 Ch. D. 273.

- (*t*) *Parkinson v. Hanbury* (1860) 1 Dr. & Sm. 143, 62 E. R. 332; *Selwyn v. Garfit* (1888) 38 Ch. D. 273.
- (*u*) *Chabildas v. Dayal Mowji* (1904) 6 Bom. L. R. 557; *Bailey v. Barnes* (1894) 1 Ch. 25.
- (*v*) *Chabildas v. Dayal Mowji* (1904) 6 Bom. L. R. 557; *Roland v. Hart* (1871) 6 Ch. App. 682; *Mohori Bibi v. Dharamdas Ghose* (1904) 31 Cal. 5.
- (*w*) 3 My. & K. 699 distinguished in *Roland v. Hart* (1871) Ch. App. 678 and *Kettlewell v. Watson* (1882) 21 Ch. D. 685.
- (*x*) *Chabildas Lallubhai v. Dayal Mowji* (1907) 31 Bom. 566.

S. 69

Protection to purchaser from irregularity in the sale.—By sub-section (3) the title of the purchaser is not impeachable on the ground of improper or irregular exercise of the power of sale, it being provided that the remedy of the person damaged shall be in damages against the person exercising the power of sale. The conditions of sale, however, must make out a title in the mortgagee to sell but there is nothing to prevent him from selling under special conditions, if they are not of a depreciatory character (y). The mortgagee, however, must not sacrifice the interest of the mortgagor and if there are circumstances which cast a doubt or put the purchaser on enquiry about the circumstances of the sale, he will not be protected, for he thereby becomes a party to the transaction which is complained of, as when, for instance, a tender was made at an auction sale which came to the notice of the purchaser, which the mortgagee refused and the property was knocked down for a price higher than the amount of the tender. It was held that the sale was oppressive and the circumstance of having seen the tender made, cast a duty on the purchaser to inquire and his knowledge of the mortgagor's struggle to redeem, placed him in the same situation as the vendor with regard to the mortgagor's right (z). But if a mortgage has been satisfied, a *bona fide* purchaser without notice will be protected (a). This protection from irregularity does not arise until the sale is completed (b), for the word "sale" in this sub-section has the same meaning as is given to it in section 54. And when a mortgage contains a covenant not to exercise the sale without notice and the purchaser has notice of this failure on the part of the mortgagee, he will not acquire a valid title (c). Nor is a purchaser protected when he is aware of any irregularity which cannot have been waived (d). Where a mortgagee is entitled to exercise the power, the Court could not look into his motives for so doing (e) nor will it restrain completion of sale on the ground of undervalue and surprise (f). When the first and second mortgagee had a power of sale and of giving receipts, they could combine together and sell and give a good discharge for the purchase-money (g).

Rights, duties and obligations of a mortgagee conducting a sale :

(1) It is incumbent on the mortgagee exercising his power of sale to act in good faith (h). He must sell as a prudent owner, intending to sell his own property (i) with reasonable conditions and if the state of the title justifies, to offer a marketable title. The power is to be regarded as a sacred thing, for it is only a security (j).

(2) The motives actuating a mortgagee in exercising his power of sale will not be considered by a Court (k).

(3) "He is not at liberty to look after his own interests alone and it is not right or proper or legal for him, either fraudulently or wilfully or recklessly, to sacrifice the property of the mortgagor" (l). The exercise of the power of sale shall not be oppressive. He must not sell after tender made to him of the mortgage-money and his costs, charges and expenses, though the latter be under protest.

(y) *Hobson v. Bell* (1839) 3 Jur. 150, 48 E. R. 1084; *Chabildas Lallubhai v. Mowji Dayal* (1902) 26 Bom. 82.
 (z) *Jenkins v. Jones* (1860) 2 Giff. 99, 66 E. R. 43.
 (a) *Dicker v. Angerstein* (1876) 3 Ch. 600.
 (b) *Life Interest and Reversionary Securities Corporation v. Hand in Hand Fire & Life Insurance Society* (1898) 2 Ch. 230.
 (c) *Perkinson v. Hanbury* (1860) 1 Dr. & Sm. 143, 62 E. R. 332.
 (d) *Selwyn v. Garfit* (1888) 33 Ch. D. 273.
 (e) *Nash v. Eads* (1880) 25 So. Jo. 95.
 (f) *Ferrand v. Clay* (1837) 1 Jur. 165.
 (g) *M'Carogher v. Whieldon* (1864) 34 Beav.

107, 55 E. R. 574.
 (h) *Kennedy v. De Trafford* (1897) A. C. 180.
 (i) *Marriot v. Anchor Reversionary Society* (1860) 30 L. J. Ch. 57, 66 E. R. 191; *Cobson v. Williams* (1889) 58 L. J. Ch. 539.
 (j) *Jenkins v. Jones* (1860) 2 Giff. 99, 66 E. R. 43; *Chabildas Lallubhai v. Dayal Mowji* (1902) 26 Bom. 82.
 (k) *Cobson v. Williams* (1889) 58 L. J. Ch. 539; *Nash v. Eads* (1880) 25 So. Jo. 95.
 (l) *Kennedy v. De Trafford* (1897) A. C. 180; *Chabildas v. Dayal Mowji* (1903) 5 Bom. L. R. 247.

(4) A mortgagee may sell under special circumstances even of a stringent character, if not unreasonably depreciatory (*m*).

(5) He must hold the balance of the sale proceeds in trust for the mortgagor (*n*), and if there are subsequent encumbrancers, in trust for them and ultimately for the mortgagors (*o*).

(6) He must not buy himself (*p*), or through his solicitors or agent (*q*), for such a sale would be vitiated even though there be no fraud or undervalue (*r*).

(7) He must hold the sale, strictly adhering to the conditions which give him the right to exercise his power (*s*).

(8) He must not sell by private treaty if the mortgage deed allows him to sell by public auction only (*t*).

(9) After *decree nisi* for foreclosure he must not sell without leave obtained from the Court.

(10) He is not bound to advertise the sale (*u*).

(11) He must distribute copies of the conditions freely among the bidders (*v*).

(12) He must not do anything which would scare away the bidders (*w*).

(13) He may carry out the sale by leaving the whole or part of the mortgage-money on the security of the property (*x*).

(14) He must use every exertion to sell the property at the best price (*y*) for he is chargeable with the full value of the mortgaged property sold, if for want of due care and diligence it has been sold at an undervalue (*z*).

(15) He must not sell before the mortgage-money has become due (*a*).

(16) He must not sell without giving to the mortgagor a written notice for payment of the principal money and before default has been made for three months after service in payment (*b*).

(17) He must not sell unless some interest amounting to at least Rs. 500 is in arrear and unpaid for three months after becoming due (*c*).

(18) His particulars of sale, even if inserted by his auctioneer, should give a correct description of the property (*d*).

(19) He may sell even after the mortgage debt is satisfied and give a good title to a *bona fide* purchaser for value without notice (*e*).

(20) If he exercises the power *bona fide* without corruption or collusion with the purchaser, the Court will not interfere even though the sale is very disadvantageous unless, indeed, the price is so low as in itself to be evidence of fraud (*f*).

(*m*) *Falkner v. Equitable Reversionary Society* (1858) 4 Drew. 356, 62 E. R. 136; *Hobson v. Bell* (1839) 2 Beav. 17, 48 E. R. 1084.

(*n*) *Warner v. Jacob* (1882) 20 Ch. D. 220; *Haji Abdul Rehman v. Haji Noor Mahomed* (1902) 26 Bom. 141; *Charles v. Jones* (1887) 35 Ch. D. 544.

(*o*) *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan* (1879) 5 Cal. 198, 6 I. A. 145.

(*p*) *National Bank of Australasia v. United Hand in Hand, etc.*, (1879) 4 A. C. 391; *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan* (1879) 5 Cal. 198, 6 I. A. 145.

(*q*) *National Bank of Australasia v. United Hand in Hand etc.* (1879) 4 A. C. 391; *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan* (1879) 5 Cal. 198, 6 I. A. 145.

(*r*) *Downes v. Grazebrook* (1817) 3 Mer. 200, 36 E. R. 77.

(*s*) *Davey v. Durrant, Smith v. Durrant* 1841)

3 Moo. P. C. C. 457.

(*t*) *Bronard v. Dumaresque* (1841) 3 Moo P. C. C. 457.

(*u*) *Davey v. Durrant* (1841) 3 Moo P. C. C. 457.

(*v*) *Davey v. Durrant* (1841) 3 Moo. P. C. C. 457.

(*w*) *Chabildas v. Dayal Mowji* (1907) 31 Bom. 566 P. C.

(*x*) *Thurlow v. Mackeson* (1868) 4 Q. B. 97; *Kennedy v. De Trafford* (1897) A. C. 180.

(*y*) *Orme v. Wright* (1839) 3 Jur. 972.

(*z*) *National Bank of Australasia v. United Hand-in-hand and Bond of Hope Co.* (1879) 4 A. C. 391.

(*a*) *Jerup Teja & Co. v. Peerbhoy* (1921) 23 Bom. L. R. 1241.

(*b*) Section 69 (2), (a).

(*c*) Section 69 (2), (b).

(*d*) *Tomlin v. Luce* (1889) 43 Ch. D. 191.

(*e*) *Dicker v. Angerstein* (1876) 3 Ch. D. 600.

(*f*) *Warner v. Jacob* (1882) 20 Ch. D. 220.

S. 69

(21) He is not bound to require a deposit. He may accept a cheque for the deposit, without liability in case of subsequent dishonour (g).

(22) He need not abstain because he is not in urgent want of moneys or because he has a spite against the mortgagor (h).

Particulars and conditions of sale on an auction.—The description of the property known as the particulars, precedes the conditions of sale. The latter usually comprise (1) the highest bidder shall be declared purchaser, (2) bidding to be in sums fixed by auctioneers, (3) sale subject to a reserve, (4) purchaser to pay a deposit of 25% and sign an agreement to complete the sale according to the terms and conditions, (5) title-deeds to be inspected at the office of the vendor's solicitors, (6) purchaser not to call for production of documents, not in the vendor's possession, (7) besides the vendor no other person shall join in the conveyance, (8) identification of the property, (9) vendor's power of sale, (10) list of title-deeds, (11) rescission of contract by vendor, if unwilling to answer objection or requisitions, (12) tracing the title, (13) property sold subject to easements and taxes, (14) property to be at the risk of the purchaser, (15) completion within one month from the date of the sale at the office of the vendor's solicitors, (16) the purchaser to take possession, the vendor not liable to put him in possession, (17) vendor will execute conveyance on payment of balance, (18) draft conveyance to be sent to the vendor's attorneys 15 days before completion, (19) condition—the title-deeds to be retained by vendor should be specified, (20) costs of stamp and registration, including the vendor's costs of the conveyance and correspondence, to be borne by the purchaser, (21) in default of completion within the time prescribed, the vendor to be at liberty to resell by private contract or public auction and sue the purchaser for deficiency. In case of excess, purchaser is not entitled to the same.

Persons qualified to bid and purchase at sale in exercise of power.—A mortgagee exercising his power of sale cannot purchase the property on his own account or in the name of his nominee (i). Neither can his agent or his solicitor if such agent or solicitor is acting in the matter of sale nor can a trustee with a power of sale purchase the property through an agent although there has been no fraud or undervalue (j). But he may purchase with the concurrence of the mortgagor and acquire an unimpeachable title (k). A mortgagee is chargeable with the full value of the mortgaged property sold, if for want of due care and diligence it has been sold at an undervalue (l). Lord Eldon in *Downes v. Grazebrook* and in *Chambers v. Goldwin* and in *Cholomondeley v. Clinton* has stated the principle on which the Court proceeds, where the question is as to the validity of a sale effected by a mortgagee under a power of sale. The Court requires that he shall exercise the power of sale in a prudent way with due regard to the rights, interests of the mortgagor in the surplus money to be produced by the sale, the legitimate purpose being to secure repayment of his mortgage-money. It is a fraud to use the power for purposes foreign to that for which it was intended (m). Similarly, at a sale by the Court where the trustee is a mortgagee, if any of the *cestuis que trust* objects, he will not be allowed to bid (n). A solicitor to a creditor of a mortgagee, is not disabled from purchasing; for his client

(g) *Farrer v. Lacey, Heartland & Co.* (1885) 31 Ch. D. 42.

(h) *Nash v. Eads* (1880) 25 So. Jo. 95.

(i) *National Bank of Australasia v. United Hand-in-Hand, etc.* (1879) 4 A. C. 391; *Rajah Kishendall Ram v. Raja Mumtas Ali Khan* (1879) 5 Cal. 198, 6 I. A. 145.

(j) *Downes v. Grazebrook* (1817) 3 Mer. 200, 36

E. R. 77.

(k) *Purmanandas Jiwandas v. Jamnabai* (1886) 10 Bom. 49.

(l) *National Bank of Australasia v. United Hand-in-Hand, etc.* (1879) 4 A. C. 391.

(m) *Robertson v. Norris* (1857) 1 Giff. 421, 65 E. R. 983.

(n) *Tennant v. Trenchard* (1869) 4 Ch. App. 537.

being at liberty to purchase, he is not disqualified (o). But a person who has been an active agent of the mortgagee vendor, the medium through which the money is advanced, surveying the security and receiving interest regularly for the mortgagee, is not a competent purchaser under the power of sale (p). Nor is a mortgagee's solicitor's clerk (q) or the secretary of a building society mortgagee (r). But a sale may be made to a corporation by a mortgagee who is a member thereof (s). Nor is there any objection to a second or subsequent mortgagee purchasing at a sale by a prior mortgagee (t).

Purchase by mortgagor.—A purchase by a mortgagor at a first mortgagee's sale is a clearing-off of the first encumbrance but not so as to confer on the mortgagor a title free from the charge of the second mortgagee (u); nor can he use it as a shield against him (v). On the principle embodied in section 43 of the Transfer of Property Act, the mortgagor cannot use this subsequently acquired interest to invalidate his own transaction (w).

Possession by purchaser under power of sale.—In conditions of sale by public auction, it is usual to provide that the purchaser shall take possession at his own cost.

"Lis pendens."—A private sale by a mortgagee in exercise of a power conferred by the mortgage deed is not affected by the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act and is valid, though made during the pendency of a redemption suit filed by the mortgagor (x).

Promise by mortgagee to postpone sale.—A mortgage debt was repayable on the 28th December 1896. On 11th May 1897 the mortgagee sold the property by public auction. The mortgagor sued to set aside the sale and to be allowed to redeem, alleging that on the day before the sale, the mortgagee had orally agreed to postpone the sale for four days and that the purchaser had notice thereof. There was no consideration and the difficulty was met by the mortgagor relying on section 63 of the Contract Act which was held not to apply. The mortgagee's agreement is not an extension of the time for performance of the mortgagor's promise to pay, but an agreement to refrain from exercising for a stated period, the right of sale arising from non-performance (y).

Injunction to stay sale.—The mortgagor is not entitled to relief when a power of sale has become absolute. The power cannot be suspended by the filing of a bill to redeem (z). The owner of the equity of redemption can only stay the sale *pendent lite* by paying the amount due which the mortgagee swears to be due to him (a), unless, it appears from the deed that such amount cannot be due (b), or where the mortgagee was the solicitor of the mortgagor at the date of the mortgage (c), or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. To grant such an injunction would be to cancel one of the clauses of the deed, to which

(o) *Guest v. Smythe* (1870) 5 Ch. App. 551.
 (p) *Orme v. Wright* (1839) 3 Jur. 972.
 (q) *Parnell v. Tyler* (1833) 2 L. J. Ch. 195.
 (r) *Martinson v. Clowes* (1882) 21 Ch. D. 857;
 Robertson v. Norris (1857) 1 Giff. 421, 65
 E. R. 983 disapproved of.
 (s) *Farrar v. Farrars, Ltd.* (1888) 40 Ch. D. 395.
 (t) *Shaw v. Bunny* (1865) 11 Jur. N. S. 99; *Kirk-*
 wood v. Thompson (1865) 2 De. G. J. Sn.
 613, 46 E. R. 513; *Raja Kishendatt Ram v.*
 Raja Mumtaz Ali Khan (1879) 5 Cal. 198,
 6 I. A. 145.
 (u) *Otter v. Lord Vaux* (1856) 25 L. J. Ch. 734.

(v) *Krishna Ayyangar v. Venkatarama* (1906) 29
 Mad. 115.
 (w) *Manjappa Roy v. Krishnayya* (1906) 29 Mad.
 113.
 (x) *Ramakrishna Mudali v. Official Assignee*
 (1922) 45 Mad. 774.
 (y) *Trimbak Gangadhar v. Bhagwandas Mulchand*
 (1899) 23 Bom. 348.
 (z) *Adams v. Scott* (1859) 7 W. R. 213.
 (a) *Whitworth v. Rhodes* (1850) 20 L. J. Ch. 165;
 Warner v. Jacob (1882) 20 Ch. D. 220.
 (b) *Hickson v. Darlow* (1883) 23 Ch. D. 690.
 (c) *Macleod v. Jones* (1883) 24 Ch. D. 289.

S. 69

both the parties had agreed and to annul one of the chief securities on which persons advancing money on mortgages, rely. It would be otherwise, if the notice of sale had been given by the mortgagee after the suit for redemption had been filed (*d*). A mortgagor by disputing the amount due, cannot deprive the mortgagee of his remedy by way of sale, (*e*). But the first mortgagee would be restrained if the puisne mortgagee offered to pay him off and he declined (*f*). But no injunction will be granted to stop a sale if the mortgage deed provides that the remedy of the mortgagor be in damages (*g*). If a mortgagee exercises his power of sale *bona fide*, the Court will not interfere, unless the price is so low as in itself to be evidence of fraud (*h*), nor where the transaction has to some extent been sanctioned by the mortgagor (*i*). Undervalue is not by itself enough to prove bad faith (*j*).

Destruction of power of sale.—By a deed of 1812 mortgagor assigned to mortgagee a policy of insurance. In a further charge of 1813, there was a power to sell but upon a further advance in 1822, the power was omitted. It was held that the vendor should shew an unquestionable power, and the power was gone by not being mentioned in the third deed (*k*). A recital in a transfer of mortgage that “the power has not been and is not intended to be exercised” was held not to be destructive (*l*). After the usual *order nisi* for foreclosure, the power is only suspended and not extinguished and a *bona fide* purchaser without notice may get a good title under the power (*m*).

Right of auctioneer to refuse biddings.—An auctioneer may refuse to receive the biddings of the mortgagor (*n*).

Assignment of power of sale.—A mortgagee who has such power may assign it with the mortgage to a third person and the latter can validly exercise it (*o*).

Two powers of sale.—On a sub-mortgage, both the original and the sub-mortgagee are entitled to exercise the power of sale.

Effect on power of sale by assignment of part of the mortgage debt.—First mortgagees declared themselves trustees for F. & Sons of part of the mortgage debt and then assigned that part to F. & Sons, without power to the latter to give receipts for any part of the principal and interest due on the security. F. & Sons did not give notice of the assignment to any person interested in the equity of redemption. The first mortgagees in exercise of the statutory power sold the premises by auction to F. & Sons for the amount of principal and interest to themselves. It was held that the sale was valid and the statutory power of sale was not brought to an end by the assignment (*p*).

Measure of damages when property sold at an undervalue.—The measure of damages is the difference between the price realized and the price which would have been realized, had the property been sold at a Court sale with a reserved price (*q*).

(*d*) *Jaggiwan Nanabhai v. Shridhar Balkrishna* (1878) 2 Bom. 252.

(*e*) *Gill v. Newton* (1866) 12 Jur. N. S. 220; *Cockell v. Bacon* (1852) 16 Beav. 158, 51 E. R. 737.

(*f*) *Rhodes v. Buckland* (1852) 16 Beav. 212, 51 E. R. 759; *Jerup Teja & Co. v. Peerbhoy* (1921) 23 Bom. L. R. 1241.

(*g*) *Muncherji Furdoonji v. Noor Mahomedbhoy* (1893) 17 Bom. 711; *Pritchard v. Wilson* (1864) 10 Jur. N. S. 330.

(*h*) *Warner v. Jacob* (1882) 20 Ch. D. 220; *Downes v. Grazebrook* (1817) 3 Mer. 200, 36 E. R. 77 and *Robertson v. Norris* (1877) 1 Giff. 211,

65 E. R. 983, observed upon.

(*i*) *Ferrand v. Clay* (1837) 1 Jur. 165.

(*j*) *Waring (Lord) v. London & Manchester Assurance Co., Ltd.* (1935) 1 Ch. D. 310.

(*k*) *Curling v. Shuttleworth* (1829) 6 Bing. 121, 130 E. R. 1226.

(*l*) *Boyd v. Petrie* (1872) 7 Ch. App. 383.

(*m*) *Stevens v. Theatres, Ltd.* (1903) 1 Ch. 857.

(*n*) *Ferrand v. Clay* (1837) 1 Jur. 165.

(*o*) *Ramakrishna Mudali v. Official Assignee* (1922) 45 Mad. 774.

(*p*) *Flower & Sons Ltd. v. Pritchard* (1908) 53 So. Jo. 178.

(*q*) *Wolff v. Vanderzee* (1869) 20 L. T. 350.

Can a puisne mortgagee restrain a prior mortgagee from selling.—It is obvious that a puisne encumbrancer could only stop the sale, if he paid the mortgage-money which became due owing to default in payment of interest, if by agreement between the parties the whole of the mortgage-money had become payable. But no authority is to be found that if a prior mortgagee was attempting to sell the mortgaged premises, when owing to interest being in arrears the whole of the money had become payable, a puisne encumbrancer could stop the sale by payment only of the interest due, that is to say, by removing the cause which gave rise to the power of sale being exercised (*r*). A puisne mortgagee could obtain an injunction, if the mortgage deed did not provide that the principal also became payable, if interest remained unpaid for three months (*s*).

Section 69, Sub-section 4.

Mortgagee on sale how far a trustee.—This sub-section follows section 21, sub-section (3) of the Conveyancing Act of 1881 (*t*). The mortgagee is a trustee of the surplus left after discharge of prior encumbrances, to which the sale is not made subject. As soon as the surplus is ascertained, the fiduciary relationship arises and the mortgagee becomes a constructive trustee of the surplus (*u*). The surplus includes the moneys due to him as also the costs, charges and expenses of the sale or attempted sale. Under the Act, a mortgagee in exercising his power of sale, is not, except as to the balance of the purchase-money after a sale, a trustee for the mortgagor or the person entitled to the equity of redemption (*v*), even if the mortgage is in the form of a trust for sale (*w*); and when there are subsequent encumbrancers, he is a trustee of the surplus proceeds after satisfying his own charge, first for the subsequent encumbrancers and ultimately for the mortgagor (*x*). If he overlooks the rights of the second mortgagee and pays the surplus to the mortgagor, he would be held liable (*y*). If the mortgagee is a creditor, he cannot retain the surplus for payment to himself (*z*). He must refund the surplus for which he is a trustee for the mortgagor and subsequent encumbrancers with interest at 6%, i.e., the Court rate from the date of the completion of the sale (*a*), unless there are circumstances which prevent him from handing over such surplus as, for example, a notice from a second mortgagee not to part with the surplus, owing to disputes pending between puisne encumbrancers, in which case he may allow the moneys to lie uninvested with his bankers (*b*). He will, however, not escape liability, if the second mortgagee laid by and made no claims (*c*). Such surplus, being in the hands of the mortgagee as a trustee, is liable to attachment for the levy of fine by distress in the hands of the mortgagee under section 386 of the Criminal Procedure Code (*d*). This lien which the mortgagee has, enables him to claim interest, though barred by the Statute of Limitation. No provision is made in the Limitation Act as to the interest of the mortgagee. Westropp J., in laying down the principle of an account in a redemption suit, said that the interest on the mortgage-money must be calculated without saying that any limit is made by law (*e*).

(*r*) See *Doolabdas v. Chhabildas* (1899) 1 Bom. L. R. 273 (the whole principal there had become due).

(*s*) *Jerup Teja & Co. v. Peerbhoy* (1921) 23 Bom. L. R. 1241.

(*t*) 43 & 44 Vict., c. 41.

(*u*) *Banner v. Berridge* (1881) 18 Ch. D. 254.

(*v*) *Jenkins v. Jones* (1860) 2 Giff. 99, 66 E. R. 43.

(*w*) *Warner v. Jacob* (1882) 20 Ch. D. 220 (where the cases are collected).

(*x*) *Rajah Kishendatt Ram v. Rajah Mumtaz Ali-khan* (1880) 5 Cal. 198, 6 I. A. 145.

(*y*) *West London Commercial Bank v. Reliance*

Permanent Building Society (1885) 29 Ch. D. 954.

(*z*) *Talbot v. Frere* (1878) 9 Ch. D. 568.

(*a*) *Haji Abdul Rahman v. Haji Noor Mahomed* (1892) 16 Bom. 141, *Charles v. Jones* (1886) 35 Ch. D. 544.

(*b*) *Mathison v. Clarke* (1855) 25 L. J. Ch. 29.

(*c*) *Read v. Eley* (1879) 80 L. T. 369.

(*d*) *Pechu Vadhiar v. The Secretary of State for India* (1917) 40 Mad. 767.

(*e*) *Prabhakar v. Pandurang* (1875) 12 Bom. H. C. 88.

S. 69 This seems to meet the equity of the case, as the mortgagor could at any time have come in to redeem and so stopped the accrual of the interest. Hence his lien is not affected by lapse of time (*f*).

Position of a mortgagee exercising his power of sale.—He is not a trustee for the mortgagor in the exercise of that power. It is only in a secondary point of view and under certain circumstances and for a particular purpose that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract: it is only raised by implication, in subordination to the main purpose of it and after that is fully satisfied; its primary character is not fiduciary (*g*). It is a power given to him for his own benefit to enable him the better to realize his debt. The Court will not interfere even though the sale is very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud (*h*).

Result of a sale by mortgagee.—The equity of redemption in the mortgaged property is destroyed and the mortgagor's equity to redeem is extinguished (*i*) and the purchaser becomes the absolute owner of the property, taking it free from encumbrances (*j*).

Right of auction purchaser to possession.—This right is not derived from the mortgagee. The purchaser's right to recover possession comes into existence for the first time, when he becomes absolute owner of the property; it is one which was not vested in the mortgagee, so that it cannot be said that it passed from the mortgagee to him. The mortgagor is in possession adverse to the purchaser at the time of the sale (*k*). Hence the purchaser cannot claim the benefit of section 41 of the Presidency Small Causes Courts Act, XV of 1882.

Action to set aside sale—laches.—On the ground of laches, relief would be refused (*l*).

Purchase-money left on the security of the property.—A mortgagee may carry out the purchase by leaving the whole or part of the mortgage-money on the security of the property. Such action on his part will not vitiate a sale (*m*).

To whom surplus should be made when there is none to receive and give discharge.—We have seen that the surplus is paid either to the mortgagor or the subsequent encumbrancer; but the question arises, what is the mortgagee to do if none of these are available. The section does not answer it.

Outgoings previous to sale.—The conditions of sale contained the usual provision that "the purchaser shall not be liable to pay the outgoings, previous to the date of payment of the purchase-money, etc." At the time of the sale, a letter was read out, by which the Corporation of Calcutta gave notice of its dues. The purchaser was held entitled to deduct the dues and the mortgagee to the balance (*n*).

Mortgage deed.—On a sale by mortgagee under his power of sale where the proceeds are insufficient to discharge the mortgage, the mortgagee is entitled to retain the mortgage deed.

(*f*) *Daudbhai v. Daudbhai* (1890) 14 Bom. 113;
In re Mansfield (1885) 34 Ch. D. 544.

(*g*) *Cholomondeley v. Clinton* (1817) 2 Mer. 171,
35 E. R. 905.

(*h*) *Warner v. Jacob* (1882) 20 Ch. D. 220.

(*i*) *Rajah Kishendall Ram v. Rajah Mumtaz Ali-*
khan (1879) 5 Cal. 198, 6 I. A. 145; *Hender-*
son v. Astwood (1894) A. C. 150.

(*j*) *Chabildas v. Mowji Dayal* (1902) 26 Bom. 82.

(*k*) *Chabildas v. Mowji Dayal* (1902) 26 Bom. 82.

Heath v. Pugh (1881) 6 Q. B. D. 361 (1882)
7 A. C. 235; *Purmananddas v. Jamnabai*
(1886) 10 Bom. 49.

(*l*) *Null v. Easton* (1900) 1 Ch. 29.

(*m*) *Kennedy v. De Trafford* (1897) A. C. 180;
Brilles v. Maynard (1883) 49 L. T. 389;
Thurlow v. Mackson (1888) L. R. 4 Q. B. 97.

(*n*) *Bibhulubhushan v. Majibai Rahman* (1934)
61 Cal. 956.

Section 69, Sub-section 5.

Ss. 69-69A

Implied power of sale.—Sub-section (5) takes out of the operation of the Act, powers conferred before the 1st day of July 1882. Accordingly, therefore, powers which were exercised before the passing of the Act, would still be exercisable notwithstanding the provisions of the Act. This is particularly observed in the case of mortgages of personal chattels and pledges, as to which see the undernoted cases (o).

69A. (1) *A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.*

Appointment of receiver.

(2) *Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.*

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shewn.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) *A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.*

(o) *Ex-parte Official Receiver in re Morrill* (1887) 18 Q. B. D. 222; *France v. Clarke* (1883) 22 Ch. D. 830; *Harold v. Plenty* (1901) 2 Ch. 314; *Deverges v. Sandeman Clark & Co.* (1902) 1 Ch. 579; *Pigot v. Cubley* (1864)

50 C. B. (N. S.) 701; *Deverges v. Sandeman Clark & Co.* (1902) 1 Ch. 579; *Stubbs v. Slater* (1910) 1 Ch. 632; *Carter v. Wake* (1877) 4 Ch. D. 605.

S. 69A

(4) *The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.*

(5) *A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.*

(6) *The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent., on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent. on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.*

(7) *The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.*

(8) *Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely :—*

- (i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property ;*
- (ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ;*
- (iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act,*

and the cost of executing necessary or proper repairs directed in writing by the mortgagee ; S. 69A

(iv) *in payment of the interest falling due under the mortgage ;*

(v) *in or towards discharge of the principal money, if so directed in writing by the mortgagee ;*

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) *The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed ; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.*

(10) *Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.*

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) *In this section, " the Court " means the Court which would have jurisdiction in a suit to enforce the mortgage.*

New section.—This section has been added by Act 20 of 1929 to avoid the complicated situation to which a mortgagee taking possession was exposed. Like section 69 it is for the protection of a mortgagee.

Clause (1) : receiver.—The right to appoint is given to a mortgagee who has a power of sale. Such appointment must be made in writing signed by the mortgagee or on his behalf. Such receiver shall be of the income or part thereof. The clause follows section 109 (1) of the Law of Property Act, 1925. The wording is not so clear as of the English Act but the words " having a right to exercise the power "

S. 69A have reference to section 69, sub-section 2 which prescribes when the power becomes exercisable. Clause 9 enacts that this clause applies so far as a contrary intention is not expressed in the mortgage deed.

Appointment of receiver.—This is dealt with in clause 2. The receiver may be a person named in the mortgage deed if able and willing to act—otherwise a person agreed to by the mortgagor. So also if there be no person named. On failure to agree the mortgagee may apply to the Court and the person so appointed shall be deemed to have been appointed by the mortgagee. He is not a public officer within the meaning of section 2 (17) of the Code of Civil Procedure which includes a receiver appointed in a suit when the Court is administering an estate or property. Under this section, he is merely the agent of the mortgagor (*p*).

Removal of receiver.—The mortgagor and mortgagee by agreement, or the Court on the application of either party on due cause shewn, may remove a receiver (*q*).

Vacancy.—This shall be filled up in accordance with the provisions of the section (*r*).

Clauses 3 to 8.—Clause 9 enacts that the provisions of these clauses are subject to modifications by the act of the parties.

Agent of the mortgagor.—Receiver being the agent of the mortgagor, the latter is responsible for his acts or defaults unless (a) the deed provides otherwise, or (b) they are due to the mortgagee's improper intervention (*s*). When a receiver has been appointed, the mortgagor cannot distrain without the receiver's authority (*t*).

Powers of a receiver.—A receiver has powers :—

- (a) to demand and sue for the income in the name of the mortgagor or mortgagee
- (b) to give valid receipts accordingly
- (c) to exercise powers delegated by the mortgagee (*u*).

Protection of person making payment.—Such a person is not concerned to see to the validity of the appointment of the receiver (*v*).

Remuneration of receiver.—If no rate is fixed, he is entitled to deduct 5% on the gross receipts for his remuneration and costs, charges and expenses, or such rate as may be fixed by the Court on his application. In his appointment a rate may be fixed not exceeding 5% (*w*).

Insurance.—The receiver may, out of the moneys received by him insure, if directed by the mortgagor in writing, to the extent to which the mortgagor might have insured (*x*).

Application by receiver of moneys received.—All moneys received by him (except insurance moneys which shall be subject to the provisions of the Act) shall be spent as provided in sub-section 8 and in the order they are enumerated. This clause wholly adapts section 109 (8) of the English Act.

(*p*) *Prasaddas v. Bonnerjee* (1930) 57 Cal. 1127 ;
Radharam v. Purna Chandra (1930) 34
 C. W. N. 671.
 (*q*) See sec. 109 (5) of the Law of Property Act,
 1925.
 (*r*) See sec. 109 (5) of the Law of Property Act,
 1925.
 (*s*) See sec. 109 (2) of the Law of Property Act,

1925 ; *John v. Pink* (1900) 1 Ch. 296.
 (*t*) *Woolston v. Ross* (1900) 1 Ch. 788.
 (*u*) See sec. 109 (3), Law of Property Act, 1925.
 (*v*) See sec. 109 (4), Law of Property Act,
 1925.
 (*w*) See sec. 109 (6), Law of Property Act, 1925.
 (*x*) See sec. 109 (7), Law of Property Act, 1925.

Suit.—A suit is not necessary under this section and an application, as stated Ss. 69A-70 in clause 10, is sufficient. Such application is to be made to the Court which would have jurisdiction to enforce the mortgage. Costs are in the Court's discretion.

Powers before 1st July, 1882.—These remain unaffected notwithstanding the enactment of this section (y).

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Accession to mort-
gaged property.

Illustrations.

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

The Punjab.—The principle of the section applies to the Punjab (z).

Scope of the section.—The provision of this section is mandatory. It is the converse of section 63 which applies to the case of a mortgagee in possession. In section 70 possession is with the mortgagor. It must be made during the continuance of the mortgage. It includes not only the mortgagor and mortgagee but their transferee and representatives thereby including an auction purchaser, in execution of a decree on a prior mortgage, so that accession made by him enures for the benefit of a subsequent mortgagee (a). The accession may be natural, as in illustration (a), or physical, as in illustration (b), to the section.

Accretion to the original holding by clearing new land, when it is considerable, is not an accretion within the meaning of this section (b). For the purpose of this section as well as section 8, no distinction is made between leasehold and freehold (c). The rule embodied in the section may be excluded by contract between the parties.

Accession to mortgaged property.—This section deals with the right of a mortgagee to accretions after the date of the mortgage. The rule is that if after the date of the mortgage, accession is made to the mortgaged property, it shall be deemed to form part of the security. After discharge of the first mortgagee, the puisne mortgagee gets the benefit (d). These accessions, however, are not to be regarded as though they had been added to the security in the same sense as when a mortgagee takes an additional and independent property by way of an additional security for his mortgage debt. The mortgaged property and the accretions together constitute one homogeneous security of which the accretions form an integral part (e). Additions and improvements made by the mortgagor (f) or by the second mortgagee (g) enure for the benefit of the first mortgagee.

(y) See sec. 69 (5).

(z) *Punjab & Sind Bank, Ltd. v. Kishen Singh-Gulab Singh* (1935) 16 Lah. 881.

(a) *Nannu Mal v. Ram Chandra* (1931) 53 All. 334.

(b) *Tay Gyi v. Maung Yan, A. I. R.* (1933) Rang. 81.

(c) *Macleod v. Kissan* (1906) 30 Bom. 250.

(d) *Ex-parte Bisdee* (1840) 1 Mont. D. & De. G. 333; *Nannu Mal v. Ram Chandra* (1931) 53 All. 334.

(e) *Krishna Gopal v. Miller* (1902) 29 Cal. 803.

(f) *Re. Kilchin ex-parte Punnett* (1880) 16 Ch. D. 226.

(g) *Landowner West of England, etc. v. Ashford* (1880) 16 Ch. D. 411, 433.

S. 70

Accessions, what are—Everything that the mortgagor adds to enhance its value must be taken to be an accretion for the benefit of the mortgagee (*h*). Erection by the mortgagor on the land after the execution of the mortgage of electric fixtures (*i*), a theatre (*j*), two new houses (*k*), seven new houses from moneys borrowed from a third party after pulling down two houses and a bungalow originally mortgaged (*l*). The opening of a mine or quarry (*m*), renewal of a lease by the mortgagee (*n*) or the mortgagor (*o*), the purchase of a reversion (*p*), or the grant of a lease to the mortgagor by person claiming a title anterior to the mortgage after evicting the mortgagor under an award (*q*). A mortgage of a share is liable to be decreased or increased on a sale to a mortgagee or resale by him to the mortgagor (*r*), or purchase of the equity of redemption by original sub-mortgagor (*s*). So also a purchase by the mortgagor upon a sale by the first mortgagee of the mortgaged property is an acquisition as regards the second mortgagee (*t*), and all incidental rights such as the unexpired term in a house and goodwill of a business established with it (*u*), changes in goodwill, rights under contract and so forth (*v*), purchase of a *mokurari* (*w*), extension of a patent (*x*), machinery permanently planted (*y*), enlargement or renewal on a limited or restricted interest in mortgaged property (*z*), improvements made to an undivided share allotted on partition (*a*), enlargement by inheritance (*b*). It was observed by the Privy Council that under the English Law, which so far as it rests on principles of equity and good conscience, may properly be applied in India, it is recognized as a general rule that most acquisitions by a mortgagor enure for the benefit of the mortgagee; and, conversely, that many acquisitions by a mortgagee are, in like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption (*c*). A mortgage of the zamindari executed before resumption and resettlement by the Collector would cover resumed *chowkidari chakran* lands upon their transfer to the zamindar (*d*). A mortgage was executed of *warg* lands as also adjoining lands over which the mortgagor had *kumaki* rights which at the settlement having been classified as waste *poramboke* the mortgagor obtained the same on *darkhast*. These were not accessions to the *warg* lands mortgaged nor could section 90 of the Trust Act apply, as the mortgagor was not a limited owner (*e*).

Mortgagee not entitled to accession.—A mortgagee is not entitled to accession unless it is of a permanent nature. Nor is he entitled to accession if the mortgage has been extinguished (*f*), as also when there is a contract to the contrary.

- (*h*) *Re. Kitchin, ex-parte Punnett* (1880) 16 Ch. D. 226.
- (*i*) *Punjab & Sind Bank Ltd. v. Kishen Singh* (1935) 16 Lah. 881.
- (*j*) *Macleod v. Kissan* (1906) 30 Bom. 250.
- (*k*) *Krishna Gopal v. Miller* (1902) 29 Cal. 803.
- (*l*) *Bhooresao Khemchand v. Mahomed Syed Khan* (1886) 1 C. P. L. R. 38.
- (*m*) *Elias v. Snowden Slate Quarries Co.* (1879) 4 A. C. 454.
- (*n*) *Rushworth's case* (1676) Freem. Ch. 13, 22 E. R. 1026.
- (*o*) *Leigh v. Burnett* (1885) 29 Ch. D. 231.
- (*p*) *Rakestraw v. Brewer* (1729) 2 P. Wms. 511, 24 E. R. 839.
- (*q*) *Doe d Ogle v. Vickers* (1836) 4 Ad. & El. 782, 111 E. R. 977.
- (*r*) *Deolie Chand v. Nirban Singh* (1879) 5 Cal. 253.
- (*s*) *Ajudhia Prasad v. Mansingh* (1903) 25 All. 46.
- (*t*) *Bhaja Chowdhury v. Chunilal Lal Marwari* (1907) 5 C. L. J. 95.
- (*u*) *Chissum v. Dewes* (1828) 5 Russ. 29, 38 E. R. 938.
- (*v*) *Bhupendra Nathu Basu v. Mussammat Waji-*

- humniss Begum* (1917) 2 Pat. L. J. 293.
- (*w*) *Surja Narain Mandal v. Nanda Lal Sinha* (1906) 33 Cal. 1212.
- (*x*) *Church's Patents* (1886) 3 R. P. C. 95.
- (*y*) *R. M. P. M. Chettyar Firm v. Siemens (India) Ltd., A. I. R.* (1933) Rang. 195; *Reynolds v. Ashby & Sons* (1904) A. C. 464.
- (*z*) *Shyama Churn Buttacharjee v. Anada Chandra Das* (1899) 3 C. W. N. 323; *Surendra Nath Dey v. Rajendra Chandra* (1918) 27 C. L. J. 289.
- (*a*) *Amar Singh v. Bhagwan Das, A. I. R.* (1933) Lah. 771.
- (*b*) *Behari Lal v. Indra Narayan, A. I. R.* (1927) Cal. 665; *Ajjuddin v. Sheikh Budan* (1895) 18 Mad. 492.
- (*c*) *Raja Kishendatt Ram v. Raja Mumtaz Ali-khan* (1878) 5 Cal. 198, 67 I. A. 145.
- (*d*) *Rakhal Das Mukherjee v. Madhab Chandra Singha* (1911) 13 C. L. J. 109.
- (*e*) *Kodi Shankara v. Moidin* (1918) 35 M. L. J. 120.
- (*f*) *Nannu Mal v. Ram Chandra* (1931) 53 All. 334; *Haradhan v. Hargobind* (1921) 6 Pat. L. J. 347; *Kapmiah Sivananjiah v. Sithay Goudar* (1921) 41 M. L. J. 490.

71. When the mortgaged property is a lease, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease. S. 71

Renewal of mortgaged lease.

Amendment.—The words “for a term of years” in the original section have been dropped by Act 20 of 1929.

This section deals with renewal of a lease by a mortgagor as section 64 deals with the case of a mortgagee renewing a lease. Renewal obtained by a mortgagor is an accretion and for the purposes of his security the mortgagee is entitled to it; whether he be volunteer or purchaser for value. There is an implied covenant by the mortgagor so long as the mortgagee is not in possession, if the lease be renewed, to pay the rent reserved by the renewed lease and perform and observe the conditions and contracts binding on the lessee and indemnify the mortgagee against all claims arising by reason of non-payment of rent or non-performance or non-observance of the conditions and contracts (g). Section 72 empowers a mortgagee to spend moneys for renewal of a leasehold mortgaged. If an encumbrancer calls for a renewal of the lease mortgaged to him at the end of the term, the mortgagor cannot resist it. If the mortgagor has a lease with a capacity to be extended by renewals, the charge would always attach on the renewed lease. An annuity is an encumbrance, and the property is bound by it as much as by a mortgage. As such, it is a charge upon the renewed lease and the annuitant is not bound to contribute to the costs of the renewal of the lease, the grantor being bound to keep it up for his benefit (h). In *Moody v. Mathews* (i), the covenants entered into on the grant of the annuity were in effect a covenant for further assurance. And where the ultimate assignee of the lease allowed the rent to fall into arrear and by arrangement with the lessor the lease was determined and a new lease granted, the object being to defeat the annuity of the widow of the original lessee, it was held that if a lessee have a lease subject to an existing encumbrance which he is bound to see satisfied, he cannot by committing a breach of contract be permitted to divest himself of the estate and acquire a new interest discharged of the old encumbrance (j). Similarly, the assignee of the equity of redemption of leasehold property mortgaged, borrowing money pending negotiation for purchase, and securing the lender by a mortgage, does not gain any prior lien on the property for the purchase of the reversion notwithstanding that the mortgagor was under no obligation to the mortgagee of the lease to obtain a renewal of it or to purchase the reversion. The assignee can only be treated as the mortgagor of the lease, and in that character he could hold the reversion on the same terms, as he would have held a renewed lease of the property. The doctrine of law has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. Here the lease contained no covenant for renewal by the lessors though it was renewable by custom (k). A somewhat interesting illustration is afforded by *Trumper v. Trumper* (l). In 1805 a lessee for lives with a proviso for renewal charged the hereditaments (subject to his own life-interest in part) with £1,500, and subject

(g) Transfer of Property Act, IV of 1882, sec. 65 (d).
 (h) *Moody v. Mathews* (1802) 7 Ves. Jun. 174, 32 E. R. 71; *Maxwell v. Ashe* (1752) cited in 7 Ves. 184, 32 E. R. 75.

(i) (1802) 7 Ves. Jun. 174, 32 E. R. 71.
 (j) *Jones v. Kearney* (1842) 1 Dr. & War 134.
 (k) *Leigh v. Burnett* (1885) 29 Ch. D. 231.
 (l) (1872) 14 Eq. Cas. 295.

S. 71

thereto, conveyed the premises in trust for his son. W. W. T., the testator in the cause. In 1811 W.W.T. settled the premises subject to the life-interest in part, and as to the whole charged £1,500 for himself, his wife and eldest son, and further charged the same with £2,000 for his younger children. In 1815 the tenant for life having died, W.W.T. executed deeds reciting (erroneously) that the whole of £1,500 charges had been paid off and taking from the trustee (in breach of trust) a conveyance of the hereditaments to himself absolutely freed from £1,500 charges, but there was no evidence that this deed was ever acted on. In 1818 the *cestui que vie* having all died, W.W.T. obtained a renewal of the lease but without prejudice to a question whether the lessee had not lost the right of compelling a renewal. In 1819 W.W.T. purchased the reversion in fee of the leasehold, the latter not being merged. In 1838 W.W.T. was a party to a deed whereby he recited that he had paid, £1,200 part of the £1,500, but that when he did so he did not intend that the same should sink into or be extinguished in the premises. In 1845 he appropriated the remaining £300 to himself as part of his share in the estate of *cestui que trust* thereof who had died. By his will, after reciting to the like effect, he devised the hereditaments comprised in the deed of 1805 subject to all such encumbrances as the same might at his decease be subject to, and from the payment of which he exonerated his personal estate, to his son T.T. absolutely subject to a further charge. W.W.T. died in 1859. T.T. entered into possession and disputed his liability to pay either the £1,500 or the £2,000, but paid interest upto 1869. Held (1) that the charges paid off were kept alive for the benefit of W.W.T.'s personal estate, (2) that the renewed lease of 1818 was subject to the charges, (3) that the reversion in fee, purchased in 1819, was subject to the charges, (4) that if the reversion had not been so charged T.T. could not have availed himself of the devise without giving effect to the testator's intention. W.W.T. having in 1845 mortgaged the hereditaments comprised in the deed of 1805, it was held that if the above sums had been charged on the leasehold only and not on the reversion, the mortgagees must have recourse to the reversion first on the principle of *Barnes v. Racster* (m). Fraud or contrivance on the part of the mortgagor in incurring a forfeiture will not deprive the mortgagee of his security. Hence a new lease obtained by the mortgagor after forfeiture fraudulently incurred, is subject to the mortgage, notwithstanding the Conveyancing and Law of Property Act, 1852 (c. 76), section 210, and a decree was made for payment of the mortgage with costs (n). Nor will confession of judgment by a trustee in a collusive and fraudulent suit brought by a landlord for arrear of rent, and the latter bringing the property to sale in execution, destroy the mortgage lien. The mortgagee would have the same right as against the landlord as he would have against the mortgagor (o). Where a zamindar, after a mortgage, had lost his zamindari rights and became an ex-proprietory tenant of the sir, the mortgagee attached and bound the estate of the mortgagor in its altered condition. He was not entitled to relinquish his expropriatory holding. It is a well recognized principle of law that a man shall not derogate from his own grant. If the relinquishment be valid it would destroy the security of the mortgagee (p). The same principle was recognized in *Badri Prasad v. Sheo Dhian* (q) which was the case of a lease. A deposit of a lease in the interval between the termination of the lease and the renewal thereof, would constitute a valid equitable mortgage (r).

(m) (1842) 11 L. J. Ch. 228, 62 E. R. 944.
 (n) *Hughes v. Howard* (1858) 25 Beav. 573, 53 E. R. 756.
 (o) *Ram Saran Das v. Ram Pergash Das* (1905)

32 Cal. 283.
 (p) *Sham Das v. Batul Bibi* (1902) 24 All. 538.
 (q) (1896) 18 All. 354.
 (r) *Villa v. Pelley*, A. I. R. (1934) Rang. 51.

72. *A mortgagee may spend such money as is necessary :—* S. 72

Rights of mortgagee
in possession.

- (a) * * * *
- (b) *for the preservation of the mortgaged property from destruction, forfeiture or sale ;*
- (c) *for supporting the mortgagor's title to the property ;*
- (d) *for making his own title thereto good against the mortgagor ; and,*
- (e) *when the mortgaged property is a renewable leasehold, for the renewal of the lease ;*

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent. per annum : *Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.*

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property ; and the premiums paid for any such insurance shall be *added to the principal money with interest at the same rate as is payable on the principal money, or where no such rate is fixed, at the rate of nine per cent. per annum.* But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction, to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

S. 72

Changes in the section.—As it originally stood, the section had a marginal note of “rights of mortgagee in possession” which is still retained though the principle is made applicable to all mortgagees whether in possession or not. Clause (a) of the section which allowed moneys spent in management of the property and collection of rents and profits has been consigned to section 76. Sub-clause (b), (c) and (d) have been retained. A proviso has been added that expenditure in clauses (b) and (c) shall not be made by the mortgagee unless the mortgagor has been called upon and failed to take proper and timely steps to preserve the property or to support the title. The rest of the section has not been altered except that premium paid for insurance, which was originally made a charge on the mortgaged property, is now to be added to the principal money with the same rate of interest as is payable on the principal, and where no rate is fixed at the rate of 9% per annum. The words in the original section were “during the continuance of the mortgage” which words have now been omitted as the original section was intended to apply to mortgagees in possession. Further, Order 34 of the Code of Civil Procedure 1908, has also been amended so as to entitle the mortgagor to redeem at any time before the sale is confirmed and foreclosure takes place. These words have been omitted in order, should occasion arise, to enable the mortgagee during the interval to spend such money as may be necessary until the confirmation of the sale or the final decree for foreclosure is passed.

Necessary expenses only allowed.—The right given under the section must be of a reasonable character (s). As to what is a necessary expense is a mixed question of fact and law (t). A mortgagor is bound so long as the equity of redemption remains with him, to indemnify the estate and, therefore, it is superfluous to insert in the mortgage deed provisions regarding such indemnifications (u). The expenditure under clauses (b) and (c) is controlled by the proviso newly added. The section is not exhaustive (v).

Clause (a).—The original of this clause empowered the mortgagee to spend money necessary for the due management of the property and the collection of rents and profits. By the Amending Act, 20 of 1929, this clause has been omitted, but the right is recognized inasmuch as the same provision is inserted in clause (h) of section 76.

Clause (b).—Improvements and additions made by a mortgagee are now expressly dealt with by section 63A, repairs by section 76 (d) and public charges out of income in section 76 (c). A claim made by a mortgagee cannot be allowed, unless it comes under this section (w). Addition to the mortgaged property without the consent of the mortgagor was disallowed (x). It is not, however, clear that the latter case was governed by the Transfer of Property Act (y). The sale contemplated by the clause is such as would imperil the mortgagee's security and not the imperilment of the equity of redemption. This clause, controlled as it is by the proviso, authorizes a mortgagee to spend money as is necessary to preserve the property from destruction, forfeiture or sale, and in the absence of a contract to the contrary, to add the money so spent to the principal money at the rate of interest

(s) *Kadir Moidin v. Nepean* (1899) 26 Cal. 1, 25 I. A. 241.
 (t) *Jagannath v. Jagjiwan*, A. I. R. (1925) Oudh 429.
 (u) *Damodar Gangadhar v. Vamanrav Lakshman* (1885) 9 Bom. 435.

(v) *Rakhohari Chattaraj v. Bipra Das Dey* (1904) 31 Cal. 975.
 (w) *Arunachella Chetty v. Sithayu Ammal* (1896) 19 Mad. 327.
 (x) *Sammo v. Abdul Wahed* (1883) M. W. N. 208.
 (y) *Rupan Singh v. Champa Lal* (1915) 37 All. 81.

payable on the principal, and where no such rate is fixed, at 9% per annum (z). A mortgagee paying revenue payable by the defaulting mortgagor, to save the property from sale, is entitled to have the amount paid (a). A mortgagee making payments to save the mortgage property from being sold in execution of a rent decree has an additional lien on the property for the sums so paid by him (b). After the final decree for sale, the mortgagee as secured decree-holder is as much interested in the preservation of the security as when his mortgage subsisted (c). A usufructuary mortgage, who by satisfying a portion of the decree for sale on a prior mortgage, preserves the property from sale, is entitled to retain possession until the amount due on his usufructuary mortgage and the unpaid balance due on the decree are paid (d). The mortgagee of a share of a *putni* taluk who in order to save his interest therein, paid up the *putni* rent, was allowed to recover a proportionate share thereof from the purchaser of the mortgagor's share in the taluk under section 69 of the Contract Act (e). Payment by mortgagee to prevent a conditional decree for possession from becoming inoperative, was upheld (f). Where a well which was required for the irrigation of the mortgaged land had been ruined through river inundation and the mortgagee constructed a new one in its place with the permission of the mortgagor, reasonable expenses were allowed to the first mortgagee in a redemption suit by a second mortgagee (g). For these expenses the mortgagee may add the expenses as provided in the section or pursue his remedy under section 69 of the Contract Act. The mortgagee is not entitled to these remedies concurrently (h). Both in England and in this country, he can tack the costs of litigation relating to the security as part of the terms on which redemption is allowed (i). Once the lien on the mortgaged property is abandoned, the mortgagee cannot afterwards revive it. He could bring a simple money suit to recover the money paid (j). The statutory right is not taken away by repudiation of title as mortgagee (k).

Clause (c).—Moneys spent by the mortgagee in defending the mortgagor's title fall within clause (c) of section 72, when the title of the latter is impeached, subject to limits laid down by the proviso. The law to this effect laid down long ago in *Godfrey v. Watson* (l) and *Parker v. Watkins* (m) is no exception to this rule. For all that was there decided was that "if some litigious person chooses to contest his (the mortgagee's) title to the mortgage that should not affect the parties interested in the equity of redemption." So when a representative of a deceased mortgagor unsuccessfully contended that the property mortgaged belonged to his father and not to his mother the mortgagor, the costs incurred by the mortgagee in defending the title of the mortgagor thus impeached, were allowed (n). Such a sum shall carry interest. He will be allowed his costs, charges and expenses for doing what is necessary to protect the title of the mortgagor (o). They do not include the costs

(z) *Bohra Thakur Das v. Collector of Aligarh* (1906) 28 All. 593.

(a) *Upendra Chandra Mitter v. Tara Prosonna Mukerjee* (1903) 30 Cal. 794; *Imam Hasan v. Badri Prasad* (1898) 20 All. 402; *Girdhar Lal v. Bhola Nath* (1888) 10 All. 611; *Karnaya Naik v. Devapa* (1898) 22 Bom. 440; *Achut v. Hari* (1887) 11 Bom. 313.

(b) *Rakhohari Chatteraj v. Bipra Das Dey* (1904) 31 Cal. 975.

(c) *Monohar Das v. Hazarimull* (1931) 35 C. W. N. 1040, 58 I. A. 341.

(d) *Abdul Qayyum v. Sadar-ud-din Ahmad Khan* (1905) 27 All. 403; *Muhammad Husain v. Sheodharshan Das* (1907) 4 A. L. J. 176.

(e) *Umesh Chandra v. Khulna Loan Company* (1907) 34 Cal. 92.

(f) *Mahomed Rahimtulla v. Esmail Allarakhia* (1924) 48 Bom. 404, 51 I. A. 236.

(g) *Durga Singh v. Naurang Singh* (1895) 17 All. 282; see *Arunachella Chetty v. Sithayi Ammal* (1896) 19 Mad. 327.

(h) *Imad Hasan v. Badri Prasad* (1898) 20 All. 402.

(i) *Nadershaw v. Shirinbai* (1923) 25 Bom. L. R. 839.

(j) *Anandi Ram v. Dur Najaf* (1891) 13 All. 195.

(k) *Foodeni v. Azhar Hussain* (1931) 10 Pat. 210 (1747) 3 Atk. 517, 26 E. R. 1098.

(l) (1859) John 133, 70 E. R. 369.

(m) *Pokree Saheb Beary v. Pokree Beary* (1898) 21 Mad. 32; *Owen v. Crouch* (1857) 5 W. R. 545.

(n) *Sandon v. Hooper* (1843) 14 L. J. Ch. 120.

S. 72

of negotiating the loan and preparing the mortgage deed (*p*); nor of some person disputing his title to the mortgage (*q*); or for defending an action of trespass at the instance of a neighbour (*r*). Costs and expenses properly incurred in relation to mortgaged property payable by the mortgagor as a condition of his redemption, do not constitute a debt in respect of which an action can be maintained by the mortgagee against the mortgagor (*s*). Further, the section does not empower a mortgagee to add costs of litigation in defending the mortgagor's title during the continuance of a prior mortgage.

Clause (d).—A mortgagee is entitled to add sums spent by him for making his own title good as against the mortgagor. Failure to give details is not sufficient to deprive him of his right, as they could be gone into on redemption (*t*). The principle in such cases is that he has a right to assume his mortgagor's representations to be true, and to take any reasonable proceedings for defending his title and asserting the validity of his security (*u*), or where he successfully asserts his priority and is guilty of no misconduct (*v*). They do not include the costs of defending an action brought by the mortgagor alleging to be the highest bidder at an auction held by the mortgagee under his power (*w*). Sections 83 and 84 of the Transfer of Property Act speak of "the amount remaining due on the mortgage" and not merely of "the mortgage-money" as in section 60. The expression "amount remaining due on the mortgage" covers any just allowances or costs which can be tacked under the ordinary law of mortgage and the words "mortgage-money" in section 60 must be taken as including all money which on taking of accounts between the parties are properly allowed to the mortgagee (*x*), who is entitled to payments properly made by him in relation to the security and to have amounts so paid added to the amount of the original lien (*y*). In the event of the mortgagee being his own solicitor, he is entitled only to out-of-pocket expenses of a suit to defend his title (*z*). Money was advanced on a usufructuary mortgage to enable the mortgagors to discharge a lien decreed thereon and owing to the failure of the mortgagors to discharge it, the holder of the lien applied for sale of the property, to save which the mortgagee deposited the amount in Court. The mortgagee's suit failed, for without the knowledge or concurrence of the mortgagor, the second mortgagee could not by a transaction between himself and the first mortgagee, acquire a new right over the property (*a*). Amount of costs increased in appeal in a redemption action have been allowed to be added to the mortgage debt after payment of principal, interest and costs decreed (*b*). In a redemption suit the mortgagee is entitled to his costs unless he has refused a tender of the amount due to him, or has so misconducted himself in the course of the suit as to induce the Court to penalise him (*c*). Costs of correspondence and the costs of preparing a legal mortgage which a mortgagor refused to execute notwithstanding covenant in the memorandum accompanying the deposit of title-deeds, were allowed (*d*). In England, costs of correspondence with the surety who had

- (*p*) *Wales v. Carr* (1902) 1 Ch. 860.
 (*q*) *Parker v. Walkins* (1859) John 133, 70 E. R. 369.
 (*r*) *Owen v. Crouch* (1857) 5 W. R. 545.
 (*s*) *Ex-parte Fewings, in re Sneyd* (1884) 25 Ch. D. 348.
 (*t*) *Dallaram v. Vinayak* (1904) 28 Bom. 181.
 (*u*) *Ex-parte Carr in re Hofmann* (1879) 11 Ch. D. 62.
 (*v*) *Deeley v. Lloyds Bank, Ltd.* (No. 2) (1909) 53 So. Jo. 419; *Somes v. Martin* (1882) W. N. 113.
 (*w*) *Harrison v. Edwards* (1931) 2 Ch. 168.
 (*x*) *Nadirshaw v. Serenbai* (1921) 23 Bom. L. R. 839; *Varadarajulu Chetty v. Dhana Lakshmi*

- Ammal* (1914) 16 M. L. T. 365.
 (*y*) *Upendra Chandra Mitter v. Tara Prosanna Mukerjee* (1903) 30 Cal. 794; *Rakhohari Chatteraj v. Bipra Das Dey* (1904) 31 Cal. 975.
 (*z*) *Sclater v. Collam* (1857) 3 Jur. N. S. 630.
 (*a*) *Perianna Servaigaran v. Marudainayagam Pillai* (1899) 22 Mad. 332.
 (*b*) *Sheo Darshan v. Beni Choudhri* (1926) 48 All. 425; *Amina Bibi v. Rama Shankar* (1919) 41 All. 473; *Dambar Singh v. Kalyan Singh* (1917) 40 All. 109.
 (*c*) *Dhondo v. Balkrishna* (1884) 8 Bom. 190.
 (*d*) *National Provincial Bank of England v. Games* (1886) 31 Ch. D. 582.

given a promissory note for part of the debt were added to the mortgage claim (e). The lien is lost by abandonment and cannot be revived (f).

Clause (e).—The subject of renewed leases is dealt with by the Act in various sections.

- (1) Section 64 contemplates a renewal by the mortgagee not in possession.
- (2) Section 65 (d) imposes certain liabilities on the mortgagor when the lease is renewed but does not say by whom.
- (3) Section 72 (c) empowers the mortgagee to spend moneys for renewing a renewable lease.

The Act is silent where the lease is not renewable. Such a case would be governed by section 64. The proviso does not apply to this clause. The rule as to costs and insurance is the same as in respect of other clauses.

May in the absence of a contract to the contrary add.—Unless the mortgage instrument provides otherwise, moneys spent by the mortgagee under clauses (b), (c), (d) and (e) may be added to the principal money at the same rate of interest as the principal, and where no rate is fixed in the mortgage deed at 9% per annum. The premium being a permissive one, a separate suit will lie to recover such expenses, there being no obligation on him to add them to the mortgage debt and claim them before redemption (g). None of the expenses incurred under the above heads is the mortgagee obliged to add to the principal; and particularly where his security does not permit, he may recover them by a separate suit. He may pursue his remedy under section 69 of the Indian Contract Act. These two remedies are not concurrent (h).

Interest.—The mortgagee, in the absence of a contract to the contrary, is entitled to add moneys spent by him under section 72 to the principal at the rate of interest mentioned in the mortgage, and where no rate is mentioned at 9% per annum. He is not allowed compound interest (i), nor is interest allowed to a usufructuary mortgagee where he realizes increased rent by repairs to the property (j), or as for preservation of the property from sale by avoiding a possible litigation (k). No interest on taxed costs is allowed unless directed and then they carry interest from the date of the Taxing Master's certificate and not from the date of the judgment (l).

Proviso.—This has been added by the Amending Act, 20 of 1929, to guard against the mortgagee exercising his rights under clauses (b) and (c) until the mortgagor is in default.

Insurance.—Under this section it is permissible to the mortgagee, in the absence of a contract to the contrary, to insure the mortgaged property against loss or damage by fire if of an insurable nature. Such insurance may extend to the whole or any part of such property. The mortgagee under this part of the section is entitled to add the premium to the principal money and charge interest thereon at the same rate as the principal, or where no rate is fixed, at 9% per annum. This part of the section as it stood before the amendment gave the mortgagee, on payment, a charge on the mortgage property for the premium with the same priority, and with interest

(e) *National Provincial Bank of England v. Games* (1886) 31 Ch. D. 582; *Ellison v. Wright* (1827) 3 Russ. 458, 38 E. R. 647.
 (f) *Anandi Ram v. Din Najaf Ali Begum* (1891) 13 All. 195.
 (g) *Venkataswami Naicker v. Muthuswamy Pillai* (1918) 34 M. L. J. 177; *Parsolimalas v. Jaijit Singh* (1890) A. W. N. 90.
 (h) *Imdad Hasan v. Badri Prasad* (1898) 20 All.

401.
 (i) *Kishori Mohun Roy v. Ganga Babu Debi* (1896) 23 Cal. 228, 22 I. A. 183.
 (j) *Chammu Lal v. Bhajan Lal*, A. I. R. (1924) All. 47.
 (k) *Manjunatha Shanbhaga v. Samayya* (1924) M. W. N. 776.
 (l) *Eardley v. Knight* (1889) 41 Ch. D. 537; *Lippard v. Rickells* (1872) L. R. 14 Eq. 291

Ss. 72-73

at the same rate. This clause has, however, been omitted from the section and the premium paid for insurance is treated in the same way as money expended for other necessities mentioned in the section. This part of the section is based on section 19 (i), (ii) of the Conveyancing and Law of Property Act, 1881 (*m*). A limit is, however, placed on the extent to which the mortgagee is entitled to insure. He can only insure the property to the extent specified in the mortgage deed, or where the amount is not specified, only to the extent of two-thirds of the amount which would be required to reinstate the property in case of total destruction. But this right to insure is, however, subject to an exception, that the mortgagee cannot insure the property if the mortgagor himself has kept up the insurance to the extent to which the mortgagee is entitled to insure by virtue of this section. The proviso and the exception are based on section 23, sub-section (2) of the Conveyancing and Law of Property Act, 1881 (*n*). Hence an insurance under the power conferred by this Act cannot be effected by a mortgagee (*a*) when the property is not of an insurable nature, (*b*) where there is a declaration in the mortgage deed that no insurance is required, or (*c*) where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed, or (*d*) where the mortgage deed contains no stipulation respecting insurance and insurance is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is by this Act authorized to insure. Application of insurance money is dealt with by section 76. Also see commentaries on section 49.

“Vis Major.”—A mortgagee claimed to add to the mortgage debt the costs of rebuilding a house destroyed by fire which originated in another part of the village and, spreading, ultimately destroyed the mortgaged house. The mortgage deed provided for the mortgagee rebuilding the house, if its destruction were due to *asmani*, or *sultani* on the mortgagor's failure to rebuild. It was thought on the construction of the deed that repayment of such costs was a condition precedent to redemption, the destruction being due to a “calamity from heaven” within the meaning of the term *asmani* (*o*). In a still earlier case, where the mortgage deed was in Persian, the expression *afat samavi* admittedly equivalent to the term *asmani*, was held to apply to a loss by accidental fire and the falling down of another part of the house (*p*).

Special cases.—An equitable mortgagee applying for leave to bid must pay his own costs (*q*). A mortgagee, whether legal or equitable, is entitled to costs of proof of his debt in a suit for administration of the mortgagor's estate (*r*); also to costs of taking out administration to the mortgagor as principal creditor (*s*). But a mortgagee taking out Letters of Administration to perfect a title is not entitled to be paid out of the mortgaged property (*t*).

73. (1) *Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from*

Right to proceeds of revenue sale or compensation on acquisition.

- (*m*) 44 & 45 Vict., Ch. 41.
- (*n*) 44 & 45 Vict., Ch. 41.
- (*o*) *Sakharamshet v. Amtha Devji* (1890) 14 Bom. 28.
- (*p*) *Manchersha v. Kamrunisa* (1868) 5 Bom. H. C. 109.
- (*q*) *Re. Jackman ex-parte Robinson* (1829) Mont.

- & M. 261.
- (*r*) *Tuckley v. Thompson* (1860) 1 John & H. 126, 70 E. R. 689.
- (*s*) *Ramsden v. Langley* (1705) 2 Vern. 538, 23 E. R. 947.
- (*t*) *Saunders v. Dunman* (1878) 7 Ch. D. 825.

any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law. S. 73

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Amendment of the section.—This section, as it originally stood, dealt with the sale proceeds in case the property was sold for arrears of revenue or rent. Absence of provision as to the mortgagee's rights on a compulsory acquisition led to a conflict of decisions of the Courts in India. To remedy this anomaly the present section has been amended. Sub-section (2) has been added in accordance with the view taken of the majority of the High Courts in India. Further, the section as it originally stood, created a charge in favour of the mortgagee on the surplus, a right which created difficulties, both as to its enforcement and the remedy. The use of the word "therefore" has been avoided, leaving the mortgagee to claim the surplus or the compensation, as the case may be. The mortgaged security having been converted into money, there was no reason why the mortgagee should wait until the due date, particularly when he could not legally bring a suit to enforce his mortgage, because the procedure for enforcing a simple mortgage was not adaptable to the enforcement of a claim against a fund. The amendment provides that priority is not by conversion.

New form of security.—This section deals with the conversion of security from one form into another by reason of circumstances over which the mortgagee in clause (1) and both the mortgagor and mortgagee in clause (2) have no control. It deals with transformation effected on a compulsory sale or acquisition of land, giving the creditor a right in the new form taken by the security as he had in the old form. Commonly spoken of as conversion of security or substituted security, the principle was applied by the Privy Council in *Byjnath Lall v. Ramooden* (u) where their Lordships, in dealing with the case of partition, stated that where the subject of mortgage was an undivided share, it was clear that the mortgagor could pledge his own undivided share, but not so as to affect the interest of other sharers, and that the person who took the security took it subject to the rights of those sharers to enforce a partition and thereby to convert what was undivided share of the whole into a definite portion held in severalty, the mortgagee taking

(u) (1875) 21 W. R. 233, 1 I. A. 106.

S. 73 subject of the pledge in the new form which he had assumed, a principle followed in other Courts in India and approved in a very recent case by the same tribunal (v).

Nature of the sale.—The sale contemplated by clause (1) may be either a revenue sale (w) or a judicial sale.

Judicial sale.—A first mortgage was executed in favour of the appellants, second mortgage in favour of the respondents, and third mortgage in favour of the appellants, and the latter obtained his decree on the first mortgage, caused the property to be sold in execution, the respondents being parties to the suit. Thereafter the appellants obtained a decree on their third mortgage where the respondents were not parties and drew the surplus out of Court without giving notice to the respondents. In a suit brought by respondents it was held that the surplus proceeds represented the security which respondents had under their mortgage and that, the fact that the appellant had wrongfully withdrawn the amount the surplus did not cease to represent their security (x). It must be free from, and not subject to encumbrances (y). It may be of the entire mortgaged property or part thereof or an interest therein. Not only can a portion tenure be sold under the Bengal Tenancy Act, but decrees for rent for earlier periods can be enforced against surplus sale proceeds of a portion tenure when sold in execution of a decree (z). And on transformation by mortgagee of a *dar* taluk into a *putni* taluk, it was held that it passed to the defendants in execution sale and there was nothing of which the plaintiffs could get *khas* possession (a).

“Or any part thereof.”—These words were not in the old section. They have been construed as conferring on the mortgagee on a sale of part of the mortgaged property, a right to the sale proceeds where a portion was sold for arrears of Government revenue, and it was subject to encumbrances under section 54, Revenue Sales Act. It was held, that notwithstanding the claim against the sale proceeds, the mortgagee had the right to follow the mortgaged property in the hands of the purchaser (b).

Sale by default of mortgagee.—The mortgagee forfeits his rights under clause (1) when the sale is brought about by his own default. The clause is defective inasmuch as it does not provide what is to happen to the surplus in such a case. Clause (e) of section 76, which imposes an obligation on the mortgagee of a similar nature, has a corresponding provision rendering the mortgagee liable to be debited with the loss caused by his failure. His failure may arise in one of two ways where he has agreed to pay or where he has entered into possession. No liability attaches to him when the sale is held otherwise. Mortgagee in possession committed default in payment of assessment and the land was forfeited by Government, who resold the land to the mortgagee. Mortgagor then sued to redeem. Held right to redeem

(v) *Mahommad Afzal Khan v. Abdul Rahman* (1933) 35 Bom. L. R. 1, 59 I. A. 405.

(w) *Narottam Das v. Thakur Sukhraj*, A. I. R. (1928) Oudh 442; *Umaritara Gupta v. Uma Charan* (1904) 3 C. L. J. 52; *Kamala Kant v. Abdul Barkat* (1900) 27 Cal. 181; *Chowdhry Jogessar v. Kheller Mohun* (1889) 17 Cal. 148; *Gosto Behary v. Shib Nath* (1892) 20 Cal. 241.

(x) *Barhamdeo v. Tara Chand* (1914) 41 Cal. 654, 41 I. A. 45; *Bakhtawar Lal v. Barumal* (1907) 4 A. L. J. 492 (Court sale second mortgagee entitled to surplus); *Basant Kumar v. Khulera Loan Co.* (1914) 19 C. W. N. (1001) (right subsists even after decree), *Gosto Behary v. Shib Nath* (1893) 20 Cal.

241.

(y) *Narottam Das v. Thakur Sukhraj*, A. I. R. (1928) Oudh 442; *Beni Prasad v. Rewat Lal* (1897) 24 Cal. 746; *Prem Chand v. Purnima Dasi* (1888) 15 Cal. 546; *Umaritara Gupta v. Uma Charan* (1904) 3 C. L. J. 52 (mortgage between default and sale for arrears of revenue); *Kamala Kant v. Abdul Barkat* (1900) 27 Cal. 181; *Chowdhry Jogessar v. Kheller Mohun* (1889) 17 Cal. 148.

(z) *Satya Sankar v. Monomohan* (1917) 22 C. W. N. 131.

(a) *Jotindra Mohan v. Godadhur* (1897) 2 C. W. N. 29.

(b) *Kapuri Sahu v. Mathura Das*, A. I. R. (1934) Pat. 209.

was lost owing to forfeiture, and could be revived only on proof that mortgagee was in default, that the income was sufficient to pay assessment, or that mortgagor had put mortgagee in funds to pay assessment (c). But a purchase by the mortgagee of mortgaged property sold on account of his default in payment of rent is not destructive of the equity of redemption (d).

Mortgagee has a right to surplus sale proceeds :

- (a) When mortgaged property or part thereof or interest therein is sold for failure to pay,
- (b) (i) arrears of revenue or other charges of a public nature,
(ii) rent due in respect of such property and
- (c) such failure was not due to his default.

Surplus.—The surplus in clause (1) is what remains after payment of the arrears and all charges and deductions directed by law. It is over this that the section gives the mortgagee a right. The effect of the sale is not to enlarge the security (e). There is nothing in the section restricting the mortgagee to the surplus and precluding him from following the property (f). In clause (2) the surplus is the compensation money awarded to the mortgagor.

On compulsory acquisition.—

- (a) The mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part,
- (b) out of the amount due to the mortgagor as compensation. In such cases the mortgage lien is transferred to the compensation moneys (g). When a mortgagee neglected to make a claim to the compensation moneys but subsequently obtained a decree and sought to attach them in the hands of the Collector, the Court refused relief. This view of the Allahabad High Court stands modified by the section (h).

Partition of undivided share.—On a partition of property in which an undivided share is mortgaged, the mortgagee has a right to proceed against the property allotted to his mortgagor in substitution of his undivided share. The securities are shifted and the allotments made to the various parties stand charged with the respective encumbrances and charges created on the undivided shares (i). A stipulation in a mortgage to substitute the mortgaged property by partitioned share is not inoperative (j).

(c) *Abdul Rehman v. Vinayak* (1927) 29 Bom. L. R. 1056.

(d) *Jaikaran Singh v. Sheo Kumar* (1928) 50 All. 36; *Balaji v. Magniram* (1895) 21 Bom. 396; *Kalappa v. Shivaya* (1894) 20 Bom. 492; *Nawab Sidhee v. Rajah Ojoodhyaram* (1866) 10 M. I. A. 540; *Lakshmayya v. Appadu* (1884) 7 Mad. 111; see sec. 90, *ills. (c)*, Indian Trusts Act, 1882.

(e) *Beni Prosad v. Rewat Lall* (1897) 24 Cal. 746.

(f) *Rasik Chandra v. Jagabhandu*, A. I. R. (1929) Cal. 392.

(g) *Jotoni Choudhurani v. Amor Krishna* (1904) 13 C. W. N. 350 (mortgage after declaration of acquisition); *Debendra Nath v. Mirza Abdul* (1909) 10 C. L. J. 150; *Ashutosh Rai v. Babu Lal* (1920) 5 P. L. J. 650; *Venkata v. Krishna* (1883) 6 Mad. 344; *Jaluni v. Amar Krishna* (1907) 6 C. L. J. 745; *Venkatrama v. Esuma Rowther* (1910) 33 Mad. 429; *Bhuj Singh v. Chheda Singh* (1920) 42 All. 596; *Prag Din v. Nankan Singh*, A. I. R. (1930) Oudh 292.

(h) *Basa Mal v. Tajammal* (1894) 16 All. 78.

(i) *Byjnath Lall v. Ramooden* (1875) 21 W. R. 233, 1 I. A. 106; *Mohammad Afzal Khan v. Malik Abdul Rahman* (1933) 35 Bom. L. R. 1, 59 I. A. 405; *Amar Singh v. Bhagwan Das*, A. I. R. (1933) Lah. 771; *Mohan Lal v. Wadhwa Singh*, A. I. R. (1934) Lah. 660; *Narayana Ayyar v. Biyari Bivi* (1921) 45 Mad. 103; *Kasi Vishwatham v. Ramaswami* (1918) 35 M. L. J. 441; *Umar Hussain v. Sakharan* (1934) 58 Bom. 49; *Hem Chandra v. Thako Moni* (1893) 20 Cal. 533; *Lakshman v. Gopal* (1898) 23 Bom. 385; *Shahebzada v. Hills* (1908) 35 Cal. 388; *Sharat Chunder v. Hurgobindo* (1878) 4 Cal. 510; *Khetterpal v. Khelal Kristo* (1894) 21 Cal. 904; *Pullamma v. Pradosham* (1895) 18 Mad. 316; *Amolak Ram v. Chandan Singh* (1902) 24 All. 488; *Bhup Singh v. Chedda Singh* (1920) 42 All. 596; *Muthia Raja v. Appala Raja* (1910) 34 Mad. 175; *Venkatrama Iyer v. Esumza Rowther* (1909) 33 Mad. 429.

(j) *Lala Mahabir Prasad v. Mt. Taj Begam* (1914) 19 C. W. N. 162 P. C.

Ss. 73-75

Restoration of security.—On a sale being set aside the property reverts in the mortgagor and the mortgagee falls back on his original security (*k*). So also where the mortgagor fails to discharge his obligation under section 65 (c) and the revenue purchaser resells the property to him, the mortgage is not extinguished (*l*), and the more so when the auction purchaser was a *benamidar* for the mortgagor (*m*). The general principle is that a mortgagor cannot set up against his own encumbrancer any other encumbrance created by himself (*n*). The same principle underlies section 65 of the Indian Trusts Act in the case of trust property.

Claims priority.—The claims to payment under sub-sections (1) and (2) rank in priority over all other claims save those of prior encumbrancers (*o*). This sub-section, while emphasizing that the mortgagee rights are preserved unimpaired, re-enacts the rule in section 48 of the Act. In a contest between the ground landlord entitled under his lease to a charge for rent and the mortgagee under a mortgage subsequent to the lease, the former is entitled to the surplus in priority to the mortgagee (*p*).

Enforcement of claim.—The claims in sub-sections (1) and (2) are enforceable notwithstanding the principal money on the mortgage has not become due. The section is silent, when the due date has not expired, as to interest for the residuary period. In case of compulsory acquisition, the mortgagee cannot claim interest for the unexpired period (*q*). The same rule would apply where the sale is through the mortgagor's default, though there is no reason why the mortgagee should suffer.

Limitation.—A suit for the surplus sale proceeds has been held, prior to the amendment, to be governed by article 132, being a suit "to enforce payment of money charged upon immoveable property" and within time, if brought within 12 years from the date when the money became payable (*r*). As there is no charge in consequence of the amendment, such a suit would now be governed either by article 62 or article 120 of the Limitation Act.

Personal covenant.—Nothing in this section is intended to exclude the mortgagee's right to proceed on the personal covenant (*s*).

Hypothecation.—Goods purchased out of the sale proceeds of goods hypothecated are not within the rule, unless the contracts attach the creditor's right to the substituted article (*t*).

74. (Right of subsequent mortgagee to pay off prior mortgagee.) Repealed by s. 39 of Act 20 of 1929.

75. (Rights of mesne mortgagee against prior and subsequent mortgagees.) Repealed by s. 39 of Act 20 of 1929.

- (*k*) *Rash Behari v. Kasum Kumari*, A. I. R. (1925) Cal. 1145.
 (*l*) *Sanagapally v. Intoory Bolla* (1903) 26 Mad. 385.
 (*m*) *Ganga Sahai v. Tulshi Ram* (1903) 25 All. 371.
 (*n*) *Olter v. Lord Vaux* (1856) 6 De. G. M. & G. 638; *Ragunath v. Lalji Singh* (1895) 23 Cal. 397.
 (*o*) *Gosto Behary v. Shib Nath* (1893) 20 Cal. 241; *Krishnaswami v. Thirumalai*, A. I. R. (1926) Mad. 101; *Gobind Lal v. Ramjanam* (1894) 21 Cal. 70, 20 I. A. 165; *Debendra Narain v. Ramalan* (1903) 30 Cal. 599; *Padmanabh v. Khemu* (1894) 18 Bom. 684; *Barhamdeo v. Tara Chand* (1914) 41 Cal.

- 654, 41 I. A. 45.
 (*p*) *Central Bank of India, Ltd. v. Sachindra*, A. I. R. (1933) Pat. 257.
 (*q*) *Prakash Chandra v. Hasan Banu* (1915) 42 Cal. 1146.
 (*r*) *Barhamdeo v. Tara Chand* (1914) 41 Cal. 654, 41 I. A. 45; *Bhagwan Das v. Karam Husain* (1911) 33 All. 708; *Upendra Chandra v. Mohri Lal* (1904) 31 Cal. 745; *Kamala Kant v. Abdul Barkat* (1900) 27 Cal. 180; *Umalara Gupta v. Uma Charan* (1904) C. L. J. 52.
 (*s*) *Banarsi Prasad v. Mohiuddin*, A. I. R. (1924) Pat. 586.
 (*t*) *Kandaswami v. Adimoola*, A. I. R. (1925) Mad. 275.

76. When, during the continuance of the mortgage,
Liabilities of mort-
gagee in possession. the mortgagee takes possession of the
mortgaged property,—

S. 76

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own
- (b) he must use his best endeavours to collect the rents and profits thereof
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature *and all rent* accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;
- (e) he must not commit any act which is destructive or permanently injurious to the property ;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;
- (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by

S. 76

him, a fair occupation-rent in respect thereof, shall, after deducting the expenses *properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon*, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest . . . and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

- (i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his . . . receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court as the case may be, *and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.*

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, ^{Loss occasioned by his default.} when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Amendments by Act 20 of 1929.—The words “and all rent” have been introduced in clause (c) as it is the duty of the mortgagee, in case the mortgaged property is leasehold, to pay rent due under the lease. Clauses (a), (b), (d), (e), (f) and (g) remain unaltered. In clause (h) the repealed provisions of clause (a) of section 72 have been re-enacted in a modified form and the words “on the mortgage-money” after the word “interest” have been omitted as being ambiguous. Originally clause (i) provided that after tender or deposit the mortgagee should account for his gross receipts. But the Madras High Court (u) held that it was open to the mortgagee to deduct any sum properly incurred even after such tender or deposit. The Legislature considered this view erroneous and has provided that after such tender or deposit the mortgagee shall not be entitled to deduct any amount on account of any expenses.

(u) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7.

Marginal note.—This is misleading. It refers to “liabilities of a mortgagee in possession” while the section enumerates certain governing principles. The last para, however, refers to these as “duties.”

During the continuance of the mortgage.—The section formulates certain well recognized rules regulating the duties and liabilities of a mortgagee in possession during the continuance of the mortgage. The circumstance that the rights of the parties have been ascertained by a decree does not deprive the mortgagor of his equity (v). The same principle was applied in favour of the mortgagor in a case where a decree for redemption was passed in favour of the mortgagor (w). Hence the final adjustment must be made with reference to the state of the things at the time of the actual redemption, whether it be the mortgagor or the mortgagee who claims a revaluation, if he can shew, that since the passing of the decree, the value of the improvements has increased, or a part of it has ceased to exist, and that too, in execution proceedings or by a separate suit. “Continuance” implies that the section has no application when the mortgagee takes possession at the time of execution of the mortgage (x). In a recent case it has been held to mean after the contract establishing the relationship of mortgagor and mortgagee has been entered into (y).

Possession.—In common practice mortgagor retains possession, but the mortgage usually provides that the mortgagee shall be entitled to take possession on breach of certain covenants or non-performance of certain conditions. In the event of default the mortgagee can enter into possession either by calling upon the mortgagor to put him in possession or by giving notice to the tenants to attorn to him, treating the mortgagor if he is in possession, as a tenant. Possession subjects the mortgagee to certain liabilities which he is loathe to undertake. This could be avoided by his taking action under section 69A of the Act. It is a somewhat vexed question whether a mortgagee having once taken possession can give it up at his pleasure (z). In *In re Prytherch, Prytherch v. Williams* (a), North, J., held a mortgagee who has once taken possession of the mortgaged property cannot relinquish possession at his pleasure. On entry his right relates back to the time at which his legal right to enter accrued (b).

Courts of equity were slow to decide that possession had been taken, unless satisfied that he took possession in his capacity of mortgagee (c). When a person was a tenant and a mortgagee it had not the effect of changing the relative position of the parties (d). He may enter into possession whenever he pleases and recover the rents unpaid and due subsequent to his mortgage (e). The Court never interferes (f). He is entitled to possession from the date of execution of the mortgage or to the rents and profits, including rents due under leases subsequent to his mortgage (g). He may limit his possession to a part and if there are two independent tenements, he

(v) *Ramunni v. Shankee* (1887) 10 Mad. 367.
 (w) *Krishna Patter v. Srinivasa Patter* (1897) 20 Mad. 124.
 (x) *Kallu v. Ganesh*, A. I. R. (1929) All. 348.
 (y) *Lakshmi Narain v. Mohamdi Begam*, A. I. R. (1932) Oudh 123, 132.
 (z) *Mason v. Westoby* (1886) 32 Ch. D. 208.
 (a) (1889) 42 Ch. D. 590, see *Anchor Trust Co. v. Bell* (1926) 1 Ch. 805.
 (b) *Ocean Accident Guarantee Corporation v. Ilford Gas Co.* (1905) 2 K. B. 493, *Barnet v. Guildford (Earl of)* (1855) 11 Exch. p. 19.

(c) *Gosling v. Gaskell* (1897) A. C. 575 H. L.
 (d) *Page v. Linwood* (1837) 4 Ch. & Fin. 399, 7 E. R. 154; see *Vengubai v. Ramaswami*, A. I. R. (1927) Mad. 964.
 (e) *Birch v. Wright* (1786) 1 Term Rep. 378, 99 E. R. 1148; *Moss v. Gallimore* (1779) 1 Doug 279, 99 E. R. 182.
 (f) *Cholmendeley (Marquis) v. Clinton (Lord)* (1817) 2 Mer. 171, 35 E. R. 905.
 (g) *Pope v. Biggs* (1829) 9 B. & G. 245-109 E. R. 91; *Soar v. Dalby* (1852) 15 Beav. 156, 51 E. R. 496.

S. 76

may take possession of one only, and it makes no difference that the properties consist of conterminous estates nor does obtaining an injunction or undertaking amount to possession (*h*). The question whether the mortgagee is in possession or not depends upon whether he has taken out of the mortgagor's hand the power and duty of managing the estates and dealing with the tenants. Mere receipts of rents and profits do not necessarily make him chargeable as mortgagee in possession (*i*). Merely calling upon a tenant to pay rent and acquiescing in his laying the rents in repairs is not entering in possession (*j*). If a mortgagee gives notice to the tenants not to pay their rents to the mortgagor, he becomes entitled to take possession and though he does not do so, he must be answerable to the mortgagor for any loss which may occur. It is his duty either to take possession himself, or to leave the mortgagor in possession (*k*).

Attornment clause.—Where a mortgage contains an attornment clause, the mortgagee is liable for the wilful default in respect of the rent, as being in possession (*l*). Similarly, where the mere words of attornment clauses are “for better securing the punctual payment of interest” (*m*). But it will not render the first mortgagee liable to the second (*n*).

Possession by second mortgagee.—He can, subject to the rights of the first mortgagee, take possession and enter into receipt of the rents in either one of two ways, (*a*) in an action to enforce his security he can obtain an order appointing a receiver, or (*b*) he can himself appoint a receiver. In the one case he obtains judicially, and in the other contractually, by virtue of the statute, a right to take the rents by the hand of a receiver, but his only remedy is the appointment of a receiver. He has no legal right to take possession or to demand payment to himself of the rents (*o*). In a possessory mortgage accompanied by a lease, at the termination of the lease the mortgagee is entitled to possession (*p*). In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought (*q*).

Clause (a).—The Act requires the mortgagee in possession to take as much care of the property as a man of ordinary prudence would take if the property were his own. This is analogous to the provisions of section 15 of the Indian Trust Act, 1882. The same care is required by a guardian under section 27 of the Guardian and Wards Act, VIII of 1890, and by a bailee under section 151 of the Contract Act. A mortgagee who has entered into possession is not responsible for the amount of the gross rental as shewn in the *jamabandi* or rent-roll, but only for such sums as are actually received by him or on his behalf and such sums, if any, as might have been received by him but for his own neglect or fault (*r*). He is not bound to make the most of the mortgagor's property once having obtained possession of the land, but is only bound to cultivate the ordinary crop which it is capable of yielding (*s*). The Court requires him to be diligent in order that he may restore the estate to the mortgagor who is entitled to it. It is a part of his contract that he should do so (*t*).

(*h*) *Simmins v. Shirby* (1877) 6 Ch. D. 173.

(*i*) *Noyes v. Pollock* (1886) 32 Ch. D. 53.

(*j*) *Ward v. Carttar* (1865) L. R. 1 Eq. 29, 55 E. R. 860.

(*k*) *Heales v. M'Murray* (1856) 23 Beav. 40, 53 E. R. 157.

(*l*) *Re. Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335.

(*m*) *Re. Kilchin, ex-parte Punnett* (1880) 16 Ch. D. 226.

(*n*) *Stanlet v. Grundy* (1883) 22 Ch. D. 478.

(*o*) *Vacuum Oil Co., Ltd. v. Ellis* (1914) 1 K. B. 693.

(*p*) *Feroz Shah v. Sohbat Khan* (1933) 14 Lah. 466, 60 I. A. 273.

(*q*) *Doe d. Roby v. Maisey* (1828) 8 B. & C. 767, 108 E. R. 1228; *Doe d. Garrod v. Olley* (1840) 12 Ad. & El. 481, 113 E. R. 894; *Doe d. Parsley v. George Day* (1842) 2 Q. B. 147, 114 E. R. 58; *Rogers v. Gratebrook* (1846) 8 Q. B. 895.

(*r*) *Banarsi Prasad v. Ram Narain* (1903) 25 All. 287, 30 I. A. 66.

(*s*) *Girjoji v. Keshavray* (1866) 2 Bom. H. C. 222.

(*t*) *Kensington (Lord) v. Bouverie* (1852) 7 D. M. & G. 157, 51 E. R. 752.

Both on principle and authority it appears that the proper form of account against a mortgagee in possession who has sold, is an account of the proceeds of sale received by him or by his order or for his own use or which without his wilful default might have been received (*u*). As to wilful default, the general rule is that an order charging a person with wilful default cannot be made, unless he was so charged in the pleadings as originally framed or introduced by amendment. There has, however, been always one exception to that rule, viz., the case of mortgagee in possession. Always a decree is made against him of wilful default in respect of rents and profits, though no charge of wilful default has been made on the pleadings and there has been no proof of it at the trial (*v*). Where a mortgagee sold under his power of sale and retained the surplus proceeds, in an action for accounts against him, he admitted a sum which he paid into Court, but a larger sum was found due by him on the actual taking of accounts, his costs of taking accounts were disallowed (*w*). Although the Court is very reluctant to treat a mortgagee as being a trustee when he has paid himself, the question is, how can he be treated otherwise (*x*).

A mortgagee in possession is accountable not only for his actual receipts but for what, but for his wilful default, he might have received and whatever was received by those, whom it has been found the mortgagee put into possession without just title and in derogation of the mortgagor's rights. A mortgagee in possession is not chargeable with interest on his receipts, if and when he took possession arrear of interest was due to him (*y*). When he once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform his duty and he cannot, when he pleases, elect to give up possession, nor will the Court as a general rule appoint a receiver to assist him to do so (*z*). In a redemption action the mortgagee in possession cannot claim an amount as disbursement or salary to a manager which was not fully paid either in form or in substance. Where lands had been under general management of the mortgagee's son the Judicial Committee allowed the costs of his son's separate maintenance while absent from his father's home. After the father's death, the son was then himself the mortgagee and their Lordships thought it would be contrary to principle to allow either a salary or allowance for his maintenance in such circumstances (*a*).

Clause (b).—Subject to the rule in section 77 of the Act, a mortgagee who takes possession of the mortgaged estate is on redemption bound to render an account of the rents and profits received. He is also liable for all which he might have received but for his wilful default. It is essential in the creation of such a liability that he should have known that he was in possession as mortgagee (*b*). A mortgagee receiving rents under authority from the mortgagor is bound to render accounts in the usual form as a mortgagee who has entered into possession before there was any interest in arrear (*c*). By the mortgage deed the mortgagees were empowered to employ a clerk for collection of rent and profits, the salary of such clerk to be paid by the mortgagors. The clerk appointed by the mortgagees received rents and profits for a year or two and afterwards permitted the mortgagor to receive them for 4 or 5 years. An attachment having been levied, the mortgagees claimed its removal. The question was in what way were the mortgagee's rights affected by this

(*u*) *Mayer v. Murray* (1878) 8 Ch. D. 424.
 (*v*) *Mayer v. Murray* (1878) 8 Ch. D. 424.
 (*w*) *Charles v. Jones* (1886) 35 Ch. D. 544.
 (*x*) *Charles v. Jones* (1886) 35 Ch. D. 544; *Quarrell v. Beckford* (1807) 1 Mad. 269, 33, E. R. 335.
 (*y*) *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co.* (1879) 4

A. C. 391.
 (*z*) *In re Prytherch v. Williams* (1889) 42 Ch. D. 591; *Mason v. Westoby* (1886) 32 Ch. D. 206 (considered).
 (*a*) *Kadir Moidin v. Nepean* (1899) 26 Cal. 1, 25 L. A. 241.
 (*b*) *Parkinson v. Hanbury* (1867) 36 L. J. Ch. 292.
 (*c*) *Jones v. Linton* (1881) 44 L. T. 601.

S. 76

conduct of the clerk. Their Lordships on construction of the deed held that possession by the mortgagee was merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debts by reason of the mortgage. The only effect would be when some subsequent encumbrancer came in, and he had notice of that claim. In that case the rule and law of England would be, that if after notice he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second encumbrancer, and that is the principle which their Lordships think ought to be applied to the present case (*d*).

Clause (c).—This clause renders the mortgagor liable to pay Government revenue, all other charges of a public nature and all rent where the property is leasehold, both accruing and also in arrears, provided that (1) the mortgagee is in possession, (2) there is no contract to the contrary (3) they can be paid out of the income of the property, and (4) are such that in default of payment the property is liable to be summarily sold.

Government revenue.—This liability is attached only under circumstances enumerated above. A mortgagor paying Government revenue on default by the mortgagee, is entitled to recover the same with interest (*e*). As to enhanced Government revenue the decisions are not uniform. One line of cases hold that the mortgagee is liable to pay (*f*), even if the Act does not apply (*g*), the other line holding that where the Government revenue has been subsequently enhanced, the mortgagor is liable to pay (*h*). Payment of enhanced land revenue and cesses out of usufruct cannot be recovered on redemption by a usufructuary mortgagee as it is a part of his duty to manage the property with ordinary prudence (*i*). In such cases, whether he is liable for enhanced revenue depends on intention of the parties (*j*).

Other charges of a public nature.—These would include *tagavi* advance by Government (*k*) and other cesses (*l*). These payments depend on the circumstances enumerated above.

Rent.—The liability to pay rent has been imposed by the Amending Act, 20 of 1929. Such liability is dependent on circumstances enumerated above. It arises on a mortgage of leaseholds (*m*) both in respect of rents accruing due and those in arrears. A usufructuary mortgagor cannot get credit for any rent not actually paid by him (*n*). A contract between the mortgagor and the mortgagee that the mortgagor should pay rents, and if on his failure the mortgagee paid, the equity of redemption would be lost though such contract is a clog on the equity of redemption, but if notwithstanding the mortgagee made the payment, it would have to

(*d*) *Jugjeeroun Das v. Ramdas* (1841) 2 M. I. A. 487.

(*e*) *Shib Chandra v. Lachmi Narain* (1929) 51 All. 686, 56 I. A. 339; *Nugenderchunder v. Sreemully Kamince* (1867) 11 M. I. A. 241, 258; *Krishnan v. Ambu Kurup*, A. I. R. (1927) Mad. 59; *Abdul Saffur v. Hamida* (1919) 42 Mad. 661.

(*f*) *Veyathan v. Lakshmiammal* (1909) 5 M. L. T. 254; *Tuppan v. Chinna Pari* (1908) 18 M. L. J. 31; *Nathuwath v. Kolli Vallapil* (1911) 22 M. L. J. 151; *Nanu Nair v. Ashta Moorthi* (1915) 29 M. L. J. 772.

(*g*) *Vasteva v. Mahabala*, A. I. R. (1926) Mad. 405.

(*h*) *Krishnier v. Arappuli* (1904) 14 M. L. J. 488; *Panigatan v. Raman Nair* (1907) 17 M. L.

J. 517; *Thippa v. Krishnaswami* (1911) 9 M. L. T. 206; *Panambatta v. Kalathi-podkil* (1914) 16 M. L. T. 317.

(*i*) *Abid Husain v. Kaniz Fatima* (1924) 46 All. 269, 51 I. A. 157; *Hari v. Shridhar* (1914) 10 Nag. L. R. 9.

(*j*) *Hari v. Shridhar* (1914) 10 Nag. L. R. 9.

(*k*) *Chilla v. Bai Jamni* (1916) 40 Bom. 483.

(*l*) *Gunnam v. Vedapillari* (1914) 27 M. L. J. 295; *Abid Husain v. Kaniz Fatima* (1924) 46 All. 269, 51 I. A. 157.

(*m*) *Vithal v. Shriram* (1905) 29 Bom. 391; *Kannye Loll v. Mistoriny* (1884) 10 Cal. 443; *Ardeshir Cowasji v. K. D. & Brothers* (1925) 27 Bom. L. R. 553.

(*n*) *Prosanna Kumar v. Girish Chandra*, A. I. R. (1934) Cal. 149.

be accounted for in the redemption action (o). A mortgagee is not liable to pay rent in respect of that portion of the holding not mortgaged to him (p).

Limitation.—No question of limitation arises in respect of a mortgagee's liability to account during the subsistence of the relationship of mortgagor and mortgagee (q).

Clause (d).—A mortgagee in possession is entitled to all proper and necessary repairs (r). A usufructuary mortgagee having permitted certain buildings on the mortgage premises to fall into a ruinous condition, the mortgagee was held liable on the ground that it was his paramount duty to make such necessary repairs, and his excuse that to do so would diminish his interest or profits could not be accepted. The question is one of procedure and the estimation of the loss caused to the mortgagor by the failure of the mortgagee to make such necessary repairs is an item which must be considered in determining the accounts in settlement of the mortgage. A separate suit by the mortgagor for the amount is not necessary (s). In a redemption action a mortgagee rendering an account of the rents and profits is entitled to credit for reasonable costs and repairs but such costs as were necessarily incident to the enjoyment of the profits (t). It is not the duty of a mortgagee to repair premises which are in a ruinous condition when he takes possession, if a prudent owner would not repair or attempt to repair them, nor is it his duty to repair when repairs can only be effected by pulling down the premises (u). Under this clause repairs are to be done out of the surplus rents and profits left after payments of expenses mentioned in clause (v), and the interest on the principal money (w), nor is it his duty to repair premises which fall into disrepair by wear and tear. Failure to perform the duty imposed by this clause renders him liable under the last para (x). This duty to repair does not arise when there is a contract to the contrary, as also when there is a contract between the parties as in section 79 provided.

Clause (e).—Under section 66 of the Act, the mortgagor is not liable, while in possession, for allowing the property to deteriorate with the qualification that he must not commit any act which is destructive or permanently injurious thereto. This qualification is attached to a mortgagee under this clause. A mortgagee committing waste will be ordered out of possession (y), or debited with loss occasioned by his wrongful act when accounts are taken as in the last clause provided (z). If waste be proved the value of the damage would be deducted from the mortgage debt (a). There is no liability in case of accidental destruction of the premises as by a fire (b) or if the waste is not committed by the mortgagee or by some person acting under his authority (c). When the mortgaged estate is of an insufficient value to pay the mortgagee, the mortgagee on entering into possession may open mines and cut timber and he will be charged only with the net profits. But where the estate is sufficient a mortgagee in possession has no such right and if he opens and works mines he will be charged with gross receipts and will be disallowed the expenses of working (d). A

(o) *Hardwar v. Sita Ram*, A. I. R. (1934) All. 888.
 (p) *Ram Dulare v. Sahdeo*, A. I. R. (1925) All. 189.
 (q) *Narasimha v. Seshayya*, A. I. R. (1925) Mad. 825.
 (r) *Munchersha v. Kamrunissa* (1868) 5 B. H. C. 109.
 (s) *Shiva Devi v. Jaru Heggade* (1892) 15 Mad. 290.
 (t) *Lakshman Bhisaji v. Hari Dinkar Desai* (1880) 4 Bom. 584.
 (u) *Moore v. Painter* (1842) 6 Jur. 903.
 (v) *Russell v. Smithies* (1794) 1 Anst. 96, 145 E. R. 811.
 (w) *Richards v. Morgan* (1753) 5 Y. & C. Ex. 570,

160 E. R. 1136.
 (x) *Wragg v. Denham* (1836) 2 Y. & C. Ex. 117, 160 E. R. 335.
 (y) *Hanson v. Derby* (1700) 2 Vern. 392, 23 E. R. 852.
 (z) *Shiva Devi v. Jaru Heggade* (1892) 15 Mad. 290.
 (a) *Withrington v. Banks* (1725) Cas. Temp. King 30, 25 E. R. 205.
 (b) *Venkateshwara v. Kesava Shetti* (1879) 2 Mad. 187.
 (c) *Anon* (1823) 1 L. J. P. S. Ch. 119.
 (d) *Millett v. Davey* (1862) 31 Beav. 470, 54 E. R. 1221; *Farrant v. Lovel* (1750) 3 Atk. 723, 26 E. R. 1214.

S. 76

mortgagee is liable for cutting trees (e), but not when planted by him, in the absence of evidence that his act was destructive or permanently injurious to the property (f) unless his security be defective, and accounts would be decreed of what is cut down and the same be applied in payment of interest and the sinking of principal (g). Injunction was refused when the tenant explained the nature of the acts, as being the person best acquainted with the truth of the case (h). On a bill to redeem, and while pending exceptions to the report, the mortgagee committed waste, the Court ordered him to deliver up possession, on the plaintiff giving security to abide the event of the account (i). The mortgagee's liability must be settled at time of redemption (j).

Permanently injurious clause.—This phrase is also used in section 66 and section 108 (o). There is no relation between mortgagor and mortgagee's tenants. The lessee's rights under such a tenancy come to an end with the mortgage (k).

Clause (f).—Usually in a mortgage deed it is provided that the mortgagor shall, during the continuance of the mortgage, keep the messuage and building insured and that in case he shall neglect or refuse to do so, it shall be lawful for but not obligatory upon the mortgagee to insure. It is further provided that all moneys received under or by virtue of such insurance shall at the option of the mortgagee be applied in substantially rebuilding or reinstating and repairing the premises or in or towards payment of the principal money and interest for the time being remaining due on the security. By the penultimate clause of section 72, where the property is in its nature insurable, due provision is made for the mortgagee, in the absence of a contract to the contrary, to keep insured the whole or any part of the property. A mortgagee is, however, not authorized to insure when the insurance is kept up by the mortgagor or on his behalf. This clause deals with the application of the insurance money when the insurance is effected by the mortgagee in case of destruction of the premises wholly or partially. The mortgagee is bound to apply any money which he actually receives or so much as is necessary in reinstating the property or he may, with the concurrence of the mortgagor, apply the moneys so received in reduction or in discharge of the mortgage-money. Where, however, the insurance is effected by the mortgagor and nothing is mentioned in the mortgage deed as to the application of the policy moneys in case of fire, the mortgagee has no claim to the benefit of the policy as against the mortgagor. It could not be held otherwise except on the ground that where there was a covenant to insure there is an implied contract with the mortgagee that the policy moneys should be applied in liquidation of the mortgage debt and thereby introducing into the contract a term which the parties did not think fit to introduce into it at the time of the contract (l). He cannot claim the benefit of the insurance unless there is a covenant to insure for his benefit or to apply the money to reinstate. Nor can he sue on the policy unless it has been assigned to him (m). When the insurance had been effected by a receiver appointed by the Court, it is at the discretion of the Court in what manner the moneys should be laid out for the benefit of the parties. The mortgagee's rights under a policy are also regulated by section 49 of the Transfer of Property Act. Where a lease contained a

(e) *Mahabir v. Sheo Shankar*, A. I. R. (1929) Oudh. 124.

(f) *Ramchandra v. Shripati* (1926) 50 Bom. 692; *Vasudevan v. Valia Chathu* (1901) 24 Mad. 47.

(g) *Withrington v. Banks* (1725) Cas. Temp. King 30, 25 E. R. 205.

(h) *Anon* 1823) L. J. O. S. 119.

(i) *Hanson v. Derby* (1700) 2 Vern. 392, 23 E. R. 852.

(j) *Mohammad Sher v. Seth Bisheshwar*, A. I. R. (1925) Oudh. 654.

(k) *Ram Chand v. Raj Hans* (1906) 3 A. L. J. 517.

(l) *Lees v. Whiteley* (1886) L. R. 2 Eq. 143.

(m) *P. V. Chetty, Firm v. Motor Union Insurance Co.*, A. I. R. (1923) Rang. 6.

covenant that the premises should be insured in the name of lessor and lessee and the moneys secured by the policy should be applied in restoring the premises and the lessee mortgaged his lease but the mortgage contained no mention of the insurance, on destruction of the premises by fire, the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt to the insurance office, to enable the mortgagee to receive the money payable under the policy (n).

Clause (g).—This clause is controlled by section 77. A mortgagee in possession is bound to keep clear, full and accurate accounts of his receipts and disbursements and furnish to the mortgagor, at his request and costs, true copies not only of the accounts but also of the vouchers in support. Without seeking redemption, a suit by a mortgagor for accounts only will not lie (o). A mortgagee is not an assurer of the continuation of the same rate of profit which the mortgagor was able to raise. Much depends in this country on personal qualities. The very change in management and possession may cause a falling off of receipts. Therefore, an estimate of a preceding rental does not suffice to shew actual receipts. The mortgagee is to verify only his gross receipts and his expenditure, not the rents nor the extent of arrears nor the causes of such arrears. The common rule *qui facit per alium facit per se* would apply to him and the accounts of the agent are his. Hence they cannot in all cases be verified by his personal oath as he may know nothing at all about them (p). The Court must proceed upon proof of the actual collections and not upon materials speculative and conjectural (q). The assignee is bound by the state of accounts between the mortgagor and the mortgagee although he may have paid more when the assignment is without the concurrence of the mortgagor (r). A mortgagee in possession is bound to apply the rents and profits towards the mortgage debt and when cesses had to be collected by subsequent passing of a statute, the mortgagor was entitled to credit thereof notwithstanding arrangement between the parties not to take accounts on redemption (s). A usufructuary mortgagee cannot escape liability to account by reason of section 77 (t). If the mortgagee held possession under any contract of title distinct from his mortgage he would be entitled to set up that title (u). Liability to account under this clause is statutory and the mortgagee cannot contract himself out of his liability (v). Exception is, however, made under section 77. The deposit and notice under section 83 is a demand for accounts within the meaning of this clause (w). Failure on the part of a mortgagee to keep and produce proper accounts is a misconduct which ought to be taken into consideration when dealing with the question of costs (x).

Clause (h).—Subject to the limitations in section 77, when a mortgagee takes possession of the mortgaged premises during the subsistence of the mortgage, he is liable to account on the footing of the provisions of this clause (y) and pay the surplus to the mortgagor. This clause contemplates the case where receipts are in

(n) *Garden v. Ingram* (1852) 23 L. J. Ch. 478; *Rayner v. Preston* (1881) 18 Ch. D. 1.

(o) *Hari v. Lakshman* (1881) 5 Bom. 614; *Baboo Kallyan Doss v. Baboo Sheo Nundun Purshad Singh* (1872) 18 W. R. 65; *Lakshmi Narain v. Mohamdi*, A. I. R. (1932) Oudh. 123.

(p) *Shah Mukun Lall v. Bavo Sree Krishna Singh* (1868) 12 M. I. A. 157; *Kundummal v. Kashi Bai* (1902) 26 Bom. 363, 371.

(q) *Mohun Lall Sookool v. Goluk Chander Dutt* (1867) 11 M. I. A. 1.

(r) *Chinnayya Rawuthan v. Chidambaram Chetti* (1879) 2 Mad. 212.

(s) *Ramavatar v. Tulsi Prosad Singh* (1911) 14 C. L. J. 507.

(t) *Surandra v. Kilindra* (1919) 29 C. L. J. 434;

Lakshmi Narain v. Mohamdi, A. I. R. (1932) Oudh 123.

(u) *Doolee Chand v. Omda Khanum* (1879) 6 Cal. 377.

(v) *Kazim Hussain v. Debi Dayal*, A. I. R. (1934) Oudh. 104; *Lal Bahadur v. Murli Dhar*, A. I. R. (1924) Oudh 92; *Shambhu Nath Nihal Chand*, A. I. R. (1922) Lah. 213; *Ma Myo v. Maung Hla*, A. I. R. (1925) Rang. 13.

(w) *Ramlal v. Narayandas*, A. I. R. (1927) Nag. 138.

(x) *Baboo Kallyan Doss v. Baboo Sheo Nundun Purshad Singh*, 18 W. R. 65.

(y) *Mahomed Ishaq v. Rup Narain*, A. I. R. (1931) All. 562.

S. 76

excess of expenses. Nothing is stated as to what course a mortgagee in possession is to adopt when the expenses incurred are in excess of the receipts. It appears, therefore, that in such a case the mortgagee must fall back upon section 72. This clause is inconsistent with clauses (c) and (d) of the same section. In clause (d) it is provided that out of the rents and profits, the mortgagee has to make first payments mentioned in clause (c), secondly, interest on the principal money, thirdly, make such necessary repairs as he can pay for out of rents and profits after making payments first and secondly mentioned. Now turning to clause (h), it will be noticed that out of the rents and profits the mortgagee is given liberty to make the following deductions :— First expenses properly incurred for the management of the property and collection of rents and profits, secondly, expenses mentioned in clause (c), thirdly expenses mentioned in clause (d); fourthly, interest on items first, secondly and thirdly mentioned; and fifthly, in reduction of the amount from time to time due to him on account of interest. It will be observed, therefore, that under clause (d) the mortgagee has to deduct first expenses under clause (c), secondly interest on the principal money and then make repairs, while under clause (h) interest has to be deducted after expenses incurred in clauses (c) and (d). In laying down the principles on which an account should be taken from a mortgagee in possession, it has been held that he is liable to account for profits arising from trees planted by himself on the mortgagor's land^(z). *Tadi* from *sindi* trees is not a profit (a). The mortgagee is not responsible for the amount of the gross rental as shewn in the *jamabandi*, but only for such sums as were actually received by him or on his behalf, and such sums, if any, as might have been received by him but for his own neglect or default (b). The liability extends even to unauthorized or wrongful realization (c).

Fair occupation rent.—The mortgagee is liable when he is personally in occupation to be charged with a fair occupation rent. Occupation rent is only charged against a mortgagee who occupies. A man may have been in possession of an estate without being in occupation of an acre of it. Anyone is in possession of the estate who receives rents from the tenants who occupy it (e). The occupation may be personal or through servants. It is impossible for a man to be in occupation if somebody else is in occupation; that is, excluding the case of joint tenants or tenants in common. A mortgagee sold the property by auction. There being no prospect of redemption, before completion, he put the purchaser in possession. The Court refused to charge the mortgagee with the occupation rent (f). In the case of a building occupied for the purpose of residence or carrying on trade or business a fair occupation rent would be charged. In the case of land personally occupied or cultivated by him, he might be charged either in that way or with the actual net profits after allowing credit for money expended in obtaining produce from the land such as costs of seeds and young trees and fair expenses of the cultivation and interest, say, 6% per annum on the capital thus employed (g). A mortgagee, however, cannot be charged with occupation rent on a building in a ruinous state if during the term no rent could be obtained for it (h). Nor is he liable for increased occupation rent for permanent improvements made by him, after a decree for redemption, unless moneys expended by him are allowed (i).

(s) *Prabhakar v. Pandurang* (1875) 12 B. H. C. 88.
 (a) *Shamrao v. Pandurang*, A. I. R. (1923) Nag. 137.
 (b) *Banarsi Prasad v. Ram Narain* (1903) 25 All. 287, 30 I. A. 66; *Lakshmi Narain v. Mohamdi*, A. I. R. (1932) Oudh 123.
 (c) *Lakshmi Narain v. Mohamdi*, A. I. R. (1932) Oudh 123.

(e) *Trulock v. Robey* (1846) 15 Sim. 265, 60 E. R. 619.
 (f) *Shepherd v. Jones* (1882) 21 Ch. D. 469; *Bright v. Campbell* (1885) 54 L. J. Ch. 1077.
 (g) *Prabhakar v. Pandurang* (1875) 12 B. H. C. 88.
 (h) *Marshall v. Cave* (1824) 3 L. J. O. S. Ch. 57.
 (i) *Bright v. Campbell* (1885) 54 L. J. Ch. 1077.

And interest thereon.—Items enumerated in this clause bear interest. No rate is fixed. The rule in section 72 would apply. In clause (h) interest on expenses in clauses (c) and (d) are not only made payable but in priority to interest on the principal. Clauses (c) and (d) refer to no interest on those expenses while clause (d) makes interest on the principal money payable before expenses could be incurred under that clause. Hence the clause is defective.

Mortgage-money.—The words “mortgage-money” are, incorrectly used for according to clause (h), certain expenses are first to be deducted from the receipt and then the balance is to be applied in reduction of interest, and where the receipts exceed the interest due, in reduction or discharge, according to this clause, of the “mortgage-money.” The Legislature should have used the words “principal money” instead of “mortgage-money” for the surplus is to be employed first in payment of interest so that no interest remains added to the principal. It is needless to add that according to section 58 this phrase has been defined to include both principal and interest, the same meaning is attached to it in section 69 and section 84. Moreover it is clear that here the words “mortgage-money” could not have been used in the sense of principal and interest, as in the same para interest has been allowed to be deducted as a separate item.

Charge for personal services.—The expenses of management allowed before Act, 20 of 1929, under section 72, clause (a) and now under clause (h), do not include charges for personal services rendered. It is well established that a mortgagee in possession cannot be allowed remuneration for personal trouble (j), but if he employs a skilful bailiff he will be allowed his salary (k). Nor for trouble in receiving the rents of the estate himself (l), nor profit by way of commission for receiving the produce of the mortgaged estate (m). Acquiescence of the mortgagor can have no effect (n). Nor can be charged by way of bonus for management of business, and payment of debts authorized by the mortgage deed (o). He is, however, entitled to charge commission of a receiver (p). Even under an agreement the mortgagee will not be entitled to remuneration for his trouble of receiving the rents (q). Even where the rents are realized by employment of an agent, the mortgagee will be disallowed claims in that behalf at a higher rate (r). But the mortgagee's remuneration has been allowed when there was an arrangement between the parties (s). Though a mortgagee may have a receiver at the expense of the mortgagor, he is not entitled to charge for recovering the rents personally (t). Though it seems to make little difference to the mortgagor as to who is the receiver of the rents, yet the Court considers it as tending to usury and oppression and a collateral advantage which a man contracting for a loan of money shall not make (u).

Government revenue.—An alleged redemption by the original mortgagor cannot prejudice the rights of the assignee, who has paid the annual revenue to Government for the mortgaged land, to calculate it against the principal sum due on the

- (j) *Mahadev v. Ramchandra* (1904) 6 Bom. L. R. 590.
 (k) *Bonithon v. Hockmore* (1685) 1 Ver. 360, 23 E. R. 492.
 (l) *Godfrey v. Watson* (1747) 3 Atk. 517, 26 E. R. 1098.
 (m) *Chambers v. Goldwin* (1804) 9 Ves. 254, 32 E. R. 600.
 (n) *Langstaffe v. Fenwick* (1805) 10 Ves. 405, 32 E. R. 902; *Davis v. Dendy* (1818) 3 Mad. 170, 58 E. R. 473.
 (o) *Barrett v. Hartley* (1866) L. R. 2 Eq. 789.
 (p) *Re Wallis ex-parte Lickorish* (1890) 25 Q. B.

- D. 176.
 (q) *French v. Baron* (1740) 2 Atk. 120, 26 E. R. 475.
 (r) *Staines v. Banks* (1863) 9 Jur. N. S. 1049, not followed in *Union Bank of London v. Ingram* (1880) 16 Ch. D. 53.
 (s) *Bath v. Standard Land Co. Ltd.* (1911) 1 Ch. 618; *Hope Mills Ltd. v. Cowasji Jehangir* (1911) 13 Bom. L. R. 162.
 (t) *Langstaffe v. Fenwick* (1805) 10 Ves. Jun. 405, 32 E. R. 902.
 (u) *Chambers v. Goodwin* (1803) 9 Ves. 254, 271 32 E. R. 600, 607.

S. 76 mortgage with annual rests which would be at the time when the Government revenue for each year was payable by the mortgagee. And payments made to the mortgagee with the knowledge of the purchase by the original mortgagor, being improperly made, cannot be taken into account against the assignee (v).

Expenses incurred for collection of rents and profits.—These do not include the costs of a suit to recover rents from tenants put in by the mortgagee, including the mortgagor, against whom the mortgagee had obtained a personal decree (w). So for maintaining an action for trespass, the mortgagee is not entitled to costs (x).

Surplus.—What is left over after discharging liabilities under clause (h) is payable to the mortgagor without interest (y).

Clause (i).—This is a qualifying clause providing that where a valid tender as in section 60, or deposit, as in section 83 provided, is made, then in either of those cases the mortgagee must, notwithstanding the provisions in the other clauses of the section, account for his receipts from the mortgaged property in case of tender from the date thereof, and in case of deposit from the earliest time he could take such amount out of Court. In either case section 84 provides that interest ceases from the same time (z). Tender neither extinguishes the debt of the mortgagee (a) nor determines his liability to account (b). The Madras High Court held that a mortgagee was entitled to charge not only for Government revenue and collection charges but also for repairs under clause (d) after tender or deposit. The clause has, therefore, been amended by the addition at the end. The claim as to interest damages or mesne profits must be incorporated in the redemption suit, for no separate suit would lie (c). The question as to mortgagor's interest and mesne profits would be governed by Order 20, rule 12 of the Civil Procedure Code, read with the provisions of Order 34 (d). The Code defines mesne profits.

In manner hereinafter provided.—The provision relating to tender is dealt with in section 60, whilst deposit is dealt with in section 83 of the Act. Hence the phrase "in manner hereinafter provided" refers to the word "deposits" and not to "tenders."

Uncollected rents and profits.—On the construction of this clause one of the questions which arises is whether a mortgagee is liable only for rents and profits actually collected by him, or also for those left uncollected. This clause no doubt speaks only of receipts and under that it will be difficult to make the mortgagee liable for uncollected rents and profits, but clause (b) imposes on the mortgagee in possession the duty of collecting the rents and profits and the last clause makes him liable for any loss resulting from his failure to perform that duty. His liability for uncollected rents and profits extends, therefore, only to the extent to which it can be brought within those provisions and does not depend on clause (i). No doubt section 77 provides that clauses (b), (d), (g) and (h) of section 76 shall not apply to cases where by the contract between the parties the mortgagees are to take the

(v) *Jaijit Rai v. Gobind Tiwari* (1884) 6 All. 303.

(w) *Pokree Saheb Beary v. Pokree Beary* (1898) 21 Mad. 32.

(x) *Owen v. Crouch* (1857) 5 W. R. 545.

(y) *Saiyid Ismail v. Saidid Mahdi*, A. I. R. (1924) All. 881; *Janoji v. Jamoji* (1883) 7 Bom. 185; *Lake v. Bell* (1886) 34 Ch. D. 462.

(z) *Hukam Singh v. Babu Lal* (1922) 44 All. 198; *Jagat Tarini v. Naba Gopal* (1904) 34 Cal. 305; *Velayudu v. Hyder Hussan* (1910) 33 Mad. 100.

(a) *Bank of New South Wales v. O'Connor* (1880) 14 A. C. 273; *Johnson v. Dipnose* (1893)

1 Q. B. 512; *Jagat Tarini v. Naba Gopal* (1907) 31 Bom. 527.

(b) *Rukhminibai v. Venkatesh* (1907) 31 Bom. 527; *Bank of New South Wales v. O'Connor* (1880) 14 A. C. 273; *Johnson v. Dipnose* (1893) 1 Q. B. 512.

(c) *Ma Nyo v. Maung Hla*, A. I. R. (1925) Rang. 13; *Satyabhadi v. Harabati* (1907) 34 Cal. 223; *Rukhminibai v. Venkatesh* (1907) 31 Bom. 527; see *Mahabir v. Sheo Shankar*, A. I. R. (1929) Oudh 129.

(d) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7.

receipts from the mortgaged property towards interest, but when on deposit of the mortgage-money in Court the covenant in the contract ceases to be in force, the excepted clauses become applicable to the mortgagee (e).

Loss of mortgagor.—The last para in this section gives the mortgagor a right to claim damages against the mortgagee, if loss is caused to the mortgagor or to the mortgaged property by reason of his failure to carry out any of the duties imposed on him by this section. These damages must be claimed by the mortgagor when accounts are taken in a redemption suit filed by him and not in execution proceedings. The right to accounts and to debit him with the loss is a cumulative remedy and it is not intended to operate as a bar to any other remedy which the mortgagor may have under old section 92, now Order 34, rule 7 of the Civil Procedure Code (f). The value of missing items must be determined in the suit for accounts (g). A mortgagee in possession ought not to be charged with deterioration arising in the ordinary way, but if there be gross negligence, to that extent he ought to be made responsible for that deterioration. Fraud is not necessary, gross negligence is sufficient (h). In this clause "may" has not the force of "must" (i). Certain brewers who were mortgagees in possession let the premises with a restriction that the tenant should take his supply of beer entirely from the mortgagees. They were held liable to account for such additional rent as they might have received if the premises had been let as a tied house (j).

Accounts between mortgagor and mortgagee.—Every presumption will be made against a mortgagee in possession if he refuses, fails and neglects (k) to furnish detailed accounts of all actual receipts and disbursements verified by vouchers (l). The liability is the same whether possession be taken with or without the consent of the mortgagor (m). If the mortgagee is found to have been overpaid, the general practice is to order the payment by him of the balance due from him with interest from the date of institution of the redemption suit (n). If he cultivates the land he is bound to account for the whole of the profits (o). Presumption will be against him if he has not kept proper accounts. When the mortgage provided that after payment of Government revenue and *malikana*, the profits should go in reduction of the debt, failure to pay the latter charge was held not to render the mortgagee liable for accounts (p). Under a proviso in a mortgage deed for reduction of interest on punctual payment, the mortgagee is entitled to charge the higher rate when he takes possession through the default of the mortgagor (q). In taking the account of the mortgagee in possession, you take all receipts and place them on one side, whether they arise from rents or accidental payments, as whatever the mortgagee has received is charged against him. Then you give the mortgagee credit for principal and interest on the other side. The result is that if the rents are more

(e) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7, 27.

(f) *Sivachidambara Mudaliar v. Kamalchi Ammal* (1910) 33 Mad. 71; see *Mahabir v. Sheo Shankar*, A. I. R. (1929) Oudh 124.

(g) *Gopala Menon v. Narayana* (1917) M. W. N. 289.

(h) *Wragg v. Denham* (1836) 2 Y. & C. Ex. 117, 160 E. R. 335.

(i) *Mahabir v. Sheo Shankar*, A. I. R. (1929) Oudh 124.

(j) *White v. City of London Brewery Co.* (1889) 42 Ch. D. 237.

(k) *Sunder Singh v. Bhogal Singh*, A. I. R. (1929) Lah. 741; *Sirdar Golab Singh v. Ram Buddin Singh* (1866) 6 W. R. 127.

(l) *Union Bank of England v. Ingram* (1880) 16

Ch. D. 53; *Mokund Lall Sookul v. Goluck Chunder Dutt* (1867) 9 W. R. 572; *Kuddilal v. Aisha*, A. I. R. (1927) Oudh 199; *Hardeo Prasad v. Gangasahari*, A. I. R. (1921) All. 197; *Lakshmi Narain v. Mohamdi*, A. I. R. (1932) Oudh 123.

(m) *Nilkant Sein v. Shekh Jaenoddeen* (1866) 7 W. R. 30; *Sulaiman v. Ezzo*, A. I. R. (1926) Sind 145.

(n) *Janoji v. Janoji* (1883) 7 Bom. 185.

(o) *Rughoonath Roy v. Baraik Geeredharee Singh* (1866) 7 W. R. 244.

(p) *Raghubar v. Mohit Narayan*, A. I. R. (1929) Pat. 37; *Shafi-un-nissa v. Fazl Rao* (1910) 7 A. L. J. 787.

(q) *Union Bank of England v. Ingram* (1880) 16 Ch. D. 53.

S. 76

than interest, he keeps the rents without paying interest on the excess ; if less, the mortgagor does not pay interest on the unpaid balance of interest. It is an accident in whose favour the account so taken may happen to be. This is the mode of taking the account. Therefore, it is not true to say that rents are appropriated for interest ; for all rents and receipts go in reduction of principal and interest (*r*). The Judicial Committee in dealing with a case where the decree appealed from directed a set-off of the rights in each year against the balance due for interest on expenditure in that year, said that inasmuch as the receipts were in each year less than the balance and as the balance of interest did not carry interest, it really made no difference in the result that the receipts were set-off year by year or the sum of the receipts at the end of the account was deducted from the sum of the amounts due on account of moneys laid out in improvements and management of land comprised in the mortgage. By clause (h) only simple interest is allowed on expenditure, as to which it was stated that there was no warrant in principle or in authority that the mortgagee was obliged to pay off the compound interest debt before the other debts (*s*). Usual taking of accounts and inquiries is a question not of technicality but of substance, for without the knowledge derived from such an account the mortgagor would be unable to proceed on the inquiry as to wilful default which is a matter of surcharge (*t*). A mortgagee in possession voluntarily transferring his security is liable to account for the subsequent rents but not where the transfer is made under an order of the Court (*u*). Mortgagees were allowed losses sustained in the management, where it was shewn that the moneys expended on the property were expended in the same manner as it was managed by a previous mortgagee (*v*). In taking accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to such repairs as are necessary for the support of the property (*w*), and expenses incurred in preserving the property and so protecting his security (*x*), but not in the absence of clear evidence (*y*). Under the head "just allowances" he will get necessary repairs but if he wants anything else such as "permanent improvements" or "substantial repairs" he must ask for them, for they must not only be alleged but also proved (*z*). The words "just allowances" are now imported into every decree directing accounts. They should be liberally construed (*a*). No question of limitation arises so long as the relationship of mortgagor and mortgagee subsists (*b*).

Rests.—The ordinary rule is that in the absence of special circumstances a mortgagee in possession is not liable to account with rests (*c*). The principle is that it cannot be considered that in going into possession he elected to receive his capital by dribblets. He is entitled to the whole capital paid off at once, and taking of possession is not evidence of such bargain (*d*). Wherever the gross sum received exceeds the interest, it shall be applied to sink the principal (*e*). If a mortgagee

(*r*) *Union Bank of England v. Ingram* (1880) 16 Ch. D. 53.

(*s*) *Kadir Moidin v. Nepean* (1899) 26 Cal. 1, 7; *Jaijit Rai v. Govind Tiwari* (1884) 6 All. 303.

(*t*) *Noyes v. Pollock* (1885) 30 Ch. D. 336.

(*u*) *Hall v. Heward* (1886) 32 Ch. D. 430.

(*v*) *Bompas v. King* (1886) 33 Ch. D. 279.

(*w*) *Sandon v. Hooper* (1843) 6 Beav. 246, 49 E. R. 820.

(*x*) *Wilkes v. Saunion* (1877) 7 Ch. D. 188.

(*y*) *Arumugam v. Muthiah Chetty*, A. I. R. (1927) Mad. 1156.

(*z*) *Tipton Green Colliery Co. v. Tipton Moat Colliery Co.* (1877) 7 Ch. D. 192.

(*a*) *Blackford v. Davis*, L. R. (1869) 4 Ch. App. 304.

(*b*) *Narasimha v. Seshayya* (1925) 48 M. L. J. 363.

(*c*) *Wrigley v. Gill* (1905) 1 Ch. 241 on appeal (1906) 1 Ch. 165; *Ainsworth v. Wilding* (1905) 1 Ch. 435; *Union Bank of England v. Ingram* (1886) 16 Ch. D. 53; *Thompson v. Hudson* (1871) 10 Eq. 497.

(*d*) *Ashworth v. Lord* (1887) 36 Ch. D. 545; *Horlock v. Smith* (1842) 1 Coll. 287, 63 E. R. 422.

(*e*) *Gould v. Tancred* (1742) 2 Atk. 533, 26 E. R. 720.

enters into possession, liability to account arises and it is in this case that the direction of annual rests is made (*f*). Where under a decree accounts of a mortgagee in possession are to be taken with annual rests, a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest though occurring in the interval between the annual rests. From that date the subsequent annual rests ought to be computed (*g*). Annual rests are directed under special circumstances only and never for a broken period. There are only two forms of decrees, either with or without rests (*h*). No rests are taken where the mortgagee has from time to time sold parts of the mortgaged property or where in a redemption action, rests are not directed (*i*). Nor for every trifling excess (*j*), nor where the parties are in the position of landlord and tenant (*k*). If a redemption suit, where rests are ordered, be abandoned and foreclosure proceedings adopted thereafter, accounts are directed on the same footing (*l*). When interest had never been in arrear, rests were ordered. The rule is relaxed when interest is in arrears at the time of mortgagee taking possession (*m*), even though subsequent to such entry the arrears had been worked off owing to excess of rents over interest (*n*). Rests, however, will be ordered where the rent exceeds the interest (*o*). But not where a mortgagee of leasehold takes possession to prevent forfeiture for non-payment of ground-rent (*p*). They are not directed in the middle of the time, but only from the beginning in special cases or not at all (*q*). When for the first ten years the rents were less than the interest and afterwards exceeded the interest, the Court refused to direct accounts to be taken with rests (*r*). When he denied the plaintiff's title to redeem or when his claims to retain possession in respect of his debt turned out to be unfounded, rests were directed (*s*), both in an account of occupation rent as well as in an account of rents and profits received (*t*). The mere circumstance that a mortgagee has received mortgaged property by ejectment is insufficient for directing annual rests (*u*). When liability has commenced it continues until altered (*v*). Rests can never be made by the Master unless specifically directed by the decree. The usual decree against mortgagee in possession may be rectified directing rests (*w*). The Court will not allow a mortgagee more than his principal and interest notwithstanding the fact that the mortgagor has agreed to pay the mortgagee for his trouble of receiving the rests (*x*).

Wilful default, accounts on footing of.—Mortgagees in possession are answerable for damage or loss caused by their improper conduct, that is to say, by their wilful default. It is the duty of mortgagees to act as prudent owners (*y*).

- (*f*) *Robinson v. Cumming* (1742) 2 Atk. 409, 26 E. R. 646.
 (*g*) *Binnington v. Harwood* (1825) Turn. & R. 477, 37 E. R. 1184.
 (*h*) *Davis v. May* (1815) 19 Ves. Jun. 383, 34 E. R. 560.
 (*i*) *Ainsworth v. Wilding* (1905) 1 Ch. 435.
 (*j*) *Gould v. Tancred* (1742) 2 Atk. 533, 26 E. R. 720; *Webber v. Hunt* (1815) 1 Mad. 13, 56 E. R. 6.
 (*k*) *Page v. Linwood* (1837) 4 Cl. & Fin. 399, 7 E. R. 154 H. L.
 (*l*) *Morris v. Islip* (1855) 20 Beav. 654, 52 E. R. 756.
 (*m*) *Shephard v. Elliot* (1819) 4 Mad. 254, 56 E. R. 699; *Wilson v. Cluer* (1840) 3 Beav. 136, 49 E. R. 53.
 (*n*) *Finch v. Brown* (1840) 3 Beav. 70, 49 E. R. 27.
 (*o*) *Shephard v. Elliot* (1819) 4 Mad. 254, 56 E. R. 699; *Uttermore v. Stevens* (1851) 17 L. T. O. S. 115; *Carter v. James* (1881)

- 29 W. R. 437.
 (*p*) *Patch v. Wild* (1861) 30 Beav. 99, 54 E. R. 826.
 (*q*) *Davis v. May* (1815) 19 Ves. 383, 34 E. R. 560; *Latter v. Dashwood* (1834) 6 Sim. 462, 58 E. R. 667.
 (*r*) *Latter v. Dashwood* (1834) 6 Sim. 460, 58 E. R. 667.
 (*s*) *Ashworth v. Lord* (1887) 36 Ch. D. 545; *Wilson v. Metcalfe* (1818) 3 Mad. 45, 56 E. R. 426.
 (*t*) *Wilson v. Metcalfe* (1818) 3 Mad. 45, 56 E. R. 426.
 (*u*) *Baldwin v. Lewis* (1835) 4 L. J. Ch. 113.
 (*v*) *Scholefield v. Lockwood* (1863) 32 Beav. 439, 55 E. R. 172.
 (*w*) *Webber v. Hunt* (1815) 1 Mad. 13, 56 E. R. 6; see *Stephens v. Wellings* (1835) 4 L. J. Ch. 281.
 (*x*) *French v. Baron* (1740) 2 Atk. 210, 26 E. R. 475.
 (*y*) *Taylor v. Mostyb* (1886) 33 Ch. D. 226.

S. 76

Wilful default.—With regard to wilful default the general rule is, that in every case it must be based upon a charge in the pleadings. There is, however, one exception to that rule, viz., in the case of mortgagee in possession. Always, a decree is made against him of wilful default in respect of rents and profits though no charge of wilful default has been made on the pleadings and there has been no proof of it at the trial. The exception covers tangible property or the goodwill of a business (z). On entering into possession it is the duty of a mortgagee to exercise the utmost diligence for the benefit of himself and the mortgagor (a). He must not speculate and must take the fair rents and profits (b). He is not liable to account for more than he actually receives, unless he has been guilty of wilful default, as, for example, when he turns out or refuses a sufficient tenant (c), or refuses to take proceedings in execution against a tenant sued in ejectment (d), or allows a tenant to remain without payment of rent. And so where mortgagees in possession were brewers and let the premises with a restriction that the tenant should take his supply of beer entirely from them, they were made liable for such additional rent as they would have made if the premises had been let without restriction but not for the profit which they made by the sale of beer to the tenant (e). The onus is on the party alleging, and shifts on proof given that property can be let. The mortgagee must then shew that he has not been guilty of wilful default but has been vigilant (f). He is answerable not only for what tenants pay, but for not letting the property, if he can do so, and for not getting the full rents from the tenants if they could have paid them (g). Though the mortgagor cannot question the propriety of the sale or the adequacy of consideration, he is nevertheless entitled to an account of the proceeds of sale on this footing (h). A mortgagee was rendered liable for rents from the time of ejectment when he refused to enter and suffered the bankrupt to take the profits, and fence against the assignees with his mortgage (i). And where after judgment in ejectment he entered on the mortgaged premises but permitted the mortgagor to take profits, he was charged with them since his entry (j). Under the Dekkhan Agriculturists' Relief Act, a mortgagee is liable to account for such profits as have come into his hands, but he is not liable to account for them on the basis of wilful default (k).

Fresh certificate.—If a mortgagee, whether in a redemption or foreclosure action, receives rents between the Master's report and the date fixed for payment and has thus varied the account in the interim, there must be a new reference to the Master and new day fixed for payment (l). When the account has been altered by the mortgagee himself, it is not the practice to order *immediate payment* of arrears of interest and costs, but to direct the Master to continue the accounts and appoint a new day and to add the costs of the application (m).

- (z) *Mayer v. Murray* (1878) 8 Ch. D. 424; *Kensington (Lord) v. Bouverie* (1852) 7 D. M. & G. 134.
 (a) *Sherwin v. Shakspear* (1854) 23 L. J. Ch. 896, 43 E. R. 970.
 (b) *Hughes v. Williams* (1806) 4 Ves. 493, 33 E. R. 187.
 (c) *Anon* (1682) 1 Vern. 45, 23 E. R. 298.
 (d) *Bucks (Duke) v. Gayer* (1684) 1 Vern. 258, 23 E. R. 453.
 (e) *White v. City of London Brewery Co.* (1889) 42 Ch. D. 237.
 (f) *Brandon v. Brandon* (1862) 10 W. R. 287.
 (g) *Noyes v. Pollock* (1886) 32 Ch. D. 53.
 (h) *Mayer v. Murray* (1878) 8 Ch. D. 424.

- (i) *Chapman v. Tanner* (1684) 1 Vern. 267, 23 E. R. 461.
 (j) *Coppring v. Cooke* (1684) 1 Vern. 270, 23 E. R. 463.
 (k) *Sakharam Shivram v. Dhaktolirao Shripatrao* (1934) 58 Bom. 472.
 (l) *Alden v. Foster* (1842) 5 Beav. 592, 49 E. R. 708; *Jenner Fust v. Needham* (1886) 32 Ch. D. 582; *Garlick v. Jackson* (1841) 4 Beav. 154, 49 E. R. 297; *Ellis v. Griffiths* (1844) 7 Beav. 83, 49 E. R. 994.
 (m) *Buchanan v. Greenway* (1848) 12 Beav. 355, 50 E. R. 1097; *Vasantrao v. Nanabhai* (1926) 28 Bom. L. R. 347.

77. Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Non-liability to account by mortgagee.—This section is an exception to clauses (b), (d), (g) and (h) of section 76, so that where there is a contract between the mortgagee and the mortgagor that the former shall appropriate the receipts of the mortgaged property in lieu of interest or in lieu of interest and defined portions of the principal, the above-mentioned clauses do not apply. It has been held by the Madras High Court that the excepted clauses become applicable to the mortgagee after deposit made into Court by the mortgagor (*n*). But the Legislature has, in clause (i) of section 76, otherwise provided. The principle of this section applies to mortgages executed before the Act (*o*). Exemption from the general liability to account under section 76 arises when there is a contract to take income for interest or for interest and defined portions of the principal, but not where the interest is fixed or the income is to be applied against a part of the interest (*p*); nor because the mortgage is usufructuary (*q*), but the rules apply to a usufructuary mortgage when the mortgagee is to claim no interest and the mortgagor to claim no profits (*r*); also when rents and profits are taken in lieu of interest or partly in lieu of interest and partly in payment of the mortgage-money (*s*). Where by the terms of a usufructuary mortgage, the mortgagee was to appropriate the benefits out of the rents less a fixed sum to be paid to the mortgagor for *malikana* for which alone there was to be accounting, it was held that failure to pay *malikana* entitled the mortgagor on redemption to deduct it out of the principal (*t*). But where the mortgage deed provided that after payment of Government revenue and *malikana*, the balance of the profits should go to the mortgagee, the mortgagee's failure to pay *malikana* does not render him liable for accounts (*u*). Nor is there any accounting when interest and profits are agreed to be equal (*v*). Where the parties agreed that the mortgagee should appropriate the surplus profits towards interest and that the mortgagor should have no claim to profits and the mortgagee no claim to interest, it was held that the mortgage deed was "the contract" within the meaning of this section (*w*). The rule does not apply where part of the interest is to be paid out of the usufruct (*x*), nor where there is a failure by the mortgagee to pay to the mortgagor a fixed surplus out of the profits for a fixed number of years, at the end of which the debt was to be considered as discharged (*y*).

(n) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7.

(o) *Muhammad Ishaq v. Rup Narain* (1932) 54 All. 205.

(p) *Muhammad Ishaq v. Rup Narain* (1932) 54 All. 205; *Shafi-un-nissa v. Fazal Rab* (1910) 7 A. L. J. 787 not followed; *Kamla Prashad v. Bamdeo Missir*, A. I. R. (1935) Pat. 148.

(q) *Kishun Lal v. Hira Lal*, A. I. R. (1929) Pat. 571.

(r) *Silla Sahai v. Dhum Singh*, A. I. R. (1925) Oudh 114.

(s) *Surendra Nath v. Khitindra Mohan* (1919)

29 C. L. J. 434.

(t) *Bihari Lal v. Shib Lal* (1924) 46 All. 633.

(u) *Raghubar v. Mohit Narayan*, A. I. R. (1929) Pat. 37.

(v) *Durga Shankar v. Lala Ganga*, A. I. R. (1932) All. 500.

(w) *Bachchu Lal v. Mohammad Mah* (1933) 37 C. W. N. 457 P. C.; *Osman Ali v. Faijian* (1931) 53 C. L. J. 380.

(x) *Kamla Prashad v. Bamdeo*, A. I. R. (1935) Pat. 148.

(y) *Seshayya v. Lakshminarasimha*, A. I. R. (1930) Mad. 160.

Ss. 77-78

Sub-mortgagee.—Where the mortgagor and mortgagee had agreed that there should be no accounting, a sub-mortgagee was not liable where his contract provided for the appropriation of profits towards interest after payment of Government revenue (z).

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of prior mortgagee.

Analysis of the section.—Where through the prior mortgagee's

(1) Fraud

(2) Misrepresentation, or

(3) Gross neglect

(i) another person has been induced to advance money on the security of the mortgaged property,

(ii) the prior mortgagee shall be postponed to the subsequent mortgagee.

General rule of priority.—This section is based on the maxim "*qui prior est tempore potior est jure*." As a rule mortgages rank according to their priority and as they severally stand in order of time (a) unless circumstances displace priority by shewing fraud, misrepresentation or gross negligence on the part of the prior mortgagee or by shewing a better equity on the part of the later mortgagee; one or other of these circumstances must be shewn (b). Now, whatever definition we take of the three ingredients in the section—fraud, misrepresentation or gross negligence—it is clear that the section makes them disjunctive and that one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive (c). The section applies to a contest between prior and subsequent mortgagees and not between a prior mortgagee and subsequent purchaser (d).

Fraud.—A prior mortgagee is postponed to a subsequent encumbrancer if he be guilty of an act committed by him or with his connivance or his agent with the intention of drawing another person or his agent to enter into a contract, which, but for such act or connivance, he or his agent would not have made (e). It may consist in a suggestion as to a fact of that which is not true, by one who does not believe it to be true or the active concealment of a fact by one having knowledge or belief of the fact. It is a false representation. There must be suppression of facts which would actively mislead another. It differs from mere non-disclosure (f). Mere

(z) *Mahmood Ali v. Ali Mirza*, A. I. R. (1934) Oudh 220.

(a) *Symmes v. Symonds* (1703) 4 Bro. Parl. Cas. 328, 2 E. R. 222.

(b) *Bradley v. Riches* (1878) 9 Ch. D. 189.

(c) *Nanda Lal Roy v. Abdul Aziz* (1916) 43 Cal. 1052.

(d) *Sita Ram v. Raj Narain*, A. I. R. (1934) Oudh 283; *Subraya v. Ganpa* (1911) 35 Bom. 395.

(e) *Pickard v. Sears* (1837) 6 Ad. & El. 469, 112 E. R. 179; *Ibboltson v. Rhodes* (1706) 2 Vern. 554, 23 E. R. 958; *Draper v. Borlace* (1699) 2 Vern. 370, 23 E. R. 833; *Oliver v. Hinton* (1899) 2 Ch. 264; *Walker v. Linom* (1907) 2 Ch. 104.

(f) *Peel v. Gurney* (1873) 6 H. L. 403; see sec. 17 Indian Contract Act, 1872.

silence is not fraud unless it is the duty of the person keeping silence to speak or unless his silence is in itself equivalent to speech. The fraud of a stranger is immaterial (*g*). The general rule of law as stated by Bramwell, L.J., is clear, that no action is maintainable for a mere statement, although untrue, and although acted on, to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it (*h*). Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. To prevent a false statement being fraudulent, there must be an honest belief in its truth. If fraud be proved, the motive of the person guilty is immaterial (*i*). A representation which does not operate on the mind is not fraud (*j*). Fraud must be substantially proved (*k*). The obligation is not discharged because the person charged has himself told an untrue story (*l*). The statement must be as to a fact and not a mere expression of opinion (*m*). It need not be made to the injured party (*n*). And where a representation is capable of two meanings, he must tell the Court which meaning he attached to it (*o*).

Sub-mortgage.—On the principle that an assignee of a chose in action takes subject to equities, if the original mortgage be fraudulent and void, the sub-mortgage would also be regarded as void (*p*).

Conduct in relation to title-deeds.—In considering what conduct in relation to the title-deeds on the part of a mortgagee, who has the legal estate, is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title-deeds without knowledge of the legal mortgage, the question is not what circumstances may, as between two equities, give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate. The subject has been exhaustively dealt with by Parker, J., in the case below (*q*).

Laches of mortgagee.—A mortgagee who parts with the deeds and then by laches enables the mortgagor to commit a fraud by depositing the title-deeds with a third party, has no equity against a subsequent encumbrancer (*r*). And where the solicitors of a mortgagee had handed over the deeds to the mortgagor who was also their client and who fraudulently deposited them with another encumbrancer and then the solicitors paid off the first charge, it was held that the equitable mortgage of the subsequent encumbrancer took priority over the prior charge vested in the solicitors (*s*). The Court will postpone a legal mortgage to a subsequent equitable security, where the legal mortgagee has assisted the fraud (*t*).

Representation.—A representation is a statement or assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance

- (*g*) *Wheelton v. Hardisty* (1857) 8 E. & B. 232, 120 E. R. 86; see explanation to sec. 17, Indian Contract Act, 1872.
 (*h*) *Dickson v. Reuters Telegraph Co.* (1877) 3 C. P. D. 1.
 (*i*) *Derry v. Peek* (1889) 14 A. C. 337.
 (*j*) *Arkwright v. Newbold* (1880) 17 Ch. D. 324; *Horsfall v. Thomas* (1862) 1 H. & C. 90, 158 E. R. 813.
 (*k*) *Abdul Hossein v. C. A. Turner* (1887) 11 Bom. 620 P. C.
 (*l*) *Mahomed Gulab v. Mahomed Sulliman* (1894) 21 Cal. 612.
 (*m*) *Harvey v. Young* (1602) Yelv. 21, 180 E. R. 15; *Lindsey Petroleum Company v. Hurd*

- (1874) 5 P. C. 221.
 (*n*) *Langridge v. Levy* (1837) 2 M. & W. 519.
 (*o*) *Smith v. Chadwick* (1884) 20 Ch. D. 27.
 (*p*) *Cockell v. Taylor* (1851) 15 Beav. 103, 51 E. R. 475.
 (*q*) *Walker v. Linom* (1907) 2 Ch. 104.
 (*r*) *Waldron v. Sloper* (1852) 1 Drew. 193, 61 E. R. 425; *Shropshire Union Railways and Canal Co. v. The Queen* (1875) 7 H. L. 496.
 (*s*) *Dowle v. Saunders* (1864) 10 Jur. N. S. 901, 71 E. R. 456.
 (*t*) *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch. D. 482; *Walker v. Linom* (1907) 2 Ch. 104.

S. 78 relating to it. The subject has been discussed by Williams, J., in (u). It must be of fact, present and existing (v).

Plea of "non est factum."—A married woman entitled to a reversionary interest was induced by her husband to execute a document which he represented to be a power-of-attorney enabling him to raise money at some future time. It was in fact a mortgage of a reversionary interest to which she was entitled. The wife knew that if her husband did eventually raise money under the document, it would be raised out of her reversionary interest. The wife pleaded, among other defences, *non est factum*. Held, the husband's misrepresentation was as to the nature and character of the deed and the plea was good as to the whole deed, and even if the charge on the wife's reversionary interest were valid, the defence ought to prevail as to her covenant to pay principal and interest (w).

What constitutes misrepresentation.—If a man having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of fraud for he takes upon himself to warrant his own belief of the truth of that which he so asserts (x). Similarly, a positive assertion of that which is not true, by one who believes it to be true, made in a manner not warranted by his information, amounts to a misrepresentation, if in point of fact it turns out to be false (y). Again, an innocent representation may vitiate a contract if it induces a party to a contract to make a mistake as to the substance of the thing which is the subject-matter of the contract. Just as fraud is a wilful mis-statement of fact, misrepresentation is an innocent representation of fact. In fraud there is an element of deceit whilst misrepresentation consists in a positive assertion which is not believed to be false or a breach of duty without any intention to deceive. Misrepresentation which does not induce consent is not actionable (z).

Estoppel by postponement.—When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither the former nor his representative shall be allowed to deny the truth of that thing (a). Fraud is not a necessary ingredient in raising an estoppel. By O. 21, rules 13 and 66, a duty is imposed on the applicant to disclose to the Court his own lien (which he must know of) in his application for sale. If he refrains from notifying it, it matters little to the purchaser who does not know of his lien what his motives are in refraining to notify that which he is bound in law to disclose. When, therefore, in execution of a money decree obtained for the second and third instalments due on his mortgage bond, the mortgagee brought to sale the property which he held in mortgage, but in his application for execution did not mention his lien on the property for the remaining instalments, the purchaser supposing that he purchased an absolute title was held to have purchased the property free of the mortgagee's lien (b). And where mortgaged land

(u) *Behn v. Burness* (1863) 3 B. & S. 751, 122 E. R. 281.

(v) *Cavaleiro v. Puget* (1865) 4 F. & F. 537.

(w) *Bagot v. Chapman* (1907) 2 Ch. 222; *Foster v. Mackinnon* (1869) 4 C. P. 704; *National Provincial Bank of England v. Jackson* (1886) 33 Ch. D. 1; *Kennedy v. Green* (1834) 3 My. & K. 699, 40 E. R. 266.

(x) *Evans v. Edmonds* (1853) 17 Jur. 883, 138 E. R. 1407.

(y) *Schmider v. Heath* (1813) 3 Camp. 506; *Ward v. Hobbs* (1877) 3 Q. B. D. 150; see

sec. 18, Indian Contract Act, 1872.

(z) Explanation to sec. 19, Indian Contract Act, 1872.

(a) *Pickard v. Sears* (1837) 6 Ad. & El. 469, 112 E. R. 179; sec. 115, Indian Evidence Act, 1872.

(b) *Ramchandra v. Jairam* (1898) 22 Bom. 686; *Jaganatha v. Ganga Reddi* (1892) 15 Mad. 303; *Kasturi v. Venkatachalapathi* (1892) 15 Mad. 412; *Tirippa v. Murugappa* (1884) 7 Mad. 107.

was sold by the mortgagee in execution of a money decree, the mortgagee was estopped from subsequently enforcing his mortgage as against a purchaser at such sale without notice of the mortgage, if he had fraudulently concealed the fact of his mortgage (c). Similarly, a mortgagee is postponed by conduct, when being privy to a subsequent mortgage, he fails to give notice of his own mortgage and engrosses the second mortgage (d), as where counsel holding a mortgage draws up a mortgage with a covenant against encumbrances (e), or where a first mortgagee being approached for information denies that he has any charge on the property (f).

Negligence—acting carelessly.—There are generally considered to be three degrees of negligence: (1) ordinary, which is the want of ordinary diligence; (2) slight, the want of great diligence; and (3) gross, the want of slight diligence. But “gross negligence” has been defined to be “only ordinary negligence with a vituperative epithet” (g).

Gross negligence.—See commentaries on section 3 on the subject of notice.

Gross neglect.—The word “gross” means absolute or entire, and negligence imports the neglect of some duty towards the person injured (h). Mere negligence in the custody of documents does not make a person liable for the use improperly made of them (i), so as to a corporate seal (j). There is no general duty to all the world that a man should be careful as to the custody of his documents (k). Mere carelessness or want of prudence will not displace priority (l). It is not necessary that the negligence must be such that the Court will, on the ground of it, impute fraud or that gross negligence should amount to evidence of a fraudulent intention, an expression which is certainly embarrassing, for negligence is that not doing of something from carelessness or want of thought or attention, whereas a fraudulent intention is a design to commit some fraud and leads men to do or omit doing a thing not carelessly but for a purpose. The section uses gross neglect in a different sense from fraud and as such constitutes itself a ground for taking away the benefit of the legal estate from the first encumbrancer in favour of the second even if there be no fraud. The negligence must be so gross as to make the mortgagee answerable for the frauds which he enables others to commit (m). The English cases, however, until we reach *Oliver v. Hinton* (n), regarded as a settled principle that there must be either direct fraud or negligence amounting to evidence of fraud to induce the Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed (o). It is clear from the case *Oliver v. Hinton* (p) that a purchaser obtaining the legal estate, but making no enquiry for the title-deeds, or making inquiry and failing to take reasonable means to verify the truth of the excuse made for not producing them or handing them over, is, although perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate so as to deprive a prior encumbrancer of his priority.

- (c) *Agarchand Gumanchand v. Rakhina Hanmany* (1888) 12 Bom. 678; *Muhammad Hamid-ud-din v. Shib Sahai* (1899) 21 All. 309.
- (d) *Clare v. Bedford (Earl)* cited in 2 Vern. 151, 23 E. R. 703.
- (e) *Draper v. Borlace* (1699) 2 Vern. 370, 23 E. R. 833; *Strong v. Hakes* (1853) 4 D. G. M. & G. 186.
- (f) *Ibbotson v. Rhodes* (1706) 2 Vern. 554, 23 E. R. 958.
- (g) Per Rolfe, B., in *Wilson v. Brett* (1843) 11 M. & W. 113, 152 E. R. 757.
- (h) *Swan v. North British Australasian Co.* (1863) 2 H. & C. 175, 159 E. R. 73.

- (i) *Baxendale v. Bennett* (1878) 3 Q. B. D. 525.
- (j) *Bank of Ireland v. Evans Charities* (1855) 5 H. L. C. 389, 10 E. R. 950.
- (k) *Arnold v. Cheque Bank* (1876) 1 C. P. D. 578.
- (l) *Garside v. Liverpool Railway Permanent Benefit Building Society* (1897) 13 T. L. R. 189 C. A.
- (m) *Colyer v. Finch* (1856) 6 H. L. C. 905.
- (n) (1899) 2 Ch. 264.
- (o) *Martinez v. Cooper* (1826) 2 Russ. 198, 217, 38 E. R. 309; *Evans v. Becknell* (1801) 6 Ves. 174, 31 E. R. 998.
- (p) (1899) 2 Ch. 264.

S. 78

Parting with the title-deeds with instructions which are exceeded.—A person who puts it in the power of another to raise moneys by deceit must take the consequences. He cannot afterwards rely on a particular or different equity (*q*). Where a mortgagee set his lawyer at defiance and lent the lease to the mortgagor who promised to inform the person, from whom he proposed to borrow, about his prior charge, he was postponed to the bankers without notice of prior charge (*r*). And where two ladies who being prior mortgagees, allowed their brother to have the deeds for the purpose of giving priority to a particular charge and who instead of giving priority to that particular charge only borrowed other money, the sisters were postponed to the person from whom the brother borrowed money (*s*).

Handing over title-deeds to a third person to enable him to raise money.—It is well settled that if a man hands over the *indicia* of title to a third person for the purpose of enabling that person to raise money either for his own benefit (*t*) or for the benefit of the owner (*u*) but with a limit on the amount, the lender being ignorant of the limit, is entitled to a charge for the whole amount advanced although it exceeds the limit (*v*).

Choosing to take a bundle of deeds without examining them.—This is not such wilful negligence as to fix the legal mortgagee with constructive notice of the prior charge of an equitable mortgagee who had the rest of the documents. In order to deprive him of his priority, he must be guilty of fraud or of that wilful negligence which leaves the Court to conclude that he is an accomplice in the fraud (*w*). So when a mortgagee left the deeds with his solicitor and after his death his executor called for them and received only the mortgage deed, which he was led to believe was the only title-deed relating to the property and in the meantime the mortgagor deposited the deeds with another as security for money advanced without notice of the legal mortgage, the Court refused to postpone the legal mortgage to the subsequent mortgage as neither the executor nor his testator had been guilty of gross negligence (*x*).

Sufficient reason for non-delivery but not for their non-production and herein what is a reasonable inquiry.—It cannot be denied that a mortgagee is bound to inquire into the title of his mortgagor and will be affected with notice of what appears upon the title, if he does not inquire (*y*). A false answer or a reasonable assurance given to an inquiry made may dispense with the necessity of further inquiry, but it is impossible beforehand to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry (*z*), nor could the validity of the excuse be admitted that it was unnecessary to inquire, because it would have led to no result (*a*). And where inquiry was made for the title-deeds and the mortgagor said they were in his possession but that they would not be delivered as they related to other property, but no abstract of title was asked for or delivered and no further inquiry was made nor any endeavour made to ascertain what they consisted of or to have them produced, it was held that this conduct amounted to negligence so gross, as to render it unjust to deprive the prior

(*q*) *McHenry v. Davies* (1870) 10 Eq. 88.

(*r*) *Briggs v. Jones* (1870) 10 Eq. 92.

(*s*) *Perry-Herrick v. Allwood* (1857) 25 Beav. 205, 44 E. R. 895.

(*t*) *Perry-Herrick v. Allwood* (1857) 25 Beav. 205, 44 E. R. 895; *Jones v. Rhind* (1869) 17 W. R. 1091; *Clarke v. Palmer* (1882) 21 Ch. D. 124.

(*u*) *Brocklesby v. Temperance Permanent Building Society* (1895) A. C. 173; *Lloyds Bank v. Bullock* (1896) 2 Ch. 192; *Roper v. Castell*

& *Brown, Ltd.* (1898) 1 Ch. 315.

(*v*) *Rimmer v. Webster* (1902) 2 Ch. 163.

(*w*) *Ratcliffe v. Barnard* (1871) 6 Ch. App. 652.

(*x*) *Colley v. National Provincial Bank of England Ltd.* (1904) 48 So. Jo. 589.

(*y*) *Wilson v. Hart* (1866) 1 Ch. 463.

(*z*) *Jones v. Smith* (1841) 1 Hare. 43, 66 E. R. 943.

(*a*) *Jones v. Williams* (1857) 24 Beav. 47, 53 E. R. 274.

mortgagee of his priority (b). But where a lessee who had deposited his lease by way of equitable mortgage surrendered the term to the lessor, who was told that the lease was with a friend, but that he had neither assigned nor charged his interest nor pledged the document, the lessor having no notice of the deposit and not being guilty of gross or wilful negligence, was held entitled as a holder of the legal estate, to priority over the equitable mortgagee (c). The Court will not impute fraud or gross or wilful negligence if the mortgagee has made a *bona fide* inquiry and received a reasonable excuse for non-delivery; but if he omits all inquiry, it would be otherwise; and because a mortgagor is the solicitor for the mortgagee, it does not necessarily follow that he has constructive notice of facts connected with the title which are known to his mortgagor (d). Even though there be no negligence of the mortgagee but that of his solicitor, he will be disentitled from deriving any benefit from his legal title, where by reason of the contemporaneous delivery of their mortgage deeds two independent mortgages are jointly seised of the legal estate but one of them has received the title-deeds without notice of the other's title while the other has neither claimed the deeds nor made any inquiry for them (e). A solicitor who was acting as trustee of a settlement, advanced moneys to a client to whom he fraudulently handed over the title-deeds. The client suppressed the mortgage and deposited them with a bank which obtained a certificate from the same solicitor that the title was good. On the bankruptcy of the solicitor, the deposit with the bank was discovered by the co-trustee and the beneficiaries. Both the solicitor and the client being dead, the mortgage deeds could not be discovered. The Court refused to impute notice of the first mortgage to the bank owing to the fraud of the solicitor, they being mortgagees for value without notice of the prior mortgage (f). The presumption that a solicitor has communicated to his client facts which he ought to have made known, cannot be rebutted by proof that it was to the solicitor's interest to conceal the facts (g). But where a lady lent moneys to her solicitor on the deposit of title-deeds, but the deeds deposited did not contain the later deeds, and the solicitor deposited them with his bankers to secure an advance, she was not considered guilty of gross negligence (h). It is now well settled that when fraud is out of the case on both sides, the question entirely depends upon this, whether there was gross and wilful negligence (i).

Reversion.—The mortgagee of a reversion not having the title-deeds, cannot be postponed (j). Two mortgagees were executors and also tenant for life and reversioner, respectively. The former handed the title-deeds to the mortgagor, who obtained them on the pretence of securing moneys to pay off the mortgagees. Afterwards he returned some deeds, having mortgaged the others to a bank. Discovery of the fraud was made on the death of the tenant for life, and it was held that whatever rights the bank might have had against the tenant for life, the surviving executor who was also a reversioner, was entitled to priority over the bank and to delivery of the title-deeds (k).

(b) *Oliver v. Hinton* (1899) 2 Ch. 264.

(c) *Brown v. Stedman* (1896) 40 So. Jo. 457.

(d) *Hewitt v. Loosemore* (1851) 9 Hare. 449, 68 E. R. 586; *Atterbury v. Wallis* (1856) 8 De. G. M. & G. 454, 44 E. R. 465; *Agra Bank v. Barry* (1874) 7 H. L. 135; *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch. D. 482; *Manners v. Mew* (1885) 29 Ch. D. 725; *Colley v. National Provincial Bank of England* (1904) 20 T. L. R. 607.

(e) *Hopgood v. Ernest* (1865) 3 De. G. J. & Sm.

116, 46 E. R. 581.

(f) *Waldy v. Gray* (1875) L. R. 20 Eq. 238.

(g) *Bradley v. Riches* (1878) 9 Ch. D. 189.

(h) *Roberts v. Croft* (1857) 2 De. G. & J. 1, 44 E. R. 887.

(i) *Hunt v. Elmes* (1830) 28 Beav. 631, 45 E. R. 745; *Dixon v. Muckleston* (1872) 8 Ch. App. 155.

(j) *Tourle v. Rand* (1789) 2 Bro. C. C. 650, 29 E. R. 360.

(k) *Jones v. Ingham* (1893) 1 Ch. 352.

S. 81

Marshalling and Contribution.

81. *If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.*

Marshalling securities.

Old section.—If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has no notice of the former mortgage, the second mortgagee is in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Amendment.—By Act 20 of 1929, the old section as it stood above was substituted by the present section.

Analysis of the section.—If the owner of two or more properties

- (i) mortgages them to one person,
- (ii) and then mortgages one or more of the properties to another person

The subsequent mortgagee (in the absence of a contract to the contrary) is entitled :

- (a) to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him.
 - (i) So far as the same will extend
 - (ii) but not so as to prejudice the right of the mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

Marshalling securities.—Section 81 appears to enact as a rule of law, the equity of marshalling securities as administered by the Courts of Chancery in England. The principle on which it rests is that a person having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund (t). But no marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the same person and have demands against the property of the same person (u). The general principle of marshalling was stated by Sir William Grant M. R., that “a person having resort to two funds shall not by his choice disappoint another, having one only” (v). The doctrine of marshalling comes to this, that if A has a charge upon Whiteacre and Blackacre and if B has also a charge upon Blackacre only, A must take payment of his charge out of Whiteacre, and must leave Blackacre, so that B, the other creditor, may follow it, and obtain payment of his debt out of it ; in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one

(t) *Aldrich v. Cooper* (1803) 8 Ves. 382, 32 E. R. 402.

(u) *Ex-parte Kendall* (1811) 17 Ves. 514, 34 E. R.

199.

(v) *Trimmer v. Bayne* (1802) 7 Ves. 508, 32 E. R. 205.

person, and subsequently one of them, Blackacre, is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave to the second mortgagee Blackacre, upon which alone he can go (w).

Notice.—According to the Act as it stood prior to the amendment, absence of notice of prior mortgage was considered necessary to enable the subsequent mortgagee to exercise his right to marshal. By the amendment, however, this requirement has been done away with and it is now not necessary to inquire whether the second mortgagee had notice of the prior mortgage. Consequently decisions of the Indian Courts based on notice must be regarded as obsolete. This provision seems to have got in owing to an observation in *Lanoy v. The Duke of Athol* (x), but subsequent decisions of the English Courts have thought that the rule as to marshalling was independent of the fact whether the subsequent creditor had notice or not. This was pointed out by Kay, L.J., in *Flint v. Howard* (y), where his Lordship has at length reviewed the authorities.

Two properties not on the same footing.—Where two properties are in the hands of the same person, the doctrine of marshalling cannot apply where different rights exist, and unless a creditor with the superior right has security over the two properties to which he might have resorted under equal circumstances, the principle of marshalling does not apply (z).

Principal and surety.—A surety is entitled to marshal. A person effected a policy on his own life and mortgaged it to secure an advance of £1,000. A few months after, he effected a second policy which he mortgaged to secure a loan of £500 and then a year after effected a further policy which together with the first policy was mortgaged to secure £1,500. In respect of this last mortgage two persons, one of whom afterwards became bankrupt, became surety for repayment of the amount thereby secured. Six months after the last mortgage, the mortgagor became bankrupt and the surety was compelled to pay part of the debt under a decree obtained against him by the mortgagee. It was held that the plaintiff was entitled to the right claimed by him and to having securities marshalled so as to pay out of the balance of the several policy moneys, the sums which he had been compelled to pay as surety under the judgment including the costs of the action (a).

Partition of mortgagee's estate.—On a division of the mortgaged property between heirs who divide the interest of the mortgagee between themselves in moieties, each moiety being like the mortgage itself, secured on both the shares, one of the heirs cannot claim to proceed against the other moiety, but must first sell the property mortgaged to him and can only proceed against the other property in the event of the proceeds of the first sale not being sufficient to satisfy his decree (b).

Must not prejudice third parties.—The doctrine does not apply where there are different funds as to which different rights exist. Assets shall not be marshalled where by so doing another man's right would be prejudiced (c). A person having estates A, B and C with mortgages upon all, executed a voluntary settlement of C and afterwards created a mortgage upon B alone. By this doctrine he could not throw the mortgages of A, B and C upon the estate conveyed away by voluntary

(w) *Webb v. Smith* (1885) 30 Ch. D. 192.

(x) (1742) 2 Atk. 444, 26 E. R. 668.

(y) (1893) 2 Ch. 54.

(z) *Webb v. Smith* (1885) 30 Ch. D. 192, 199.

(a) *Heyman v. Dubois* (1875) 13 Eq. 158; *Praed v.*

Gardiner (1788) 2 Cox. Eq. Cas. 86, 30 E. R. 40; *Re. Westzintus* (1833) 5 B. & Ad. 817, 110 E. R. 992.

(b) *Chunital v. Fulchand* (1894) 18 Bom. 160.

(c) *Webb v. Smith* (1885) 30 Ch. D. 192.

S. 81 settlement, in order that he may leave B entirely clear and free from the mortgage debt (*d*).

Limitations of the doctrine of marshalling.—

1. There must be no contract to the contrary.
2. Assets shall not be marshalled where by so doing another man's rights would be prejudiced (*e*).
3. Nor will marshalling be allowed to prejudice the rights of the prior mortgagee.
4. Both claims must be against the same debtor (*f*).
5. Both funds or estates must be in existence when the claim arises (*g*).
6. It should not prejudice the priority of securities (*h*).
7. Marshalling cannot be enforced so as to throw the prior charge which exists on both estates against the security which may be insufficient or of a dubious nature. Similarly, the existence of a dispute which may involve the prior mortgagee in litigation would take the case out of it (*i*).

The rule does not apply when there are separate second mortgages (*j*). Two properties, X and Y, were mortgaged to A and afterwards X to B and Y to C. This would not entitle B to throw A's mortgage on C's estate and so destroy C's security.

Time to marshal.—The time to marshal is when the prior mortgagee seeks to realize his security (*k*).

Right of an equitable mortgagee to marshal.—Testator gave freehold and leasehold estates charged with the payment of his debts and legacies, to his wife for life, and the residue to H. and five other persons and appointed H. executor, who purchased the interests of four of the other residuary legatees, and afterwards in 1845, deposited title-deeds of the freehold and leasehold estates with B. as security for a personal debt contracted in 1843. Held, this was a good equitable mortgage of the five-sixth of H. and the mortgagee was entitled in case of deficiency to have assets marshalled (*l*).

Purchaser for value.—The right to have the securities marshalled extends to a purchaser and is not confined to a puisne encumbrancer (*m*). No distinction can be drawn between a purchaser at a Court sale held in pursuance of a mortgage decree and an ordinary purchaser or a purchaser of an auction sale in pursuance of a money decree (*n*). In the case of a purchaser at a sale for arrears of Government revenue, the Court refused to extend the rule (*o*).

Purchaser of portion of mortgaged property has no right to marshal.—A, the owner of property X and Y, mortgaged them to B and subsequently sold and delivered possession of X to C. In B's suit on the mortgage, C contended that he

(*d*) *Dolphin v. Aylward* (1870) 4 H. L. 486.
 (*e*) *Webb v. Smith* (1885) 30 Ch. D. 202; *Unnamalai v. Gopalaswami* (1931) 54 Mad. 59; *Subraya v. Ganpa* (1911) 35 Bom. 395.
 (*f*) *Ex-parte Kendall* (1811) 17 Ves. 514, 34 E. R. 199; *Venkayya v. Venkataramayya*, A. I. R. (1930) Mad. 178; *Gopala v. Saminatha Ayyar* (1889) 12 Mad. 255.
 (*g*) *Re. Professional Life Assurance Co.* (1867), L. R. 3 Eq. 668.
 (*h*) *Binns v. Nichols* (1868) L. R. 2 Eq. 258; *Wallis v. Woodyear* (1855) 2 Jur. N. S. 179.
 (*i*) *Krishna Ayyar v. Mulhukumaraswamy Pillai* (1906) 29 Mad. 217.
 (*j*) *Gibson v. Seagrim* (1855) 20 Beav. 614, 52

E. R. 741.
 (*k*) *Unnamalai v. Gopalaswami* (1931) 54 Mad. 59.
 (*l*) *Haynes v. Forshaw* (1853) 11 Hare. 93, 68 E. R. 1201; *Farhall v. Farhall* (1871) 7 Ch. App. 123.
 (*m*) *Narain Singh v. Mohammad Khalil-ul-Rahman*, A. I. R. (1924) Pat. 459.
 (*n*) *Lakshmidas v. Jannadas* (1898) 22 Bom. 304; *Chunilal v. Fulchand* (1894) 18 Bom. 160; *Inderdawan v. Gobind Lall* (1896) 23 Cal. 790.
 (*o*) *Beni Prosad Sinha v. Rewall Lall* (1897) 24 Cal. 746.

was entitled to require B to proceed against Y and that recourse should be had to X only if Y be found insufficient to satisfy the debt due to B. This contention was not, however, upheld on the ground that a purchaser of a part has no right to marshal (*p*). A similar case arose before the same Court which, interpreting the qualifying part of the section that marshalling shall not prejudice the rights of the first mortgagee, held that his right to proceed against any of the properties mortgaged to him could not be hampered by any obligation undertaken to others by his mortgagor, subsequent to his contract and that he could proceed to sell in any order he chose, in which case the second mortgagee would be entitled to stand in his shoes as regards the other estate (*q*). Both decisions are prior to the amendments of section 56 and the present section, which invite a different interpretation.

Execution proceedings.—When there is no adjudication as to the order in which property is to be sold, the Court executing the decree has a right to determine the order in which the sale shall take place (*r*). But when the right of marshalling has been decided in the judgment, it cannot be re-opened in execution proceedings (*s*).

82. *Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.*

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the *subsequent* mortgagee.

Amendment of the section.—This section has been amended by Act 20 of 1929. There was no provision in the old section where the mortgaged property was subsequently sub-divided into distinct and separate portions and the absence

(*p*) *Kommineri Appayya v. Mangala Rangayya* (1908) 31 Mad. 419 (F. B.)
 (*q*) *Thanmul Sowcar v. Nathu Ramadoss* (1928) 51 Mad. 648.

(*r*) *Chokkalinga v. Ramanadan*, A. I. R. (1926) Mad. 1031.
 (*s*) *Subba Aiyar v. Pichumani*, A. I. R. (1926) Mad. 1144.

S. 82 of this led to a conflict of decisions. Secondly, the Courts in India being divided as to the time at which the valuation was to be taken for the purpose of contribution, the amendment provides that the value taken shall be the value at the time of the original mortgage. The last paragraph has been amended by the word "subsequent" being substituted for the word "second" before the word "mortgagee."

Analysis of the section.—Paragraph 1—

1. Where property is subject to a mortgage and
2. Belongs to two or more owners having distinct and separate rights of ownership.
3. The different shares in or parts of such property are liable.
 - (a) In the absence of a contract to the contrary
 - (b) To contribute rateably to the mortgage debt
4. The rate of such contribution shall be
 - (1) According to the value at the date of the mortgage
 - (2) After deducting the amount of any other mortgage or charge to which it may be subject on that date.

Paragraph 2.—Where of X and Y belonging to the same owner—

- (i) X is mortgaged to secure one debt
- (ii) And then both X and Y are mortgaged to secure another debt and
- (iii) The former debt is paid out of X. Both X and Y are liable
 - (a) in the absence of a contract to the contrary
 - (b) to contribute to the latter debt
 - (c) after deducting the amount of the former debt from the value of X out of which it has been paid.

Paragraph 3.—Where marshalling and contribution conflict the former is to prevail.

Principles upon which contribution is to be assessed.—The principle upon which contribution is assessed is rateable distribution of the mortgage debt over the whole mortgaged property in whosoever's possession it may be. If once they have been mortgaged and transferred subject to such mortgage, they remain liable. It is necessary that they must be held by different persons. The principle is adjustment of the debt amongst different persons in proportion to the value of the properties of which such persons have become the owners. The liability to contribute is after deducting from the value of the property the amount of any other mortgage or charge to which it may have been subject at the date of the mortgage. This section enunciates the rule of contribution where several properties mortgaged belong to one person, who has executed a mortgage of them and they subsequently pass into different hands whether by private sale (*t*) or public auction (*u*), partition (*v*), gift, inheritance (*w*), or device or in any other manner. Such properties may even consist of distinct shares in or part of one property as in the case of co-sharers or

(*t*) *Hirachand v. Abdal* (1879) 1 All. 455; *Jagat Narain v. Qutub Husain* (1880) 2 All. 807; *Chagandas v. Gansing* (1896) 20 Bom. 615; *Baldeo Sahai v. Baiji Nath* (1891) 13 All. 371.
 (*u*) *Rama Chankar Prasad v. Ghulam Hussain*

(1921) 43 All. 589.
 (*v*) *Ramabhadrachar v. Srinivasa* (1901) 24 Mad. 85.
 (*w*) *Mutty Lal Pal v. Nandu Lal Neogi* (1908) 12 C. W. N. 745; *Nawab Jahan v. Mirza Shujaiddin* (1905) 9 C. W. N. 865.

co-owners (x), in which case liability to contribute is distinct and several, and not joint.

S. 82

Between purchasers of several properties which are subject to the same debt, such properties are liable to contribute to the mortgage debt in proportion to their value (y). This section has nothing to do with the personal liability of co-mortgagors which is governed by sections 92 and 95 (z). This liability is not affected by any subsequent release by the mortgagee which would mean splitting up of the mortgage (a). A mortgagee, who has a security upon two or more properties which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected (b). But there is nothing in the Transfer of Property Act to support the view that as between the mortgagee and the holders of the equity of redemption, the mortgagor is bound to distribute in a certain manner or is unable to enforce it against each and every part of the property made security for the mortgage or to distribute (c) his debt rateably upon the mortgaged properties (d) unless he has by his act prejudicially affected the rights of the holders of the properties to contribute among themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties who are liable though the properties in their hands have not been included in the suit (e). Where two properties mortgaged together to secure one debt have become vested in different owners, who purchase subject to the mortgage, if one of them discharges the mortgage he is entitled, under section 82 of the Transfer of Property Act, 1882, to rateable distribution from the other, although under an earlier contract of purchase made with the mortgagor (the other not being a party) he retained part of the then agreed price for the express purpose of discharging the mortgage (f). Though as between the mortgagor and the purchaser from the mortgagor, property in the hands of the mortgagor should be sold first without giving the mortgagee any claim for contribution, yet when all the properties have passed to the hands of purchasers for value, there is no sufficient reason for holding that the later purchasers should not be entitled to contribution like the earlier ones (g). On a transfer *pendente lite* the transferee takes the property with all its imperfections. Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. In a sale by the mortgagee under his decree of property A, the proceeds were more than sufficient to satisfy the decree. Before sale, X, in execution of a simple money decree, acquired a share in property A and he sued for contribution from property B, in that so far as his share in property A went, he had satisfied the mortgage debt and ultimately obtained a decree in his favour; but during the pendency of that

(x) *Chagandas v. Gansing* (1896) 20 Bom. 65.

(y) *Din Dayal v. Gursaran Lal* (1920) 42 All. 336; *Meghraj v. Krishna Chandra Bhattacharji*, A. I. R. (1924) All. 365.

(z) *Jai Narain v. Rashik Behari*, A. I. R. (1931) All. 546.

(a) *Hari Kirsan Bhagat v. Valiat Hoosein* (1903) 30 Cal. 755; *Jugal Kishore v. Kedar Nath* (1912) 34 All. 606; *Perumal Pillai v. Raman Chettiar* (1917) 40 Mad. 968; *Sheo Prasad v. Behari Lal* (1903) 25 All. 79; *Sheo Tahal v. Sheodan Rai* (1906) 28 All. 174; *Rama v. Manak* (1912) 7 Bom. L. R. 191; *Maya-shankar v. Burjorji* (1925) 27 Bom. L. R. 1449; *Imam Ali v. Baij Nath* (1906) 33 Cal. 613.

(b) *Imam Ali v. Baij Nath Ram Saher* (1906) 33 Cal. 613; *Surjiram v. Bharamdeo* (1905) 2 C. L. J. 202; *Ponnusami v. Srinivasa*

(1908) 31 Mad. 333; *Muktakeshi Pal v. Ramani Mohan*, A. I. R. (1927) Cal. 195.

(c) *Timaji Krishna Poldar v. Rama Piraji Bhat Khanle* (1918) 20 Bom. L. R. 175.

(d) *Hara Kumari Chowdhurani v. Eastern Mortgage & Agency Co., Ltd.* (1908) 7 C. L. J. 274; *Krishna Ayyar v. Muthukumaraswami* (1906) 29 Mad. 217; *Roghu Nath Persad v. Harlal Sadhu* (1891) 18 Cal. 320.

(e) *Krishna Ayyar v. Muthukumaraswami* (1906) 29 Mad. 217; *Perumal Pillai v. Raman Chettiar* (1917) 40 Mad. 968; *Jugal Kishore v. Kedar Nath* (1912) 34 All. 606.

(f) *Ganeshi Lal v. Charan Singh* (1930) 52 All. 358, 57 I. A. 189; *Muhammad Abbas v. Muhammad Hamid* (1912) A. I. J. 499 distinguished.

(g) *Magniram v. Medhi Hoosein Khan* (1904) 31 Cal. 103.

S. 82 litigation property B had been transferred to Y. Held that Y must take the property subject to X's right to contribute for it in respect of the loss of his share in property A (h). "The doctrine of equity as to contribution has been expressed in different ways by different Judges. Chitty, J., in *re. Dunlop, Dunlop v. Dunlop* (i), says the right of contribution arose where there were two properties available in equity for the debt of course in equal degree. It is quite clear that either by special agreement to be found in the instrument creating the mortgage or by declaration on the part of the testator he can, where two or more properties are comprised in the same security, direct the order in which the securities are to be applied *inter se* so as to make one the first and another the second and so forth available for the purpose of the charge."

Lord Eldon in *Marquis of Bute v. Cunynghame* (j), says that in order that a right to contribution may exist the two properties must be "equally liable."

Lord St. Leonards in *Averall v. Wade* (k) says that there must be "a common fund." Jessel in *re. Dunlop, Dunlop v. Dunlop* (l) says it applies "where the two properties are equally charged."

The claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought.

In *Rajah of Vizianagram v. Rajah of Setrucherla* (m), the following observations appear: "Bearing in mind that in cases in which the right to contribution exists under law, the principle on which it rests is that both in law and equity contribution is bottomed and fixed on general principles of justice and does not spring from contract . . . and the reason given in the books is in *equali jure* the law requires equality. One shall not bear the burden in case of the rest" [per Lord C. B. Eyre in *Swain v. Wall* (n), see also *Dering v. Earl of Winchelsea* (o), also per Lord Redesdale in *Sterling v. Forester* (p)] and that the claim has its foundation in the clearest principles of natural justice, for as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim "*qui sentit commodum sentire debet et onus*" (Story's Equity Jurisprudence, section 493). "It is perfectly immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, i.e., whether he made the payment and thus averted any coercive process against his property or without making such payment, suffered his property to be seised under process of law for the purpose of the amount being realized from its income or by its sale. In either case, he has been damnified to the extent to which the payment made by him or the amount realized from his property exceeds his share of the liability as between him and the party or parties from whom he seeks contribution and the latter have been to that extent benefited." Being a statutory provision by which contribution as between owners of equities of redemption subject to a common mortgage, is regulated, it should not be modified by introduction of any extrinsic principle (q). The intention of section 82 is not that the lien of the mortgagee should be split but simply to determine the liability of the purchasers *inter se*. The section refers to contribution as between the various

(h) *Baldeo Sahai v. Baij Nath* (1891) 13 All. 372.
 (i) (1882) 21 Ch. D. 588.
 (j) (1826) 2 Uss. 275, 38 E. R. 339.
 (k) (1835) L. & G. Temp. Sugd. 252.
 (l) (1882) 21 Ch. D. 588.
 (m) (1903) 26 Mad. 686.

(n) (1641) 1 Rep. Ch. 149, 21 E. R. 534.
 (o) (1787) 1 Cox. Eq. cases 218, 29 E. R. 1184.
 (p) (1821) 3 Bligh. 590, 22 R. R. 76.
 (q) *Ganeshi Lal v. Charan Singh* (1930) 52 All. 358, 57 I. A. 189.

persons who may be liable with respect to the same debt (r). A sale for arrears of revenue does not, *ipso facto*, cancel encumbrances (s). A mortgagee will not be allowed without special reason deliberately to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt (t). Similarly, the mortgage of an undivided share which under a partition has been allotted to another co-sharer, in the absence of fraud cannot be enforced by the mortgagee against the share originally mortgaged, and the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged (u).

Contribution on partial redemption.—Two owners, A and B, mortgaged their two properties jointly. A created a second mortgage on his property. The Court rejected the second mortgagee's claim to contribution, that the original mortgagees were bound to retain the surplus of the sale proceeds of the property of B in excess of the moiety of the mortgage debt for which B was liable and could only claim against the property of A for the balance of the debt over the surplus (v). A and B mortgaged their respective properties to C who retained a part of the consideration to pay a prior mortgagee of B but failed to pay and the prior mortgagee sold the property of B which C purchased in the name of D. Here the wrongful conduct of C having led to the sale of B's property, A was only liable for his quota of the debt and C could not throw the whole burden on A's property (w). Even where two properties belonging to two owners of unequal value were mortgaged to secure a single debt and the mortgagee on recovering one-half of the debt released the property of higher value, the liability of the other property was not only to contribute rateably to the mortgage debt but the mortgagee was entitled to realize the whole of the balance by sale of such property. It, therefore, follows that such of the mortgaged properties as have been sold for realization of the mortgage-money and have thus contributed to the mortgage debt are not liable to a claim for contribution and that such a claim can only be advanced by the owners of those which have contributed more than their rateable share of the debt and against those portions of the mortgaged property only which have not contributed to the mortgage debt and have benefited by the sale of the property of the claimants for contribution. The unsold portion of the mortgaged property affords the fund out of which the claims of all the persons whose properties have contributed more than their own share of liability must be satisfied (x). Where of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, in apportioning liability of the two properties for the latter debt, the value of the two properties must be taken into account and credit given for the amount due on the earlier mortgage out of the value of the property comprised in the subsequent mortgage; but if the amount of the earlier mortgage exceeds the value of the property comprised in that mortgage, the whole of the amount due on the subsequent mortgage, must be recovered from the value of the property comprised in the second mortgage and not included in the earlier mortgage (y). The primary liability on each of several properties included in a mortgage,

(r) *Roghu Nath Pershad v. Harlal Sadhu* (1891) 18 Cal. 320.

(s) *Beni Prasad v. Rewat Lall* (1897) 24 Cal. 746.

(t) *Ram Dhum Dhum v. Mohesh Chunder Chowdhry* (1882) 9 Cal. 406; *Moro Raghunath v. Balaji Trimbak* (1889) 13 Bom. 45; *Lakhmidas v. Jannadas* (1898) 22 Bom. 304.

(u) *Amolak Ram v. Chandan Singh* (1902) 24 All. 483; *Hem Chander Ghose v. Thako Moni Debi* (1893) 20 Cal. 533; *Byjnath Lall*

v. Ramooddeen Chowdry (1875) 21 W. R. 233, 1 I. A. 106.

(v) *Neelamegan v. Govindan* (1891) 14 Mad. 71.

(w) *Wajhat Husain v. Ratan Lal* (1911) 8 A. L. J. 1092.

(x) *Hari Raj Singh v. Ahmad-ud-din Khan* (1897) 19 All. 545.

(y) *Ghulam Hazrat v. Gobardhan* (1911) 8 A. L. J. 195.

S. 82 being under section 82 a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent. There can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability *inter se* is proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it. If the purchaser of a part of the mortgaged property be the mortgagee himself, the rights of the mortgagee and mortgagor, as regards the portion purchased, become vested in the same person, and the result is that a part of the mortgage debt is wiped out by reason of this fusion of interests, and the balance only is recoverable from the remainder of the mortgaged property. It is in consequence of this confluence of interests and the discharge of a portion of the mortgage debt, that upon the mortgagee purchasing a part of the property, the integrity of the mortgage is broken up, and the mortgagee is not allowed to recover the whole amount of the debt from the remainder of the property. The true rule, therefore, is that when the mortgagee buys at an auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage (z).

Where a mortgagee of three properties purchased at an auction the equity of redemption in one of them, it was held that he purchased it subject to its due proportion of the mortgage debt. That proportion of the mortgage debt thus ceased to exist and the lender's right as mortgagee to recover the moneys secured by his mortgage was reduced to that extent. What proportion of the mortgage debt was thus wiped out depended upon the proportion of the value of the house to the value of the rest of the mortgaged properties. That proportion must be settled by the Court executing the decree (a). Where a property is subject to three mortgages and is sold under decrees of two, it is not liable to contribute to the third mortgage (b).

Shield of the mortgagor.—The rule in this section has been enacted with a view to protect a mortgagor against the caprice of a mortgagee who cannot be restrained by a mortgagor in choosing any of the securities held by him for realization of his debt. It is when, in the exercise of his choice injury is caused to the mortgagor, that the latter is entitled to seek relief under this section. There is nothing in the language of the section which compels the conclusion that the mortgagee must distribute his debt in a particular manner or is unable to enforce it against each and every part of the property made security for the mortgage (c). But a mortgagee is not entitled to throw the burden of the entire mortgage debt on a portion of the mortgaged property when through his negligence he has lost his remedy against

(z) *Bisheshur Dial v. Ram Sarup* (1900) 22 All. 284 F. B.; *Mahomed Taki Reza v. W. A. Thomas* (1906) 4 C. L. J. 317; *Chunilal v. Sikishan Singh* (1911) 33 All. 434 (auction); *Shib Lal v. Bhawani Shankar* (1904) 26 All. 72 (auction); *Sarju Kumar v. Thakur Prasad* (1920) 42 All. 544; *Raghavachari v. Venkatanarayana*, A. I. R. (1935) Mad. 456; *Ponnambala v. Annamalai* (1920) 43 Mad. 372; *Nawab Azmat Ali v. Jawahir Singh* (1870) 13 M. I. A. 404.

(a) *Lakhmidas v. Jamnadas* (1896) 22 Bom. 304;

Fakiraya v. Gadigaya (1902) 26 Bom. 88; *Nyaunglebin v. Maung*, A. I. R. (1928) Rang. 266.

(b) *Bhagawati v. Shafaat Muhammad* (1921) 43 All. 42.

(c) *Timaji v. Rama* (1918) 20 Bom. L. R. 175; *Raghu v. Harlal* (1891) 18 Cal. 320; *Krishna Ayyar v. Muthukumarasawmiya* (1905) 29 Mad. 217; *Abdul Rahim v. Abdul Hussein*, A. I. R. (1928) Sind 101; *Hara Kumari v. Eastern Mortgage Agency Co.* (1908) 7 C. L. J. 274.

the owners of the other portion (*d*). Failure to keep an account of what the mortgagor himself was doing with his equity of redemption, was not held to be negligence or laches. In a recent Calcutta case, while observing that in the latter case there being a breach of real duty, the matter possibly might come within the decisions of the cases on which the above exception was engrafted, the section as it stands in its present form or in the form in which it stood prior to the amendment, did not warrant the conclusion that a mortgage by seven persons of their shares in different properties shall be treated as seven entirely separate mortgages. The very contrary was implied by the section and it was open to the mortgagee to recover the whole of his money from any one of these properties, he being entitled to treat the mortgage as one (*e*).

Mortgage charge or encumbrance.—The word “encumbrance” in the old section has been substituted by the Amending Act, 20 of 1929, by the words “mortgage or charge” as it was pointed out by the Privy Council that “encumbrance” is a term of wider connotation than “mortgage” (*f*).

Distribution disturbed.—*Prima facie*, equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the *prima facie* distribution of the burden and throw it wholly on one person, so that where a debtor mortgaged policies of insurance on his life with trustees of an insurance company and entered into a personal covenant to pay the debt, and subsequently made a voluntary assignment of the policies to his wife without referring to the mortgage, and the insurance company, on the death of the debtor, paid to the widow only the amount of the policies less the debt and interest, it was held that the testators’ estate was bound to recoup the widow as the assignee of the policies of insurance, the moneys seized on by the insurance company to pay the debt (*g*). Prior to 13th November 1897, Darby deposited with his bankers certain Dock Warrants and policy of assurance on his own life and executed a memorandum of charge and on 13th November 1897 deposited deeds of certain leasehold premises as security for payment of all moneys for the time being owing from him to the bank. He undertook to pay on demand such moneys as should actually be due. By deed of assignment dated April 3, 1903, out of natural love and affection for his wife, he assigned unto her the leasehold premises for the residue of the term. The deed contained no covenant for title nor any reference to the charge of 13th November 1897, nor to the mortgage by deposit of title-deeds of the leasehold premises. Darby died in October 1906. It was held, that in order to establish a right to a contribution, it was incumbent upon the executors to shew that they had an equity to call upon the assignee to contribute to the debt which was their debt alone. The debt was the debt of the assignor as the charge was created by him, and the charge not being paramount to his own title, they as executors were bound to pay it, and that the widow was under no liability to contribute (*h*).

Purchaser for value, the subsequent conveyance containing covenant for further assurance without reference to mortgage.—A person entitled to an estate, mortgaged it and afterwards sold an undivided moiety of it to a purchaser by duly executed conveyance which made no mention of the mortgage but contained a covenant

(*d*) *Budhmal v. Rama* (1920) 44 Bom. 223, 226;
Imam Ali v. Baij Nath (1906) 33 Cal. 613,
621.

(*e*) *Rajani Kanta v. Sourendra Nath*, A. I. R.
(1934) Cal. 421.

(*f*) *Faquir Chand v. Aziz Ahmad* (1932) 54 All.
199, 59 I. A. 106.

(*g*) *In re Best, Parker v. Best* (1924) 1 Ch. 42.

(*h*) *In re Darby's estate, Rendall v. Darby* (1907)
2 Ch. 465.

S. 82

for further assurance by the vendor with the purchaser. The two moieties afterwards devolved on different persons. In a partition action between the owners of the two moieties, the unsold moiety was made to bear the mortgage debt (i). In 1876 P. mortgaged two properties, the Paper Mills and the reversion to H., for securing £6,000. He then raised a sum of £5,000 on both properties by mortgage in favour of F. in 1882. In 1884 P. made a third mortgage of the Paper Mills only to F. for £2,500. On 30th October 1885 a deed was executed between F. of the first part, P. of the second part and H. of the third part, whereby F. transferred his mortgage debt for £2,500 on the Paper Mills to H. and released the Paper Mills from his mortgage for £5,000. Thus H. became first and second mortgagee of the Paper Mills as well as first mortgagee of the reversion. P. made subsequent mortgages of both the properties. F. foreclosed the mortgages on the reversion subsequent to his own and then brought an action to redeem H.'s mortgage on the reversion on payment of £6,000. and to have a transfer from him of his first mortgage on the Paper Mills as security for what he had paid. Following *Barnes v. Racster*, 1 Y & C., Ch. 401 and *Bugden v. Bignold*, 2 Y & C. Ch. 377, it was held that F. was entitled to redeem both properties on payment of £6,000 to H. and the sum paid by him must be apportioned between the two properties according to their respective values, and that F. was entitled to have a conveyance of reversion absolutely and the Paper Mills to be held as security for such part of the money paid as should be apportioned to that property. For, if F. on redeeming £6,000 should stand as first mortgagee on the Paper Mills for that sum and if H. should redeem him in turn by paying him off the same sum, H. would then be what he was before, viz., first mortgagee of both the properties for £6,000 liable to be again redeemed by P. on the same terms as before, and that there would be perpetual release, each in turn redeeming the other as soon as the other redeemed him. This is absurd and cannot therefore be right (j). Where a mortgagor having two funds mortgaged both to A, then one to B, then both to C, and B claimed that A should pay himself first out of the one on which he B had no charge, C objecting to B's claim, it was refused (k). Whether that right arises from a positive charge or by operation of law, in the circumstances under which the two funds came into A's hands, it is a right which he can exercise against both B and C and an equity to an apportionment of A's debt exists between B and C (l).

Effect of assignment subject to prior charges.—A mortgagor entitled in reversion to funds A and B made three mortgages. Mortgage 1, mortgage 2 of A only, and mortgage 3 of A and B. mortgages 1 and 2 were in the form of assignments, the mortgagees to receive and to pay the mortgage debts thereout, and then pay the surplus to the mortgagor. Mortgage 3 was an assignment of the funds to which the mortgagor was entitled under mortgages 1 and 2 after payment of the debts thereby secured. Fund A was absorbed in payment of mortgage 1. Held, although fund B was not included in mortgage 2, it must be applied in satisfaction of that mortgage in full, in priority to mortgage 3 (m).

In the absence of a contract to the contrary.—These words relate to contracts between mortgagor and mortgagee, that certain properties are to be primarily liable and others secondarily liable and so forth (n). It is not a contract between the

(i) *In re Jones Farrington v. Forrester* (1893) 2 Ch. 461; *In re Cooks Mortgage, Lawhedge v. Tyndall* (1896) 1 Ch. 923.

(j) *Flint v. Howard* (1893) 2 Ch. 54.

(k) *Wellesley v. Mornington (Lord)* (1869) 17 W. R. 355.

(l) *Moxon v. Berkeley Mutual Benefit Building Society* (1890) 59 L. J. Ch. 524.

(m) *Re Mower's Trusts* (1869) L. R. 8 Eq. 110.

(n) *Sonaji v. Krishna* (1931) 27 Nag. L. R. 258; *Ramabhadrachar v. Srinivasa* (1900) 24 Mad. 85; *Muthukumaraswami v. Govinda*, A. I. R. (1932) Mad. 218; *Ganeshi Lal v. Charan Singh* (1930) 52 All. 358, 57 I. A. 189. But see *Isri Prasad v. Jogat Prasad*, (1937) 16 Luck. 557.

owners of the equity of redemption. It does not necessarily refer to a contract made at the time of the mortgage (o). The liability to contribute rateably may be altered by the mortgage decree or by a subsequent arrangement between the parties, so as to throw the debt primarily on some of the properties and secondarily on others (p). The word "collateral" does not necessarily mean "secondary" when the purpose is to make both properties subject immediately to the debt and where having regard to the tenure of the two properties or some other circumstances, the parties do not desire that the titles should be mixed up (q). The leading authority on the subject is the case of *Marquis of Bute v. Cunynghame* (r). In that case Lord Eldon says, "But a man may make a mortgage of two estates in such a way that though the encumbrancer may go against both or either, yet if the owner of the equity of redemption shall have created in the meantime two different titles to those estates so that they shall go to different persons, the estate which was the primary security shall remain the primary security as between the persons claiming under that mortgagor." If you can do it by express terms, you can do it by implication or by terms which amount to the same thing as express terms (s). In these cases, the question is one of construction (t).

Value for the purposes of contribution.—In estimating, for the purposes of giving effect to a claim for contribution, the respective values of two or more properties or the different shares in or parts of such property the subject of the mortgage, the time to be regarded is the date of the execution of the original mortgage in virtue of which contribution is claimed, it being the date upon which the equity of contribution arises. Before the Transfer of Property (Amendment) Act, 1929, there was a conflict of decisions as to whether the value should be calculated as at the date of the original mortgage (u) or at the date of the subsequent transfer. By the amendment the former rule has been adopted in view of the decisions of the Judicial Committee in a suit for contribution in respect of a decree for mesne profits under which all the parties to the suit were liable as judgment debtors, that the basis on which contribution should be estimated was the amount of the respective shares of the parties at the date of the decree for mesne profits. In that case a distinction was made as some of the parties contributed relatively more largely to the earlier payments under the decree, and others to the later payments, on the ground that each payment on account diminished the interest on the decretal amount, and the benefit of that reduction of interest ought to go in relief of those who made the payments and not of those who continued in default (v). Where one of the properties is subjected to an encumbrance jointly with properties not forming part of the security for the mortgage in question, its liability for the debt is to be based rateably upon its value after deducting not the whole of the encumbrance, but such proportion thereof as is attributable to it rateably with other properties jointly subject to the encumbrance (w). The Rangoon High Court, in a mortgage of land over which a house was subsequently erected, adopted the value of the latter for the purpose of contribution (x).

- (o) *Rama v. Manak* (1905) 7 Bom. L. R. 191.
 (p) *Satya Kripal Bandopadhyaya v. Gopi Kishon Mandul* (1902) 6 C. W. N. 583.
 (q) *In re Athill, Athill v. Athill* (1880) 16 Ch. D. 211.
 (r) (1826) 2 Russ. 275, 38 E. R. 339.
 (s) *Lipscomb v. Lipscomb* (1868) 7 Eq. 501;
De Rochfort v. Dawis (1871) 12 Eq. 540.
 (t) *In re Dunlop, Dunlop v. Dunlop* (1882) 21 Ch. D. 583.
 (u) *Mardan Singh v. Thakur Sheo Dayal* (1905) 27 All. 549; *Judgeo Singh v. Habibullah Khan* (1908) 12 C. W. N. 107; *Mutty Lal*

- Pal v. Nandu Lal Ncogi* (1908) 12 C. W. N. 745; *Gobind v. Kailash* (1917) 25 C. L. J. 354; *Shankar v. Lalufat* (1916) 14 A. L. J. 713; *Ishagwan Singh v. Mazhar Ali* (1914) 36 All. 272; *Meghrat v. Krishna* (1924) 46 All. 286.
 (v) *Jotindra Mohun Lahiri v. Guru Prosunno Lahiri* (1904) 31 Cal. 597, 31 I. A. 94.
 (w) *Faqir Chand v. Aziz Ahmad* (1932) 54 All. 199, 59 I. A. 106.
 (x) *Nyaunglebin Co-operative Bank v. Maung*, A. I. R. (1928) Rang. 266.

S. 82

Contribution controlled by marshalling.—The proviso to the section states that in case there is a conflict between marshalling and contribution, the former is to prevail, that is to say, if in respect of any particular case it is to the advantage of a subsequent mortgagee to claim the right of marshalling, whilst it is to the advantage of another subsequent mortgagee to claim the right of contribution, the right of the mortgagee entitled to marshal is to prevail over the right of the other mortgagee. This may be illustrated by an example :—Two properties, X and Y, each of the value of Rs. 800, are mortgaged to A for Rs. 1,000. Then X is mortgaged to B for Rs. 600 and both to C for Rs. 300. Here it is to B's advantage to marshal, for by doing so he can compel A to resort to Y, which is of the value of Rs. 800, and then come upon X, which is also of the value of Rs. 800, and out of the value of the latter property A can receive the balance of Rs. 200 and leave Rs. 600 for B to satisfy his debt, leaving nothing for C. It is, however, to C's advantage to compel contribution, for if that doctrine is applied A would get Rs. 500 out of each property leaving Rs. 300 for B, the balance of X and Rs. 300 for C, the balance of Y, so that B would get half his mortgage satisfied and C fully satisfied. But this would prejudice B, a prior encumbrancer, but the proviso prevents this, with the result that C is left with nothing and B by exercising the right of marshalling is satisfied fully.

Statutory charge.—The provisions of section 82 read with section 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability (y). This view is supported by the decision of a Full Bench of the Allahabad High Court (z). Though an earlier decision of the same Court (a) has held that one of two or more mortgagors whose portion has been sold and has fetched a price in excess of his liability to contribute but has not discharged the entire debt, cannot claim contribution, a decision which was explained in a later case (b) as meaning that the claim could not be enforced until the entire mortgage debt had been satisfied. It is perfectly immaterial whether the party seeking contribution made the payment voluntarily or involuntarily (c). A mortgagor of a one-third interest in the mortgaged property with the leave of the Court after the mortgage decree, sold the mortgaged property and paid the mortgage debt. His co-owner refused to give up possession alleging that the sale, though with the leave of the Court, did not bind his share. His contention was upheld but the Court declared that the purchaser had a charge on the property in possession of the co-owner to the extent of his share of the mortgage debt, on the ground that the mortgage debt having been paid off out of the purchase-money by one of the mortgagors who satisfied the decree, he became entitled to rateable distribution from the co-judgment debtor on whose property he had a lien which passed to the purchaser as soon as it came into existence under section 43 of the Transfer of Property Act (d). A suit to enforce contribution is governed by article 132 of the Limitation Act (e) and must be instituted within 12 years from the date of confirmation of the sale (f). A third party redeeming the mortgage with the knowledge and consent of the mortgagor is entitled to hold the mortgaged property as lienor and the mortgagor cannot recover it from him without paying the

(y) *Muhammad Mian v. Bharat Singh*, A. I. R. (1930) Oudh 280.

(z) *Bhugwan Das v. Karam Husain* (1911) 33 All. 708.

(a) *Ibn Hasan v. Brijbhukhan* (1904) 26 All. 407.

(b) *Muhammad Yahya v. Rashid-ud-din* (1909) 31 All. 65.

(c) *Raja of Vizianagaram v. Setrucharla* (1903) 26 Mad. 686.

(d) *Danappa v. Yamnappa* (1902) 26 Bom. 379; *Sitla Din v. Sheo Prasad* (1882) 4 All. 58.

(e) *Bhagvandas Das v. Hari Debi* (1904) 26 All. 227.

(f) *Ibn Husain v. Ramdai* (1890) 12 All. 110.

amount (g). Such a lien is alive for 12 years under article 132 of the Limitation Act, on the expiration of which period, the lien comes to an end and the possession of the lienor becomes that of a person holding without any right and after the lapse of 12 years his title is perfected by adverse possession (h). But when the amount of mortgagee's decree is paid by one of several representatives of a deceased mortgagor, he does not thereby acquire a charge. Such a case is not within the provisions of sections 82 and 95 of the Transfer of Property Act (i). No question of contribution arises as between the mortgagee and a person who is a representative of the mortgagor and not a transferee from the mortgagor (j). A purchaser of one of two properties mortgaged, has a charge, upon satisfying the mortgage decree, for such sum as the purchaser of the other property is liable for (k). This was the state of the law anterior to the Amending Act, 20 of 1929. Now the more extensive right of subrogation conferred by section 92 would prevail in most of these cases chiefly in the case of a redeeming co-mortgagor.

Contribution being an equitable right can be resisted on equitable grounds.—Where contribution is ordered between different properties, each of them should be so placed as if it had contributed its proper proportion at the time at which it ought to have done so. The owners of shares in X and Y having mortgaged them, sold the properties to the plaintiffs who retained the amount due to the mortgagee and undertook to pay the same. Subsequently, instead of paying the moneys in discharge of the mortgage they paid a part of it to the vendors, who agreed to pay the same to the mortgagee, the plaintiffs agreeing to pay the balance, the greater part of the debt. Thereafter the shares in Y were sold "free from encumbrances" to the defendants. Neither the vendors nor the plaintiffs paid the mortgagee who obtained a decree for sale and parts of X and Y were proclaimed for sale. Plaintiffs paid up the amount and sued for contribution. Here the shares purchased by the plaintiffs and defendants were originally bound to contribute to the mortgage debts. But after the purchase by the plaintiffs it was not the intention of any of the parties that the shares in X and Y should contribute rateably to the mortgage debts and the defendants were therefore entitled to hold the property Y free from liability to contribute. The plaintiffs were supplied with funds to pay the debts and no question of contribution would have arisen if they had done so. The fact that plaintiffs made payment at a later time under a threatened sale made no difference in the rights of the parties (l). A decree for sale having been passed and the mortgaged property sold, one of several mortgagors paid the decree-holder and got the sale set aside. His claim for contribution in a suit against the others was allowed on the ground that the others who had kept the property were bound in equity to pay their share although they were not liable under section 69 of the Contract Act as the payment was not made to prevent the sale. The amount was declared a charge on the shares of the others (m).

Contribution not allowed in execution proceedings.—A mortgagee having purchased the equity of redemption in a part of the mortgage property previously,

- (g) *Sambhu bin Hanmanta v. Nama bin Narayan* (1911) 35 Bom. 438; *Loma Gomaji v. Visvanath Amril* (1894) 18 Bom. 86; *Mahomed Shamsool v. Shewukram* (1874) 14 Beng. L. R. 226, 2 I. A. 7.
 (h) *Sambhu bin Hanmanta v. Nama bin Narayan* (1911) 35 Bom. 438.
 (i) *Nawab Jahan Ara v. Mirza Shujauddin Bukht Bahadur* (1905) 9 C. W. N. 865.

- (j) *Chaubi Beneik v. Puttam Singh*, A. I. R. (1924) All. 929.
 (k) *Siraj-ud-din v. Siraj-ud-din* (1905) 2 All. L. J. 698.
 (l) *Muhammad Abbas v. Muhammad Hamid* (1912) 9 A. L. J. 499.
 (m) *Sri Maharaja Parbhu Narain Singh Bahadur v. Babu Beni Singh* (1910) 14 C. W. N. 361.

Ss. 82-83

applied subsequently to enforce his decree against the remaining mortgaged properties without bringing the property purchased in the hotchpot and without making all the persons interested in the said properties parties. On objections being taken that the decree-holder was not entitled to do so, and that even if he could do so, the decretal amount in the suit to be recovered should be apportioned between the properties purchased by him and the remaining properties, it was held that the decree-holder was entitled to execute his decree against any of his mortgaged properties and the question of apportionment must be tried and disposed of in a separate litigation and could not be properly considered and decided in execution proceedings (n).

Contribution excluded.—From the foregoing commentaries on this section it will be observed that the rule enunciated in this section does not apply in the following cases :—

- (1) When it conflicts with marshalling
- (2) between mortgagee and the representative of the mortgagor
- (3) when there is a contract between the parties to the contrary
- (4) in execution proceedings
- (5) on partial redemption
- (6) when property is subject to three mortgages and is sold under decrees of two, it is not liable to contribute to the third mortgage
- (7) when the mortgagee has lost his remedy through negligence, against the owners of the other portion
- (8) when the burden is disturbed.

Deposit in Court.

83. At any time after the principal money payable *in respect of any mortgage has become due* and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Power to deposit in Court money due on mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of complaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the

Right to money deposited by mortgagor.

(n) *Amir Chand v. Bukshi Sheo Pershad Singh* (1907) 34 Cal. 13.

mortgaged property apply for and receive the money, and the mortgage-deed *and all such other documents* so deposited shall be delivered to the mortgagor or such other person as aforesaid.

S. 83

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amounts so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

Amendments to the section :

- (a) for the words "has become payable" the words "payable in respect of any mortgage has become due" have been substituted.
- (b) for the words "if then in his possession or power" the words "and all documents in his possession or power relating to the mortgaged property" have been substituted ;
- (c) after the word "mortgage deed," where it occurs for the second time the words "and all such other documents" have been inserted :
- (d) Paragraph 3 has been newly added.

Summary redemption.—In addition to the other remedies open for redemption this section provides a summary procedure. The section is a survival of the Bengal Regulations, I of 1798 and XVII of 1806 which have been repealed. Deposit under this section is in effect the same as a valid tender and its withdrawal by the mortgagee discharges the mortgage. The above remedies are referred to in the case below (o).

Sum to be deposited.—The rule requires the amount remaining due on the mortgage to be deposited. This includes not only principal and interest but other charges which the mortgagee is entitled to add to the mortgage debt under section 72 (p). In other words, the mortgagor must deposit the price of redemption. No interest is to be deposited when in a usufructuary mortgage the profits discharge the interest (q). Nor is the amount to be calculated in accordance with the penal provisions of the bond (r). A deposit is not sufficient which does not include interest in respect of which the mortgagee has obtained a decree (s). Similarly, a deposit is not sufficient when it does not include interest for the day of deposit (t). Cost of litigation must be included, as the mortgagee is entitled to tack the same to the

(o) *Hai Singh v. Bihari Lal* (1921) 43 All. 95.
 (p) *Anandi Ram v. Dur Najaf Ali Begum* (1890) 13 All. 195.
 (q) *Bhabani v. Kadambini* (1929) 33 C. W. N. 279.
 (r) *Ramrao v. Gopala Patil*, A. I. R. (1932) Nag. 169; *Ayyakutti Markandan v. Periyasami* (1916) 39 Mad. 579; *Tarachand v.*

Narayan (1922) 18 Nag. L. R. 47.
 (s) *Hewanchal Singh v. Jawahir Singh* (1888) 16 Cal. 307. P.C.
 (t) *Subbai Govindan v. Palani* (1916) 30 M. L. J. 607; *Raghub v. Bhojni* (1903) 8 C. W. N. 216 *contra*.

S. 83 mortgage debt (u). A deposit in excess of the amount due is valid (v). But a deficiency, however small, vitiates the deposit (w). It may be validated by deposit of the balance, whereupon the consequences mentioned in the section ensue (x).

Revenue paid by the mortgagee.—For the purpose of testing the sufficiency of the tender, Government revenue paid by the mortgagee and interest thereon should be added to the mortgage debt, for the mortgagee is entitled to add the same for the purpose of ascertaining his total dues under his mortgage (y). But if the mortgagee accepts the deposit which does not include the revenue paid by him, his claim to the mortgage property fails (z) and his only remedy is to bring a simple money suit (a).

Premature tender.—The power to deposit in Court given to the mortgagor is after due date. A consent decree entitled the mortgagee to take possession in default of payment of certain instalments provided thereby. The mortgagor tendered money in Court under section 83, but the mortgagee took possession of the property notwithstanding the tender and the mortgagor sued for possession and mesne profits. It was held that as the tender was premature under section 83, he was not liable to account for mesne profits (b). The right and liabilities of the parties depend upon the terms of the instrument as controlled by the Act (c).

Deposits in two instalments.—There is nothing either in section 83 or 84 which prohibits the deposit on two days. When the amount first tendered into Court was found to be insufficient and the debtor paid the balance on a subsequent day, both of which payments became known to the mortgagee, the deposit was valid (d).

Stage of deposit.—The deposit must be made before a suit founded on the mortgage is instituted (e), and this rule is independent of the mortgagor's knowledge of the institution of such a suit (f). Nor can the mortgagor avail himself of the rule in the section when the mortgagee has filed a suit in ignorance of the deposit (g). There is nothing to prevent a mortgagor whose time for making the deposit has been allowed to pass, to proceed to deposit under Order 24, rule 1 of the Code of Civil Procedure, 1908 (h). No deposit can be made if the suit for redemption is barred, for at the time of deposit, he must have a valid right to redeem and he must not redeem contrary to the terms of his contract (i).

Nature of the deposit.—The deposit must be unconditional. A deposit accompanied with the condition that it should not be paid unless the mortgagee produced certain deeds, is not in compliance with the section (j). But a deposit accompanied by a claim to a registered receipt to which the mortgagee agrees and to the return of the title-deeds does not render it conditional (k).

(u) *Nadirshaw v. Shirinbai* (1923) 25 Bom. L. R. 839.

(v) *Subramania v. Narayanaswami* (1918) 34 M. L. J. 439; *Rajah Baikunth v. Binodi Behari* (1919) 29 C. L. J. 258; *Subba Rao v. Sarvarayudu*, A. I. R. (1923) Mad. 533.

(w) *Debi Prasad v. Kedar Singh* (1921) 19 A. L. J. 582; *Subbai Goundan v. Palani* (1916) 30 M. L. J. 607. But see *Ramrao v. Gopala Patil*, A. I. R. (1932) Nag. 169.

(x) *Deo Dat v. Ram Aular* (1886) 8 All. 502; *Har Dayal v. Pirthi Singh* (1910) 32 All. 142.

(y) *Shub Chandra v. Lachmi Narain* (1929) 51 All. 686, 56 I. A. 339.

(z) *Anandi Ram v. Dur Najap Ali Begum* (1891) 13 All. 195.

(a) *Anandi Ram v. Dur Najap Ali Begum* (1891) 13 All. 195; *Lachman Singh v. Saliq Ram* (1886) 8 All. 384; *Parsotam Das v. Jaijit Singh* (1887) 11 Bom. 312.

(b) *Ram Sonji v. Krishnaji* (1902) 26 Bom. 312.

(c) *Muhammad Sher Khan v. Rajah Seth Swami* (1922) 44 All. 185, 49 I. A. 60.

(d) *Raghub Pruste v. Bhobui Sahoo* (1904) 8 C. W. N. 216; *Deo Dat v. Ram Aular* (1886) 8 All. 502; *Har Dayal v. Pirthi Singh* (1910) 32 All. 142.

(e) *Brij Gopal v. Mt. Masuda*, A. I. R. (1935) Oudh 93.

(f) *Thiagaraja v. Ramaswami* (1918) 35 M. L. J. 605.

(g) *Sitaramayya v. Venkatramanna* (1888) 11 Mad. 371.

(h) *Shib Chandra v. Lachmi Narain* (1929) 51 All. 686, 56 I. A. 339; *Brij Gopal v. Mt. Masuda*, A. I. R. (1935) Oudh 93.

(i) *Bayya Sao v. Narasinga* (1911) 10 M. L. T. 37.

(j) *Nanu v. Manchu* (1891) 14 Mad. 49.

(k) *Kora Nayar v. Ramappa* (1894) 17 Mad. 267.

Effect of deposit.—The right of deposit under this section is co-extensive with the right to institute a suit for redemption (*l*). A deposit under section 83 does not terminate the relationship of mortgagor and mortgagee unless and until it is accepted by the mortgagee. If the deposit be refused, the dissatisfied mortgagor may enforce his legal rights by a suit and until then the mortgage subsists (*m*). The mortgagee is not a trespasser and continues liable to account under clause (i) of section 76 of the Act (*n*), while the mortgagor is entitled to mesne profits (*o*). Money deposited in Court under the section does not become the mortgagee's property, unless he has complied with the conditions prescribed under the section as a condition precedent to his drawing the money out of Court. Till the conditions are fulfilled it is not liable to be attached by the creditor of the mortgagee. These conditions are that he should put in a verified petition stating his willingness to accept the money so deposited in full discharge of what is due to him and deposit the mortgage deed in Court (*p*).

Payment must be made to the credit of the mortgagee.—Under section 83 of the Transfer of Property Act, it is necessary for the tender to be valid that it must be made to the credit of the mortgagee and not to that of mortgagee and another. A mortgagee suing to enforce his claim in spite of the deposit, cannot claim interest from that date (*q*). Ordinarily it is the duty of the mortgagor to determine the real mortgagee and deposit the amount to his credit (*r*). A mortgagor who makes a payment in contravention to the above provisions would not be entitled to the benefit of sections 83 and 84, as such a deposit prevents the person entitled from withdrawing the mortgage-money (*s*). Such money deposited in Court for payment to the mortgagee, becomes his property only on the mortgagee complying with the conditions necessary for withdrawing the money out of Court, so that the amount is not liable to be attached by the creditor of the mortgagee, unless he has expressed his willingness to accept the money so deposited in full discharge and has deposited the mortgage deed and other documents in Court (*t*). But until then, money belongs to the mortgagor, and the mortgagee's creditors cannot be allowed to attach (*u*). According to section 59A "mortgagee" in section 83 includes legal representatives and assigns of the mortgagee. A sub-mortgagee is an assign and a deposit of money payable both to the legal representative and the sub-mortgagee is a proper deposit (*v*). A dispute among the heirs of the mortgagee does not affect the validity of the deposit and interest will cease to run from the date of the deposit (*w*). When there is a dispute amongst co-mortgagees, the mortgagor can deposit the money in Court for payment to the person the Court may determine (*x*). So also where there are two sets of claimants (*y*).

(*l*) *Subba Rao v. Sarvarayudu* (1924) 47 Mad. 7, 20.

(*m*) *Ahmad Ullah v. Abdul Rahim* (1923) 45 All. 592; *Balasidhantam v. Perumal* (1914) 27 M. L. J. 475.

(*n*) *Ma Myo v. Maung Hla Bu*, A. I. R. (1925) Rang. 13; *Rukhminibai v. Venkatesh* (1907) 31 Bom. 527; *Satyabadi v. Harabati* (1906) 34 Cal. 223.

(*o*) *Ayyakutti Markondan v. Periyasami* (1916) 39 Mad. 579; *Nagathal v. Arumugam Pillai*, A. I. R. (1923) Mad. 354; *Theravaya Reddy v. Venkatachalam* (1916) 40 Mad. 804.

(*p*) *Mothiar Mira Taraga v. Ahmatti* (1906) 29 Mad. 232; *Dal Singh v. Pitam Singh* (1903) 25 All. 179.

(*q*) *Debandra Mohan Rai v. Sona Kunwar* (1904) 26 All. 179; *Ganeshi Lal v. Rohni* (1928)

50 All. 655; *Madhavi Amma v. Kunhi Pathumma* (1899) 23 Mad. 510.

(*r*) *Narayan Sahu v. Kishun Sahu*, A. I. R. (1934) Pat. 622.

(*s*) *Madhavi Amma v. Kunhi Pathumma* (1900) 23 Mad. 510.

(*t*) *Mothiar Mira Taragan v. Ahmatti Ahmed Pillai* (1906) 29 Mad. 232.

(*u*) *Dal Singh v. Pitam Singh* (1904) 26 All. 179.

(*v*) *Subba Rao v. Ponnammal Nadathi*, A. I. R. (1924) Mad. 453.

(*w*) *Baluswamy Aiyer v. Krishnaswamy Aiyer*, A. I. R. (1924) Mad. 559; *Nagathal v. Arumugham Pillai*, A. I. R. (1923) Mad. 354.

(*x*) *Vasava Menon v. Kelu Achan*, A. I. R. (1926) Mad. 1087.

(*y*) *Thevaraya Reddy v. Venkatachalam* (1917), 40 Mad. 804.

S. 83

Dispute as to the legal representative.—If the mortgagee be dead and disputes arise between persons as to who is his legal representative, the mortgagor should deposit the money in Court under section 83, and he would then be entitled to the possession of the mortgaged property. The fact that the amount was paid by the Court to the claimant with the worst title, will not affect the rights of the mortgagor (z). In such cases the mortgagor is entitled to mesne profits (a).

Minor mortgagee.—A mortgage of the 25th of October 1898 stipulated for redemption on payment of interest upto 25th October 1900. On the 12th of October the mortgagor deposited the money into Court, but the mortgagee being a minor, a guardian had to be appointed to receive the notice of deposit and take the deposit out of Court. On the 18th November 1899 the minor's mother was appointed guardian, but she refused to accept the money as it did not include interest subsequent to the 25th October 1899. The mortgagor filed a suit to redeem. It was held that the deposit was not sufficient under section 83, as the mortgagor had not done all that had to be done by him, until he procured the appointment of a guardian (b). Hence in the case of a minor mortgagee, till the appointment of a guardian interest will not cease to run. In the event, however, of the amount deposited falling short by reason of delay caused by such proceedings, the mortgagor may make the additional deposit (c). So also where a minor mortgagee is joined with a major mortgagee (d). Service of notice on the father of the minor by affixing it to the door, will not bind the minor, but where money is advanced by the manager of the family out of family funds, though the mortgagee be a minor, tender to the manager is sufficient (e). Nor will substituted service discharge the mortgagor's liability to see to the appointment of a proper guardian (f).

On any other person entitled.—Besides the mortgagor any of the persons entitled to redeem under section 91 may make the deposit required by the section. But a person under a contract to purchase has no right to redeem (g). Want of registration of the conveyance was no bar to the equitable relief and the purchaser was allowed the benefit of the section when he had undertaken to discharge the liability (h).

Withdrawal of deposit by mortgagee.—On receipt of the written notice of deposit the mortgagee, on petition stating the amount due, his willingness to accept in full discharge, and on depositing into Court the mortgage deed and documents relating to the mortgaged property, may apply for and receive the moneys. The petition should be verified as a plaint. On such withdrawal the debt is discharged. A deposit once refused is no longer available to the mortgagee (i). When once the mortgagor has deposited the money into Court, he cannot object to the mortgagee withdrawing it. When the mortgagee refuses to accept the deposit made in Court, it is for the mortgagor to institute a suit to enforce his rights. Till then the mortgage subsists (j). If the mortgagee is improperly prevented from withdrawing the moneys deposited, interest will not cease to run (k). If the mortgagee disputes

(z) *Ram Sumran v. Shaibzada Biji Partap Narain Singh* (1885) All. W. N. 328.
 (a) *Nagathal v. Arumugham Pillai*, A. I. R. (1923) Mad. 354; *Thevaraya Reddy v. Venkatachalam* (1916) 40 Mad. 804.
 (b) *Pandurang v. Mahadaji* (1903) 27 Bom. 23.
 (c) *Gokul Kalwar v. Chandar Sekhar* (1926) 48 All. 611; *Kanni Lal v. Indarpal Singh* (1923) 45 All. 273.
 (d) *Appa Rai v. Somer*, A. I. R. (1925) Mad. 1017.
 (e) *Sheo Saran Chaudhri v. Ram Logan Das* (1922) 44 All. 64.

(f) *Mt. Phool Kuer v. Rewari Singh*, A. I. R. (1930) All. 609.
 (g) *Mayappa v. Kolandaivelu*, A. I. R. (1926) Mad. 597.
 (h) *Jagdeo Sahu v. Mahabir Prasad*, A. I. R. (1934) Pat. 127.
 (i) *Mt. Ratna Koer v. Mt. Nanhaki*, A. I. R. (1924) Pat. 41.
 (j) *Ahmadullah v. Abdul Rahim* (1923) 45 All. 592.
 (k) *Subba Rao Garu v. Sri Balasu Buchi*, A. I. R. (1923) Mad. 533.

sufficiency of the deposit but his agent thereafter withdraws the amount out of the Court and applies it to his use, the deposit would be deemed to be in full discharge and the onus of proving that the agent acted under such conditions and the statutory result did not follow from his act, would be on the mortgagee (*l*). Acceptance by a prior mortgagee of a deposit made by a subsequent mortgagee, precludes him from denying the validity of the subsequent mortgage (*m*). Withdrawal pending appeal is no bar to its prosecution (*n*).

Court.—The Court in which the deposit is made under the section must be the one in which a suit for redemption could be instituted under section 18 of the Code of Civil Procedure, 1908. As to the jurisdiction of the Court in such matters, it only extends to the mortgagee applying and receiving the money upon terms of depositing the mortgage deed and other documents relating to the property and when he is in possession of the property, delivering possession thereof to the mortgagor and executing the relative reconveyance. But if the deposit leads to any dispute between the parties ranged on either side or amongst themselves, the Court is not competent to determine any such issue. All that the section enacts is that the mortgagee on presenting a petition verified in the manner prescribed for a plaint, stating the amount due and his willingness to accept the money in full discharge of the amount and on depositing the necessary documents in compliance with the provisions of the section, is entitled to receive the moneys. If there is any dispute between the parties, it must be referred to a suit (*o*). A mortgagee rejecting a tender does it at his own risk and in an action for redemption, the Court may either refuse him his costs or order him to pay costs of the mortgagor (*p*). A mortgagor cannot get a decree for redemption, except by tendering the amount of the mortgage-money (*q*). A tender by one or more of several mortgagors is not valid, unless made by all the mortgagors jointly or on behalf of the rest with their concurrence (*r*). Where in a suit for redemption, the mortgagor succeeds and pays into Court the amount decreed within the time limited by the decree, the mortgagor does not lose his right to possession of the mortgaged property by reason of his subsequently attaching and withdrawing from the Court a portion of the sum so paid into Court by him, in execution of that very decree for costs of the suit or otherwise (*s*). A mortgagor who has liberty to redeem at the end of the second year on payment of the principal and interest, is not entitled to a decree for redemption in a suit brought after the close of the second year, on proof that in the first half of the second year, the principal money was deposited in Court and that for interest for both years, decrees have been obtained by the mortgagee against him before his suit was instituted (*t*).

Second appeal.—Neither the sufficiency of the tender nor whether the mortgagor kept the money dead, can be raised for the first time in second appeal (*u*).

Mode of service.—The mode of service of notice of deposit under this section is as provided in the proviso to section 102.

- (*l*) *Ramchandra Marwai v. Rani Keshobate Kumari* (1909) 36 Cal. 840, 36 I. A. 85.
 (*m*) *Sunchra v. Shadi Ram* (1904) 1 A. L. J. 590.
 (*n*) *Subba v. Sarvarayudu* (1924) 47 Mad. 7, 21.
 (*o*) *Ahmad-ullah v. Abdul Rahim* (1923) 45 All. 592; *Balbhaddai v. Bitto* (1929) 51 All. 1016; *Thevaraya v. Venkatachalam* (1917) 40 Mad. 804.
 (*p*) *Govind v. Dillar Jang* (1899) 1 Bom. L. R. 381.

- (*q*) *Joy Gobind Roy v. Bandhu Singh* (1872) 17 W. R. 342.
 (*r*) *Ram Baksh Singh v. Mohan Ram Lal Doss* (1874) 21 W. R. 428.
 (*s*) *Parmanand v. Lokman Dass* (1905) 27 All. 392.
 (*t*) *Heicancahal Singh v. Jawahir Singh* (1889) 16 Cal. 307 P.C.
 (*u*) *Jag Sahu v. Mi. Ram Sakhi* (1922) 1 Pat. 350.

S. 84

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or *in the case of a deposit, where no previous tender of such amount has been made as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, and the notice required by section 83 has been served on the mortgagee :*

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to a reasonable notice before payment or tender of the mortgage-money *and such notice has not been given before the making of the tender or deposit, as the case may be.*

Insertions.—By the Amending Act, 20 of 1929, the following insertions have been made :—(1) In paragraph 1 the words “or in the case of a deposit where no previous tender of such amount has been made” and the words “and the notice required by section 83 has been served on the mortgagee.” (2) Paragraph 2 is new. (3) In the third paragraph the last words “and such notice has not been given before the making of the tender or deposit, as the case may be” are new.

Requisites for cessation of interest.—In order to stop the running of interest :

- (a) The mortgagor or person referred to in section 83
- (b) must tender, as required by section 60, or deposit, as in section 83 provided,
- (c) and do all that has to be done by him to enable the mortgagee to take such amount out of Court
- (d) and the notice required by section 83 must be served on the mortgagee.

Cessation of interest.—In case of tender, continued readiness to pay is necessary for cessation of interest. Section 84 presupposes continuance of the deposit to justify the claim for cessation of interest, so that if the mortgagor withdraws the amount deposited in Court, he will not be entitled to this benefit (v). If the amount deposited be insufficient, the mortgagee will be entitled to interest (w). But it will cease to run if the mortgagee appears and refuses to take the money deposited, though it be afterwards withdrawn by the mortgagor, as also when the mortgagor

(v) *Krishnaswamy v. Thippay Ramasamy* (1911) 9 M. L. T. 131.

(w) *Balaram v. Nanuram* (1887) 1 C. P. L. R. 154.

has done all he could to enable the mortgagee to withdraw the amount, in which case the mortgagor is entitled to mesne profits (x).

Ss. 84.

Tendered or deposited.—The section deals with cessation of interest both in case of tender out of Court and with deposit or what is equivalent to tender in Court under section 83. The word “tendered” in the section refers to the tender contemplated in section 60 while the word “deposited” relates to the deposit under section 83.

Interest on the principal money.—These words must give rise to questions as to what is the sum on which interest ceases. Section 60 refers to tender of the “mortgage-money” while section 83 refers to “the amount remaining due on the mortgage.” These sections, it is submitted, make no distinction as to the sum to be deposited; while the present section refers to cessation of interest only “on the principal money,” a valid deposit includes other sums bearing interest besides the principal money.

Previous tender.—These words refer to a tender out of Court. Though such a valid tender has the same effect, it is open to the mortgagor to deposit the amount in Court after previous tender out of Court refused by the mortgagee. In such a case, interest ceases not from the date of deposit but from the date of tender.

Notice before payment or tender.—The exception in the third paragraph is to give the mortgagee time to save him from loss of interest by reason of his moneys being uninvested (y). A similar provision is made in section 60. The time limited in Bombay mortgages is usually three months from date of service of notice. With this may be compared the provision in clause (2) sub-clause (a) of section 69.

Service of notice.—Prior to the Amending Act, 20 of 1929, it was regarded as a duty of the Court to serve notice of the deposit unless the mortgagee had knowledge. The amendment casts the duty on the mortgagor to cause written notice to be served by the Court in accordance with sections 102 and 103 or rules made thereunder, which also deal with service of tender or notice under circumstances therein enumerated.

Withdrawal by mortgagor.—Money deposited by a mortgagor under section 83, when withdrawn by mortgagor by reason of dispute as to the title of the legal representative of mortgagee or otherwise, has no effect as to cessation of interest. In order that interest should cease to run, the mortgagor should leave the deposit in Court (z). It is, however, otherwise in case of a withdrawal of deposit preceded by a valid tender, for in the latter case, it is not the deposit in Court but the tender which suspends the interest.

Suits for Foreclosure, Sale or Redemption (a).

85. (Parties to suits for foreclosure, sale or redemption.) Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), s. 156, and Schedule V.

(x) *Nagathal v. Arumugam Pillai*, A. I. R. (1923) Mad. 358; *Jiva Ram v. Khen Koer*, A. I. R. (1923) All. 24.

(y) *Nadershaw v. Shirinbai* (1923) 25 Bom. L. R. 839.

(z) *Thevaraya Reddy v. Venkatachalam* (1917) 40

Mad. 804; *Krishnasami Chettiar v. Ramasami Chettiar* (1912) 35 Mad. 44.

(a) For the repealed provisions, as re-enacted, see Act 5 of 1908, Schedule 1, Order XXXIV.

Ss. 86-91

Foreclosure and Sale (b).

(86 to 90) Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), s. 156 and Schedule V.

Redemption.

91. *Besides the mortgagor, any of the following persons*
Persons who may sue *may redeem, or institute a suit for redemp-*
for redemption. *tion of, the mortgaged property, namely :—*

- (a) *any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;*
- (b) *any surety for the payment of the mortgage-debt or any part thereof ; or*
- (c) *any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.*

The old section.—Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

- (a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property ;
- (b) any person having any interest in or charge upon, the right to redeem the property ;
- (c) any surety for the payment of the mortgage-debt or any part thereof ;
- (d) the guardian of the property of a minor mortgagor on behalf of such minor ;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot ;
- (f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property ;
- (g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Analysis of the section.—Besides the mortgagor, the following persons may :

- (a) redeem or
- (b) institute a suit for redemption
- I. Person (other than the mortgagee who is to be redeemed) who has :
 - (i) an interest in or
 - (ii) charge upon the property mortgaged or
 - (iii) an interest in or
 - (iv) charge upon the right to redeem the same

(b) For the repealed provisions, as re-enacted, see Act 5 of 1908, Schedule 1, Order XXXIV.

II. Surety for whole or part of the mortgage debt

III. Creditor of the mortgagor who

(a) has in a suit for administration of his estate

(b) obtained a decree for sale of the mortgaged property.

Changes in the section.—By the Transfer of Property Amendment Act the following changes have been made in this section. The first part is retained as it originally stood. Clauses (a) and (b) have been combined. Clauses (c) and (g) have been retained. Clauses (d) and (e) have been omitted as being superfluous and clause (f) has been omitted inasmuch as it originally stood, it gave an attaching creditor a right to redeem although an attachment created no charge or interest in the property attached.

Clause (a): Persons who may Redeem.

Besides the mortgagor.—For the right of the mortgagor to redeem, see commentaries on section 60.

Who may sue for redemption.—This section enumerates those who besides the mortgagor are entitled to redeem or institute a suit for redemption. The mortgagor is entitled, under section 60 of the Act, to redeem. The right to redeem can only exist in such persons as are reached and bound by the contract, so that where a person interested in a mortgaged property repudiates the mortgage, he cannot redeem (c). The words in section 91, "any person having any interest in or charge upon the property" mean any person having an interest in or charge upon the property which is affected by the mortgage. The purchaser of a portion of the equity of redemption cannot redeem the whole against the will of the mortgagee (d). A person is said to have an interest in property if he would be prejudiced by foreclosure or sale of the mortgaged property in pursuance of the mortgage. Where property is mortgaged by the father and the equity of redemption is purchased by the mortgagee at a sale in execution of a decree against him in favour of a third person and both the sale and mortgage are binding on the family, the son and daughter of the mortgagor cannot redeem on the ground that the sale of the equity of redemption was not affected in a suit for sale by the mortgagee on his mortgage (e). In a suit for ejectment the plaintiff cannot claim redemption of the mortgaged property (f). A sub-mortgagee is entitled to redeem a prior mortgage (g), and so is a donee from a Hindu widow (h). A perpetual lessee of mortgaged premises, holding under a lease granted on payment of premium and yearly rent, by the terms of which the lessee was not liable to be ejected even for non-payment of rent and was entitled to a refund of the premium if the title was defective, was entitled to redeem (i).

Other than the mortgagee of the interest sought to be redeemed.—The benefit of this section cannot be obtained by the mortgagee who is to be redeemed. Neither a prior mortgagee nor a puisne mortgagee can redeem himself.

May redeem or institute a suit for redemption.—For commentaries on this subject, see section 60.

Person having an interest in.—The right to redeem, besides the mortgagor, is given to persons who would be interested in the redemption of the property.

(c) *Ghanya v. Ukand Rao* (1908) 4 Nag. L. R. 9.

(d) *Girsh Chandra Dey v. Jura Moni De* (1901) 5 C. W. N. 83.

(e) *Ikkotha v. Chakkiamma* (1904) 27 Mad. 428.

(f) *Ramaswamy Pillai v. Vellay Pillai* (1902) 2

M. L. J. 48.

(g) *Ramsubhag v. Narsingh* (1905) 27 All. 472.

(h) *Sitaram v. Khandre* (1921) 45 Bom. 105.

(i) *Raghunandan Prasad v. Ambika Singh* (1907) 29 All. 679.

S. 91

Such persons would be those who would suffer by reason of the mortgagor's failure to redeem and consequently would lose their own interest as well, for the protection of which they are dependent on the mortgagor. Persons interested in redeeming besides the heirs and legal representatives of the mortgagor, his lessee for a term of years, co-owner, whether joint tenant or tenant in common, co-sharer, co-mortgagor, a purchaser of the equity of redemption, a person who would be deemed an assignee of the mortgagor, a guardian of a minor mortgagor or a committee or other legal curator of a lunatic or idiot, a Court of Wards on behalf of a minor, ward, a surety or creditor as in clause (c), and any person under liability to pay interest, would be at liberty to redeem. It is not the duty of a mortgagee to inquire into the title of the person seeking to redeem him as to whether he has any interest in the equity of redemption (*j*). Receipt of interest by a mortgagee is not proof as against him that the title to the equity of redemption is in the person from whom he received it (*k*). The interest referred to in the section must be a subsisting one (*l*).

Any person who has a charge upon the property mortgaged.—Besides the mortgagor and persons who have any interest in the right to redeem, the right of redemption is conferred on those who have a charge on the mortgaged property. The charge must be a subsisting one (*m*). Here also the mortgagee whose interest is sought to be redeemed, is excluded though he has a charge on the mortgaged property. A person would have a charge on the property either by a charge being created in his favour by the mortgagor as a subsequent encumbrancer or by a charge arising in his favour by subrogation. Even in the case of a subsequent mortgagee, a charge would arise by way of subrogation if he redeemed a prior mortgage. Hence a subsequent mortgagee, a co-mortgagor, a part owner of the equity of redemption are persons entitled to redeem as having a charge on the property mortgaged.

Redemption action by purchaser.—A purchaser of the equity of redemption of a mortgagor can bring a suit to redeem without tendering the money to the mortgagee (*n*). An auction purchaser whose purchase had not been confirmed and who had previous to the sale by the second mortgagee, in execution of his decree deposited the amount of his decree, is entitled to stop the sale of the first mortgagee and redeem (*o*). A partial owner of the equity of redemption is entitled to redeem the entire mortgage (*p*).

Purchaser under a contract.—A contract for purchase creates no interest and the intending purchaser is not entitled to redeem until he accepts title so as to be in a position to call for a conveyance (*q*).

Purchasers of different properties consolidated by a mortgagee.—Where mortgages of different properties by the same mortgagor have been consolidated by a mortgagee, and the mortgagor has conveyed the equity of redemption in some of the properties to purchasers by deeds of various dates, upon foreclosure by the mortgagee, a first right of redeeming all the mortgages will be given to the first purchaser of part in point of date, with successive rights of redemption, in default, to the

(*j*) *Pearce v. Morris* (1869) 39 L. J. Ch. 342; see *Tarn v. Turner* (1888) 39 Ch. D. 456.

(*k*) *Owen v. Flack* (1826) 4 L. J. O. S. Ch. 202, 57 E. R. 475.

(*l*) *Ram Adhar v. Shankar*, A. I. R. (1935) Oudh 139.

(*m*) *Ram Adhar v. Shankar*, A. I. R. (1935) Oudh 139.

(*n*) *Dinonath Butobyal v. Womanchuran Roy* (1865) 3 W. R. 128.

(*o*) *Radha Kishan Marwari v. Hem Chander Bose* (1907) 11 C. W. N. 495.

(*p*) *Baikantha Nat Dey v. Mohesh Chander Dey*

(1918) 22 C. W. N. 128; *Pratap Chandra v. Peary Mohan* (1918) 22 C. W. N. 800; *Shankar v. Bhikaji* (1929) 53 Bom. 353; *Rugad Singh v. Sal Narain* (1904) 27 All. 178; *Jhum Lal v. Sham Narayan*, A. I. R. (1933) Pat. 33; *Sri Kanta v. Jag Sah*, A. I. R. (1925) Pat. 57; *Huthasanan v. Parameswara* (1899) 22 Mad. 209; *Nainappa v. Chidambaram* (1898) 21 Mad. 18.

(*q*) Section 54 of the Act; *Tasker v. Small* (1837) 3 My. & Cr. 63, 40 E. R. 848; *Pearce v. Morris* (1869) 39 L. J. Ch. 342.

subsequent purchasers of other parts in order of date, as in the case of first, second and third mortgagees (r).

S. 91

Purchaser where mortgagee claims consolidation subsequent to his purchase.—A mortgagee cannot claim to consolidate a mortgage of a property made subsequent to the purchase of the equity of redemption of another property of the same mortgagor who had sold the equity of redemption prior to the mortgage of the other property (s).

Effect of purchaser redeeming.—Where a purchaser redeems, he has a charge on the shares of the other mortgagors (t).

Administrator of a convict mortgagor.—Where a mortgagor is convicted, on his death his administrator, on obtaining Letters of Administration, is entitled to redeem.

Insolvents.—Where the mortgagor becomes insolvent it is for the Official Assignee to redeem. Neither the insolvent (u) nor his unsecured creditors can redeem (v). The Official Assignee, however, cannot redeem if the mortgagee refuses to prove his debt in insolvency. If, however, he proves after foreclosure order, the Official Assignee cannot claim to redeem on merely offering to pay the value fixed by the mortgagee, unless a special direction is given in the foreclosure order.

Joint tenants and tenants in common.—Joint tenants and tenants in common stand on the same footing and any one or more of them may redeem (w). But on the principle that the integrity of the mortgage cannot be broken up, one of such joint tenants or tenants in common cannot redeem separately (x).

Redemption by co-mortgagor.—Where the estate is joint and undivided, one of two co-mortgagors or the representatives can redeem the entire estate by payment of the entire mortgage debt (y). Where some only of several mortgagors brought a suit for redemption on the ground that the mortgage debt had been satisfied out of the usufruct, the plaintiffs could not claim their own shares (z). One of several mortgagors can redeem where a portion of the equity of redemption is purchased by the mortgagee, whereby the integrity of the mortgage is broken up (a). Where mortgage property is sold in execution of a decree in different lots and purchased by different persons, of whom the mortgagee is one, the purchaser of any one of the other lots is entitled to redeem (b). There is nothing to prevent one of several mortgagors redeeming provided he pays the full amount of the debt (c). The owner of a share in the equity of redemption is clearly entitled to redeem the whole mortgage and cannot be jointly forced to sue for partition, in order that he may then sue to redeem that share only. The circumstance that the mortgagees had themselves acquired a share in the equity of redemption could not defeat that

(r) *Beevor v. Luck*, *Beevor v. Lawson* (1867) 4 Eq. Cas. 537; *Loveday v. Chapman* (1875) 32 L. T. 689.

(s) *Jennings v. Jordan* (1881) 6 A. C. 698; *Doble v. Manley* (1885) 54 L. J. Ch. 636.

(t) *Mahesh Datt v. Babu Ram* (1906) A. W. N. 179.

(u) *Spragg v. Binkes* (1800) 5 Ves. 583, 31 E. R. 751.

(v) *Rochefort v. Battersby* (1849) 2 H. L. Cas. 388.

(w) *Waugh v. Land* (1815) Coop. G. 129; *Hall v. Heward* (1886) 32 Ch. D. 430; *Balton v. Salmon* (1891) 2 Ch. 48; *Shanmuga*

Pallavaram v. Soosi Udayan (1910) 8 M. L. T. 186.

(x) *Welman v. Wanen* (1709) 2 Eq. Cas. Abr. 595; *Wynne v. Styau* (1847) 2 Ph. 303.

(y) *Ram Kristo Manjhee v. Mt. Ameeroonissa Bibi* (1867) 7 W. R. 314.

(z) *Fakir Baksh v. Sadak Alli* (1885) 7 All. 376.

(a) *Munshi v. Doulat* (1907) 29 All. 262.

(b) *Gossyan Lachmi Narain v. Vikram Singh* (1879) 4 C. L. R. 294.

(c) *Mirza Alli Reza v. Tara Soondaree* (1864) 2 W. R. 150; *Norender Narain v. Dwarka Lal* (1878) 3 Cal. 397, 408, 5 I. A. 18.

S. 91 right (d). A mortgagor of an undivided share may redeem the entirety at any rate, if the mortgagee does not object and may be compelled to do so if required by the mortgagee (e). A joint tenant or co-tenant redeeming has a lien on the share of the other or others (f). But upon such redemption he holds subject to the equities of the other parties interested (g).

Prior mortgagee redeeming puisne mortgagee.—Prior mortgagees and equally purchasers from them are entitled to pay off the mortgage debt due on the second mortgage in order to save from sale the property which, as prior mortgagees, had been hypothecated to them as security for their mortgage debt or which if they are the purchasers, they have purchased (h).

Subsequent mortgagee.—A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the property at a sale in execution of his decree on the prior mortgage, obtained in a suit in which the subsequent mortgagee is not made a party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on his mortgage. His right to redeem in such cases arises only from the fact of his not having been made a party to the suit (i).

Redemption action by puisne mortgagee.—A puisne or subsequent mortgagee is a mortgagee of the equity of redemption. Where a first mortgagee brought the mortgaged property for sale and purchased it himself in execution, a subsequent usufructuary mortgagee, not made a party to the suit, was held entitled to redeem (j). A subsequent mortgagee, before he could sell the property, was bound to redeem the prior mortgagee who had obtained a decree against the mortgagor and in execution thereof had purchased the property and was in possession since the purchase, even though the subsequent mortgagee was not a party to the suit brought by the prior mortgagee (k). A puisne encumbrancer who has not been made a party to the suit by a prior mortgagee acquiring by purchase the equity of redemption from the mortgagor, between the date of the decree obtained by the prior mortgagee and the order absolute for sale, is entitled to redeem, and a sale by a prior mortgagee in execution of his decree is not binding upon him (l). Subsequent encumbrancer may redeem, although the mortgage is foreclosed by the decree of the first mortgagee (m), but he is not bound by the accounts taken in the suit where such decree is made. A prior mortgagee having obtained a decree, the subsequent mortgagee can redeem him on payment of interest at the mortgage rate and not the rate mentioned in the decree (n). Certain properties were mortgaged by A to B and then to C along with other properties. C obtained a decree for redemption against B but the decree was allowed to become inoperative by not being executed. D obtained an assignment of the right of A in the mortgaged properties and also the rights of C therein. It was held that the right of the assignee based on the assignment by the mortgagee whose decree had become inoperative, was unsustainable but as assignee of the

(d) *Mora Joshi v. Ramchandra Dinker Joshi* (1891) 15 Bom. 24.

(e) *Chaudhri Ahmed Baksh v. Seth Raghubir Dayal*, 32 I. A. 229, 242.

(f) *Shanmuga Pallavaram v. Soosi Udayan* (1910) 8 M. L. T. 186.

(g) *Hall v. Heward* (1886) 32 Ch. D. 430; *Pearce v. Morris* (1869) 39 L. J. Ch. 342.

(h) *Bhajahari Maiti v. Gajendra Narayan Maiti* (1910) 37 Cal. 284.

(i) *Dip Narain Singh v. Hira Singh* (1897) 19 All. 527; *Phulmani Chandrain v. Nageshar Prasad* (1911) 33 All. 370; *Radhabai v.*

Shamrau (1884) 8 Bom. 168.

(j) *Raghubano Kuar v. Ramsahai* (1883) A. W. N. 193; *Ganga Ram v. Kika Ram* (1888) A. W. N. 184.

(k) *Manohar Lal v. Ram Babu* (1912) 9 A. L. J. 323.

(l) *Kadir Baksh v. Jwala Prasad* (1904) 1 A. L. J. 288.

(m) *Raghoba Sakaram v. Madhoram Bapuji* (1901) 16 C. P. L. 26.

(n) *Ponambala Chetti v. Muthuswami Pillai* (1912) 23 M. L. J. 284.

mortgagor he was clearly entitled to redeem (o). A purchaser at a sale held at the instance of the second mortgagee, is entitled to redeem though his sale is not confirmed (p). A partial owner of the equity of redemption is entitled to redeem (q). Interest or charge referred to in the section must be a subsisting one. If the puisne mortgagee has lost all remedies available to him, he has no subsisting interest or charge upon the property (r). A subsequent mortgagee seeking to redeem a prior mortgage may take advantage of a valid tender by the mortgagor (s).

Purchaser of one moiety subsequent to sale of the other moiety.—The owner of a portion of the equity of redemption is not entitled to redeem the whole of the mortgage and recover possession of the whole of the mortgaged property on payment of the whole of the mortgage amount, against the will of the mortgagee in possession and the vendee of the other portion of the equity of redemption who was put in possession of some of the lands by the mortgagee on payment of the aliquot portion of the mortgage amount (t).

Sale of equity of redemption by mortgagor set aside by his executor.—A mortgage transaction comprised two policies of insurance on the life of the mortgagor. The mortgagor sold his equity of redemption at an undervalue and an assignee of the purchaser substituted for them another policy on the mortgagor's life, in lieu of the original ones, which were dropped, and assigned the same to the mortgagee. The assignee of the purchaser paid off the mortgagee and continued to pay the premiums. The sale of the equity of redemption was afterwards set aside at the instance of the executor of the mortgagor who was held entitled to redeem such substituted policy in the same way as he could have redeemed the original policies (u).

Specific legatee under a will.—Where property specifically bequeathed is subject to mortgage, the specific legatee is liable (as between himself and the testator's estate) if he accepts the bequest (v).

Heir of mortgagor.—Executor has a right to redeem when the heir is not ascertained (w).

Tenant for life.—Although at one time it used to be held that a tenant for life is not entitled to redeem, it is long established that he is entitled to do so, but he must hold the equity of redemption on trust according to the settlement. He cannot, however, compel the reversioner to redeem him (x).

Mortgagor with foreclosed interest.—A mortgagor whose interest is foreclosed in a suit at the instance of the mortgagee, cannot seek to redeem. He is bound by the decree of foreclosure, though a person interested with him in the mortgaged property is not made a party and his interest is not disclosed in the pleadings. But such person can redeem it, if he becomes interested in the estate after foreclosure decree under a will or otherwise from a person who was interested in the estate and not made a party to the foreclosure proceedings. In such a case the pleadings

(o) *Raman Namboodri v. Achutha Pishurodi* (1912) 35 Mad. 42.

(p) *Radha Kishun Marwari v. Hem Chander Bose* (1907) 11 C. W. N. 495.

(q) *Balkantha Nath Dey v. Mohesh Chandra Dey* (1918) 22 C. W. N. 128; *Protap Chandra Dhar v. Peary Mohan Dhar* (1918) 22 C. W. N. 800.

(r) *Ram Adhar v. Shankar*, A. I. R. (1935) Oudh 139.

(s) *A. M. K. M. Chettiyar Firm v. A. K. M. L.*

Chettiyar Firm, A. I. R. (1930) Rang. 255.

(t) *Rathna Mudali v. Perumal Reddy & Others* (1914) 38 Mad. 310.

(u) *Nesbitt v. Berridge* (1863) 10 Jur. N. S. 53, 46 E. R. 831.

(v) Sec. 167, Indian Succession Act, 1925.

(w) *Hall v. Heard* (1886) 32 Ch. D. 430.

(x) *Aynsly v. Reed* (1754) 1 Dick. 249; *Wicks v. Scivens* (1860) 1 John & H. 215; *Riley v. Croydon* (1864) 10 Jur. N. S. 1251.

S. 91

should mention the previous foreclosure proceedings and the grounds on which he seeks to set aside those proceedings (y).

Lessee under agreement for lease with mortgagor.—Where a lease made without the concurrence of the mortgagee, entitled the mortgagor or assigns to pay the mortgage-money and interest, it was held that the lessee was entitled, under the very words of the instrument, to redeem, but even if those words were not there, as the law was as laid down in *Pearce v. Morris*, L. R. 5 ch. 227, "Any person interested in the equity of redemption is entitled to redeem" (z).

Mortgagor as unpaid vendor.—A mortgagor who sells the equity of redemption cannot redeem, but where the full purchase-money has not been paid, he may, as an unpaid vendor having a charge (a). When before the full purchase-money is paid the property is conveyed in one or more lots, the purchaser or purchasers do not acquire a valid title and would be liable to the original vendor for the purchase-money and may redeem the property, but if one of several such purchasers should pay the entire balance, the others are liable to contribute (b).

On mortgage being split up.—As a general rule the integrity of a mortgage cannot be broken up and redemption piecemeal will not be allowed (c).

Reversioner.—Reversionary heirs of a Hindu during the lifetime of his widow (d) are not persons having any interest in the mortgaged property as would entitle them to redeem a mortgage made by the last male holder, unless it be on the ground of waste or necessity for preservation of the property (e). When a mortgage is made by a Hindu widow, the next reversionary heir of the husband whose consent has not been obtained, is entitled to redeem.

Mahomedan widow.—The widow, who having obtained possession of her husband's property without force or fraud and having a right to retain until she has been paid her dower (f), has no estate or interest in the property as has a mortgagee under an ordinary mortgage (g).

Landlord and tenant.—A *verumpattom* tenant in Malabar claiming under a lease from the *ottidar* is entitled to redeem a prior *kanom* (h). But a landlord cannot redeem a mortgage of his holding by an absolute occupancy tenant (i). On the death of a fixed-rate tenant, the zemindar can redeem (j). A tenant under a cultivation lease has no right (k). On the death of a sub-tenant a landlord may redeem (l).

Maintenance secured by a charge.—A person entitled to maintenance cannot redeem unless it is secured by a charge on the property (m).

Crown.—On escheat the Crown is entitled to redeem, but if the escheated estate reverts back to the mortgagor his right of redemption is revived (n).

(y) *Bromitt v. Moor* (1851) 9 Hare. 374, 68 E. R. 552.

(z) *Tarn v. Turner* (1888) 39 Ch. D. 456; *Paya Matathil v. Kovamel Amina* (1896) 19 Mad. 151; *Ananda v. Uttamrao*, A. I. R. (1930) Nag. 44; *Pannalal v. Rajaram* (1927) 23 Nag. L. R. 128; *Ghulam Nabi v. Kanhai* (1920) 16 Nag. L. R. 180; *Sheoram v. Jamnabai* (1923) 19 Nag. L. R. 18; *Shankar v. Hukumchand* (1918) 14 Nag. L. R. 117; *Raghunandan v. Ambika* (1907) 29 All. 679.

(a) *Ratnam Pillai v. Kamalambal Ammal*, A. I. R. (1925) Mad. 778.

(b) *Peto v. Hammond* (1861) 30 Beav. 495, 54 E. R. 981.

(c) *Welman v. Warren* (1709) 2 Eq. Cas. Abr. 595; see commentaries on sec. 60 of the Act.

(d) *Ram Chandar v. Kallu* (1908) 30 All. 497; but see *Narayana Kutty v. Pechiammal*

(1913) 36 Mad. 426; *Basawan v. Nathu* A. I. R. (1925) Oudh 30.

(e) *Chhote Singh v. Surat Singh*, A. I. R. (1930) Oudh 294.

(f) *Bachun v. Hamid Khan* (1871) 14 M. I. A. 377; *Ameeroonnissa v. Mooradoonnissa* (1855) 6 M. I. A. 211.

(g) *Maina Bibi v. Chaudhri Vakil Ahmed* (1925) 47 All. 250, 52 I. A. 145.

(h) *Paya Matathil v. Kovamel* (1896) 19 Mad. 151.

(i) *Ganpat v. Bhanji* (1902) 15 C. P. L. R. 175.

(j) *Tulshi Ram v. Gur Dayal* (1911) 33 All. 111.

(k) *Kalu Singh v. Hansraj*, A. I. R. (1925) Oudh 270.

(l) *Arjun Singh v. Mahesha Lal*, A. I. R. (1932) All. 437 (438).

(m) *Roshan Singh v. Balwant Singh* (1900) 22 All. 191, 27 I. A. 51.

(n) *Peyton v. Ayliffe* (1693) 2 Vern. 312, 23 E. R. 803.

Clause (b) : Surety for the Payment of the Mortgage Debt.

Surety.—A surety is a person who gives a guarantee to the creditor to perform the promise or discharge a liability which is enforceable at law, of the principal debtor in case of his default. Such a contract may be oral or written and must be supported by consideration. Anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee (o).

Right of surety to redeem.—The right given by the section to a surety to redeem is based on the implied promise of the debtor to indemnify the surety (p) and the general principle that the surety on payment or performance of all that he is liable for, is invested with all the rights which the creditor has against the principal debtor (q) and is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not. If the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security (r). The right of a surety for a part of the debt, to the securities held by the creditor, depends also upon the same principle of equity. The creditor's right to hold his security until his whole debt is paid, is paramount to the surety's claim upon such securities, which arises only when the creditors' claim against such securities has been satisfied (s). A surety being entitled to the securities of the creditor, is entitled to redeem (t). A mortgagor who has assigned his equity of redemption, is a surety for the purchaser and if he is personally sued for the debt he can redeem (u). The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract (v). A surety, however, is not discharged by any activity on the part of the creditor or even omission to sue the principal debtor. A deed of composition containing a proviso that nothing therein should affect any right or remedy, which any creditor might have against any other person in respect of any debt due by the debtor, does not discharge a surety for interest (w). A discharged insolvent is not exonerated from the claim of a surety who pays, subsequently to the discharge, a debt due before (x).

Clause (c) : Creditor Holding Decree for Sale of Mortgaged Property.

Plaintiff in a creditor suit.—The plaintiff in a creditor suit after a decree for sale of the real estate may sustain a suit for redemption against a mortgagee or a party entitled to a lien on the title-deeds (y).

Attaching creditor.—Clause (f) of the old section which conferred on an attaching creditor a right to redeem has been abrogated by the Amending Act, 20 of 1929. Thus an attaching creditor has no right to redeem. The cases on the said clause will be found collected in (z).

(o) Secs. 126 and 127, Indian Contract Act, 1872.

(p) Sec. 145, Contract Act, 1872.

(q) Sec. 140, Contract Act, 1872.

(r) Sec. 141, Contract Act, 1872.

(s) *Hobson v. Bass* (1871) 6 Ch. App. 792;

Forbes v. Campbell (1882) 19 Ch. D. 615.

(t) *Green v. Wynn* (1869) 4 Ch. 204.

(u) *Palmer v. Hendrie* (1859) 27 Beav. 349, 54

E. R. 136; *Kinnaird v. Trollope* (1889) 39

Ch. D. 636.

(v) Sec. 128 of the Indian Contract Act, 1872.

1872.

(w) *Green v. Wynn* (1869) 4 Ch. App. 204;

Bateson v. Gosling (1871) L. R. 7 C. P. 9.

(x) *Powell v. Eason* (1831) 8 Bing. 23, 131 E. R.

308.

(y) *Christian v. Field* (1842) 2 Hare 177, 67

E. R. 74.

(z) *Kiernander v. Benimadhab* (1931) 58 Cal.

598; *Chamiyappa v. Rama Ayyar* (1921)

44 Mad. 232.

Ss. 91-92

Unregistered compromise giving up equity of redemption.—In 1860, A by way of conditional sale mortgaged his property to certain persons. By an unregistered compromise, the mortgagor gave up his equity of redemption in respect of the property in suit and the mortgagees agreed to A and his wife remaining in possession during their lives and thereafter that it should revert to the mortgagees. The mortgagees dealt with the property as owners. A suit by the heirs of the mortgagor for redemption in 1876 was held barred on the ground of adverse possession (a).

92. *Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.*

Subrogation.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Amendment.—Prior to the Amending Act, 20 of 1929, subrogation was reached by the combined effect of sections 74 and 75. Section 47 of the Transfer of Property Amendment Act, 20 of 1929, introduced subrogation for the first time in the Law of Transfer of Property by the addition of the new section 92 which is founded wholly on section 74 and partially on section 75. The said two sections 74 and 75 laid the rule, known as “redeem up and foreclose down,” which was also expressed in O.34, r.11 of the Code of Civil Procedure, 1908, which has now been abrogated by the introduction of the present section. The Legislature has founded section 92 on so much of sections 74 and 75 and O.34, r.11 as related to the doctrine of subrogation, consigning the residue of section 75 to section 94. O.34, r.11 was abrogated on the ground that the rule enunciated was more of substantive law than of procedure and, therefore, its proper place was in the Transfer of Property Act, 1882, and not in the Code of Civil Procedure, 1908.

Code of Civil Procedure, 1908, Order 34, rule 11.—Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute

(a) *Khedu Rai v. Sheoparsan Rao* (1917) 39 All. 423.

a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

S. 92

Retrospective effect.—The section has not a retrospective effect (b). A contrary view has been taken by the Allahabad High Court (c).

Subrogation.—The section is supplemental to and corollary to section 91. Where one creditor had any hypothecation or privilege upon property, as security for a debt, and another creditor had a like subsequent security upon the same property for another debt, there the latter, upon payment of the prior debt to the prior creditor, was entitled to accession of the property and to a subrogation to all the rights and actions of the same creditor for that debt. It is the substitution of one party for another as a creditor. It differs from a transfer or assignment of the debt as the creditor is not a necessary party to the transaction by which the right of the third party is worked out and is not dependent on a transfer of the debts by the creditor. The right is conferred by the section on a person who pays the debt which in the event of default by the debtor he would be bound to pay, or where he has some interest to protect, or where he advanced the money under an agreement, expressed or implied, made either with the debtor or creditor that he would be substituted to the rights and remedies of that creditor. This right may be acquired in one of two ways, either by operation of law or by agreement between the parties. The former is known as legal subrogation, which proceeds on the theory, that the mortgage debt is paid. Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, which is a payment of the mortgage debt. Legal subrogation is only reached by redemption. The latter case, which is known as conventional subrogation, which is applied where an agreement is made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor, takes place where the holder of a bond assigns it to a party claiming a right to redeem or by agreement arrived at between the parties whereby such person agrees to pay or discharge the debt of the mortgagee. The case of *Gokaldas Gopaldas v. Puranmal Premsukhdas* (d), where it was held that the purchaser of an equity of redemption who had paid off the first charge, might use the first mortgage as a shield against mesne encumbrancers, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an illustration of the former class of cases. The case of *Jagatdhar Narain Prasad v. A. M. Brown* (e) furnishes an illustration of the second class of cases, which according to the decision of their Lordships of the Judicial Committee in *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (f) shews the line dividing the class of cases, where no bargain is made when the money is advanced, and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises. Consequently it may be said in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety for the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise

(b) *Jagdev Sahu v. Mahabir* (1934) 13 Pat. 111; *Pichaiyappa v. Govindarajulu*, A. I. R. (1931) Mad. 110; *Jagdeo Sahu v. Mahabir Prasad*, A. I. R. (1934) Pat. 127; *Lakshmi-chand v. Janardhan*, A. I. R. (1932) Nag. 154 (suit prior to and appeal after the

amendment); *Umar Ali v. Asmat Ali* (1931) 58 Cal. 1167.

(c) *Tota Ram v. Ram Lal* (1932) 54 All. 897.

(d) (1891) 10 Cal. 1035, 11 I. A. 126.

(e) (1904) 33 Cal. 1133.

(f) (1900) 29 Cal. 154, 29 I. A. 9.

S. 92

be adequately protected (g). A subrogee has the same rights as to redemption, foreclosure or sale as the mortgagee whose mortgage he redeems. Subrogation is the process by which a person who pays the debts of another, succeeds to the rights of the creditor who is paid off. The essence of subrogation is that a party paying off a charge becomes, in equity, the assignee of that charge. Consequently, he is subrogated to the charge in the form which it has assumed when his assignor in equity is by a legal fiction supposed to make the assignment. He steps into the shoes of the prior encumbrancer at the point where he is standing and takes over his rights and remedies, whatever they may be, at the moment the lien is discharged (h). He is an equitable transferee even without a transfer being executed (i). The contrary view, however, is held by the Calcutta (j) and Patna (k) Courts. The distinction between legal and conventional subrogation is well marked and is mainly due to the fact that when a person under an obligation pays a debt to a creditor, the latter is not bound to give him an assignment and may refuse to do so. Under those circumstances equity intervenes and regards that as done which ought to have been done, namely, the execution of the assignment, and treats the person paying the debt as the creditor. Hence it is unnecessary for the security of the person redeeming or paying the debt to obtain a formal assignment. Equity safeguards his rights and interests, irrespective of such deed, by declaring that on his discharging the creditor he shall be invested and clothed with all his rights and be entitled to all the securities possessed by the creditor. This is legal subrogation. It took place as of right and without any agreement as such by the creditor and as a matter of equity; not so in the case of conventional subrogation, which must be in writing and registered when the money is advanced by a person to a mortgagor with which the mortgage has been redeemed. Legal subrogation as dealt with in para 1 is restricted to persons enumerated in section 91 and the co-mortgagor. Conventional subrogation may be claimed by anyone who by registered instrument with the mortgagor redeems a prior mortgage. It is dealt with by para 3 of the section. It has been observed that legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession (l). In a legal subrogation no assignment is required as it is implied by law, and the subsequent mortgagee is vested with all rights and powers of the prior mortgagee, whom he redeems. So if a second mortgagee pays off the first mortgagee without obtaining an assignment and without getting a receipt for the amount paid, but obtains in lieu thereof the actual mortgage documents, the second mortgagee has a right to sue for the amount due under the first mortgage, for it would be inequitable that a party paying off the amount due under the first mortgage should not be entitled to occupy his position (m). Conventional subrogation arises by agreement made either with the debtor or creditor. According to the section, on money advanced to a mortgagor, the person making the advance is subrogated to the rights of the mortgagee whose mortgage has been redeemed, only if the mortgagor by registered instrument has agreed to such person being subrogated. In India, a mere agreement

(g) *Gurdeo Singh v. Chandrika Singh* (1907) 36 Cal. 193.

(h) *Parvati Ammal v. Venkatarama Iyyer*, A. I. R. (1925) Mad. 80.

(i) *Cracknall v. Janson* (1879) 11 Ch. D. 1.

(j) *Devi v. Mukanlal* (1921) 25 C. W. N. 283.

(k) *Sibanand Misra v. Gajmohan Lal or Jagmohan Lal* (1922) 1 Pat. 780.

(l) *Gurdeo Singh v. Chandrika Singh* (1907) 36 Cal. 193.

(m) *Narayan Budhaji v. Posha Jama* (1921) 45 Bom. 1112; *Mahomed Ibrahim v. Ambika Pershad* (1910) 39 Cal. 527 (P.C.); *Bissessur v. Lala Surnam Singh* (1907) 6 C. L. J. 134; *Cracknall v. Janson* (1879) 11 Ch. D. 1.

either with a creditor holding a mortgage or with the debtor owing it, cannot give a person lending money to discharge the mortgage, a lien over the property (n). In England and in America it may be that the principles of equity would enable the Courts to treat the agreement for a mortgage as giving the lender an equitable interest in the property agreed to be mortgaged, but equitable interests are not recognized in this country as distinct from legal interests.

In *Gurdeo Singh v. Chandrika Singh* (o), the rule of subrogation is stated and it seems to be assumed that a payment under agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security would be sufficient to entitle the lender to the benefit of subrogation. In *Jagatdar Narain Prasad v. A. M. Brown* (p), it was held that an agreement to give a mortgage would be enough to create a charge by way of subrogation, though the decision of the case itself does not seem to have required an enunciation of the principle. It appears that the important distinction between English and Indian Law pointed out above, was overlooked in these cases. It may be, however, that the lender who paid the prior mortgagee could claim as equitable mortgagee (q). A person discharging a mortgage is entitled by subrogation to hold it up as a shield against the further charge in favour of the same mortgagee. The doctrine of subrogation is extended to a person whose interest has come into existence during the pendency of a mortgage suit. His transaction is not invalid on the ground of *lis pendens*. The latter doctrine does not apply to one who during the pendency of a mortgage suit, obtains a mortgage of the property and out of whose money the mortgagor pays off the mortgage in the suit (r). The doctrine does not apply when a person merely performs his own obligation or covenant, and pays off the charge which he has undertaken or is bound to satisfy (s). Hence a mortgagor is excluded. Being a question of fact, a claim to subrogation cannot be raised for the first time in second appeal (t).

No claim to subrogation.—A person is not entitled to this right, if at the time of transfer there is nothing to assign, and there has been no mistaken belief as to the actual existence of a subsisting interest in the vendor, and payment is made in expectation of a future title (u), or where the first mortgage is extinguished by the execution of the second, where the hand that pays is that of the mortgagor and not the puisne mortgagee. A person lending money, which covered the whole mortgaged property, including the share of one who was not a party to the subsequent mortgage, and the mortgage-money was applied in discharge of a prior mortgage, was held not entitled to stand in the shoes of the earlier mortgagee and claim subrogation (v).

Persons entitled to subrogation.—They are the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor.

Satisfaction of entire mortgage debt by one co-mortgagor.—Till the introduction of this section a co-mortgagor discharging a mortgage debt and redeeming the mortgaged property was governed by section 95, which necessitated his obtaining possession whereupon he acquired a charge on the share of each of the other

(n) See sec. 54 of the Transfer of Property Act.

(o) (1907) 36 Cal. 193.

(p) (1904) 33 Cal. 1133.

(q) *Khushal v. Poonamchand* (1898) 22 Bom. 164.

(r) *Narayan v. Syed, Hafiz A. I. R.* (1925) Nag. 21.

(s) *Har Shyam Chowdhury v. Shyam Lal Sahu* (1915) 22 C. L. J. 227; *Surjiram v. Bharam-*

deo (1905) 2 C. L. J. 288.

(t) *Ali Muhammad Khan v. Sheik Maharaj Bepari* (1922) 36 C. L. J. 186.

(u) *Govinda Padayachia v. Lokanatha Aiyar* (1921) 40 M. L. J. 114.

(v) *Chellamcherla v. Mummareddi* (1911) 21 M. L. J. 180.

S. 92

co-mortgagors (*w*). According to the amended section a co-mortgagor is entitled to subrogation as he has been added to the list of persons entitled to redeem under section 91. So that *Raj Kumari's* case is now statute law (*x*). A mortgagor who pays off a mortgage created by himself and his co-mortgagor acquires, on equitable grounds, the right of the prior mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires his rights and the benefit of his securities held by him. In principle there is no difference, therefore, between the case of a subsequent mortgagee and that of a co-mortgagor who satisfies the prior mortgage. Both classes relieve another, and his property, and the liability which attaches to them, and the same principles of justice and equity which applied to one equally apply to the other. Therefore, the effect of the discharge of the whole mortgage debt by one co-mortgagor is to create mortgagee rights on his co-mortgagor's share in respect of the amount paid by him in excess of the share of the mortgage debt for which he is proportionately liable. Such a claim takes priority over a subsequent mortgage, for the same property created by one or other co-mortgagor, even though the actual payment which gave him such a right was subsequent to the mortgage of the co-mortgagor (*y*). The redeeming co-mortgagor is entitled only to such proportion of the debt properly paid in such redemption as would be attributable to the share of the co-mortgagor in the property, just as under section 95 he is entitled to the expenses in that proportion. That a co-mortgagor's suit can be only to recover not the whole mortgage amount paid by him, but only a proportion of the amount attributable to the share of the other co-mortgagor, is clear from section 95 where the basis of calculation is the same as to expenses incurred in redemption. Again, section 60 lays down an exception to the rule that the mortgage security is indivisible, by permitting a mortgagee or where there are more mortgagees than one all such mortgagees, who has or have acquired in whole or in part the share of a mortgagor to redeem his own share, so that the effect of a co-mortgagor paying off the mortgagee is as if the mortgagee had acquired the share of such co-mortgagor. Therefore, the result is that he is a mortgagee to the extent of the remaining amount due on the mortgage. Contribution or no contribution will depend on whether the mortgagors are interested jointly or severally. The value of each share will be taken as at the date of mortgage for ascertaining the rate at which each such share shall contribute. A redeeming mortgagor can only bring a suit against the others, for a suit against himself and the other mortgagors would be untenable, as under Order 34 of the Civil Procedure Code he would be bound to implead himself as a defendant as being interested in the mortgage property. Such a position would be absurd. The right is not restricted to mortgagors in the sense of persons who have actually executed the mortgage deed but includes their heirs (*z*) or assigns. Therefore the heirs of a deceased mortgagor and a purchaser of a portion of a mortgaged property in execution, must be deemed to be one of the mortgagors; so also a second mortgagee who buys the equity of redemption in execution of a decree on his mortgage becomes a co-mortgagor as regards the first mortgagee (*a*). Where property was purchased by the plaintiff and first defendant as joint owners and a *san* mortgage was executed to enable them to pay the purchase price, which mortgage was redeemed by the first defendant alone,

(*w*) *Umar Ali v. Asmat Ali* (1931) 58 Cal. 1167; *Shankar v. Bhikaji* (1929) 53 Bom. 353.

(*x*) (1920) 25 C. W. N. 283.

(*y*) *Aziz Ahmad Khan v. Chhota Lal* (1928) 50 All. 569; *Har Prasad v. Raghunandan Prasad* (1909) 31 All. 166; *Pancham Singh v. Ali Ahmad* (1882) 4 All. 58; *Lutar Ram v. Lal Ranjit Singh*, A. I. R. (1924) Oudh

85.

(*z*) *Gafur Imam v. Amir Isab* (1925) 49 Bom. 591.

(*a*) *Ramchandra v. Narayanaswami* (1928) 51 Mad. 910; *Vithal Nilkanth Pinjale v. Vishvasrav* (1894) 8 Bom. 497; *Nainappa Chetti v. Chid mbaram Chetti* (1889) 21 Mad. 18.

the payment would entitle the latter to a lien on the whole property of the plaintiff's share of the mortgage debt. The fact of redemption cannot amount to a denial of the plaintiff's right even though he was aware of it (b). The liabilities of the co-mortgagors are separate and the plaintiff is not entitled to a decree for sale of their shares jointly on their failure to pay their proportion of the mortgage debt, but is entitled to a separate decree against each of them in proportion to his share of debt. In the case of a usufructuary mortgage by several co-mortgagors which mortgage is satisfied out of the usufruct, each co-mortgagor is not entitled to recover possession of more than his share of the mortgaged property. Consequently where in such a case one of several co-mortgagors gets possession of the whole of the mortgaged property, he does not occupy the position of a mortgagee to his co-mortgagors, but his possession is adverse to them (c). Upon discharge of such a mortgage the co-mortgagor is not entitled to sue for contribution but to satisfy himself out of the usufruct as he is subrogated to the rights of the mortgagee.

Surety.—He is one of the persons enumerated in section 91. Sec. 140 of the Contract Act, IX of 1872, deals with the right of surety on payment or performance (d) while section 141 deals with his rights to the benefit of the creditors' securities. The latter right is derived from the obligation of the principal debtor to indemnify his surety (e). It arises at the time of becoming surety and does not remain in abeyance till he discharges the obligation. It certainly is not the law that a surety has no rights until he pays the debt due from his principal (f). His liability is secondary. It does not arise until the principal debtor has failed. He contracts not a contingent but an actually existing debt (g). The subrogation takes place on payment of the debt (h) and he is entitled to require from the creditor the benefit of the securities for the debt which the creditor had at the time of the contract of suretyship (i). And a creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety so as to enable him on paying the debt to take the security in its original condition unimpaired (j). If on payment by the surety the creditor is unable to give the security to the surety, the surety is discharged to the extent of that security (k). If securities to which a surety is entitled are not voluntarily given up to him by the creditor, he may compel delivery and bring an action for the purpose (l). In India the surety's right to securities is restricted to those held by the creditor at the time of the transaction (m) and does not extend to securities subsequently given or taken after the contract for the suretyship, as in England (n). A person who becomes surety for a limited amount of a debt has, on paying the amount for which he is liable, all the rights of a creditor in respect of that amount and is entitled to share in the security held by the principal debtor for the whole debt (o). But not to the benefit of a security given by the debtor to the creditor at a different time for another part of the debt (p), and where the suretyship is for the whole debt with a liability limited in amount, the

- (b) *Chandbhai v. Hasanbhai* (1922) 46 Bom. 213.
 (c) *Gobardhan v. Sujan* (1894) 16 All. 254;
 Fakir Bakhsh v. Sadat Ali (1885) 7 All.
 376.
 (d) Sec. 140, Indian Contract Act, IX of 1872.
 (e) *Bechervaise v. Lewis* (1872) 26 L. T. 848;
 Yonge v. Reynell (1852) 9 Hare. 809, 68
 E. R. 744.
 (f) *Dixon v. Steel* (1901) 2 Ch. 602.
 (g) *Atkinson v. Grey* (1853) 1 Sm. & G. 577.
 (h) *Forbes v. Jackson* (1882) 19 Ch. D. 615.
 (i) *Leicestershire Banking Co., Ltd. v. Hawkins*
 (1900) T. L. R. 317; *Newton v. Chorlton*
 (1853) 10 Hare. 646, 68 E. R. 1087.
 (j) *Pledge v. Buss* (1860) 6 Jur. N. S. 695, 70

- E. R. 585.
 (k) *Campbell v. Rothwell* (1877) 38 L. T. 33.
 (l) *Goddard v. Whyte* (1860) 2 Giff. 449.
 (m) Sec. 141, Indian Contract Act, IX of 1872.
 (n) *Leicestershire Banking Co., Ltd. v. Hawkins*
 (1900) T. L. R. 317 (D.C.); *Campbell v.*
 Rothwell (1877) 38 L. T. 33; *Newton v.*
 Chorlton (1853) 10 Hare. 646, 68 E. R.
 1087.
 (o) *Thornton v. M'Kewan* (1862) 11 W. R. 140;
 Hobson v. Bass (1871) 19 W. R. 992;
 Goodwin v. Gray (1874) 22 W. R. 312.
 (p) *Wade v. Coope* (1827) 2 Sim. 155, 57 E. R.
 747.

S. 92 surety is not entitled to the benefit of any securities until the whole debt is paid (*q*). Although the ultimate liability could be enforced against him, he being a surety for the whole, he is only to be called upon to the extent of his limitation. He has no equity arising out of any reduction of the ultimate balance if the principal debtor had paid part of the debt (*r*). As regards the balance for which he is not a surety, if he pays the balance he would be entitled to subrogation. A surety paying the debt is entitled to the same rate of interest as the mortgagee (*s*).

Waiver of right of subrogation.—There is no subrogation if he has contracted with the debtor for a particular species of indemnity (*t*) or when the liability is limited (*u*). The waiver may be not only expressed (*v*) but may be implied from the course of dealing between the parties (*w*).

Marshalling securities.—A surety is entitled to have the securities marshalled in his favour (*x*).

Contribution.—This is dealt with by the Indian Contract Act 1872, sections 146 and 147.

Consolidation.—When two properties are mortgaged by A to B for distinct sums, and C is surety for one only, the right of B to retain all the securities until repaid both debts, overrides the right of C to have the benefit of securities for that debt of which he is surety. The defendant lent AB at the same time two sums of £2,000 and £3,000 on distinct securities and the plaintiff was surety for the first sum. Held that the plaintiff on paying the £2,000 was not entitled to have a transfer of the securities held for that sum until the defendants had also been paid the £3,000 (*y*).

Surety really a principal debtor.—Where on the construction of the deed it appears that a surety is really the principal debtor, he is not entitled to the rights and powers of the first mortgagee who is discharged by him, when a second mortgage subsists on the property (*z*).

Principal debtor really a surety.—In an action by the payee of a joint and several promissory note against one who is, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety by way of equitable defence to plead a special plea for a set-off due from the payee to the principal arising out of the same transaction out of which the liability of the surety arose (*a*).

Puisne or subsequent mortgagee.—A puisne encumbrancer can always pay off a prior encumbrance, and the mortgagor who created both has neither interest nor right to object (*b*). The section, as it has been observed, confers a statutory right on the subsequent mortgagee to pay off the prior mortgage and contemplates a tender being made (*c*) and a receipt being given, and on these conditions being fulfilled, a statutory right is created in and power is conferred on the subsequent mortgagee in respect of the mortgaged property itself. Such payment must be of the whole

(*q*) *In re Sass, ex-parte, National Provincial Bank of England, Ltd.* (1896) 2 Q. B. 12.
 (*r*) *In re Rees, ex-parte, National Provincial Bank of England, Ltd.* (1881) 17 Ch. D. 98.
 (*s*) *Re Beulah Park Estate* (1872) L. R. 15 Eq. 43.
 (*t*) *Cooper v. Jenkins* (1863) 32 Beav. 337, 55 E. R. 132.
 (*u*) *In re Rees, ex-parte, The National Provincial Bank of England* (1881) 17 Ch. D. 98; *In re Mellon, Milk v. Towers* (1918) 1 Ch. 37; *Midland Banking Co. v. Chambers* (1868) 4 Ch. App. 398.
 (*v*) *Re Fernandez, ex-parte, Hope* (1844) 8 Jur. 1128.
 (*w*) *Re Balmer, ex-parte, Johnson* (1853) 21 L. T.

O. S. 109, 43 E. R. 86.
 (*x*) *Praed v. Gardiner* (1788) 2 Cox. Eq. Cas. 86, 30 E. R. 40; *Re Holland, ex-parte, Alston* (1868) 4 Ch. App. 168; *Re Stratton, ex-parte, Salting* (1883) 25 Ch. D. 148.
 (*y*) *Farebrother v. Wodehouse* (1856) 23 Beav. 18, 53 E. R. 7.
 (*z*) *Nicholas v. Ridbey* (1904) 1 Ch. 192; *Duncan Fox & Co. v. North & South Wales Bank* (1880) 6 A. C. 1; *Newton v. Charlton* (1853) 10 Hare. 646, 68 E. R. 1087.
 (*a*) *Bechervaise v. Lewis* (1872) 20 W. R. 726.
 (*b*) *Wadho Rao v. Gulam Mohiuddin* (1919) 15 Nag. L. R. 134.
 (*c*) *Shafiq-ullah v. Sami Ullah* (1930) 52 All. 139.

amount due when it has become payable, and if the money be not accepted and the receipt be not given, it may be tendered in Court, under section 83 of the Transfer of Property Act, or the tenderer may sue for the enforcement of his rights. There are thus special conditions on which the right and power mentioned in the section are founded (*d*). It is only when the puisne mortgagee redeems a prior mortgage that the question of subrogation arises. The payment must be made by his own hand to the prior encumbrancer and not to the mortgagor or his agent (*e*). In the absence of any indication to the contrary the presumption is that he wished to make the payment of his own hand with a view to keep the prior encumbrance alive for his own benefit (*f*). There is no provision in the Transfer of Property Act to support the proposition that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge or concurrence on the part of the mortgagor, acquire a new right over the mortgaged property. The language of the section makes it clear that the second mortgagee is by tender of the mortgage-money, to acquire no other right than that possessed by the prior mortgagee. In effect there is a transfer by the prior mortgagee to the subsequent mortgagee. The puisne mortgagee, however, cannot by so doing enlarge the scope of the security, created by his own mortgage deed. Again, the section covers independent acts of a subsequent mortgagee paying off a prior mortgage, and has no application, where the mortgagor executes a subsequent mortgage, to pay off a prior mortgage (*g*). If a second mortgagee buys in the first mortgage for less than the amount due or even gratuitously, he is entitled to charge the mortgagor what was on the security purchased in addition to what was due to him (*h*). So also a stranger purchasing is entitled to recover the entire mortgage debt and not what was paid for it (*i*). The essence of the doctrine is that by subrogation he succeeds to all the rights of the mortgagee he redeems (*j*). The puisne mortgagee is not entitled to make payment until the prior mortgagee is capable of redemption (*k*). On payment of the prior encumbrance he becomes an equitable transferee without an actual transfer (*l*). The law secures to him the interest which he might have acquired by a conveyance (*m*). The right of puisne mortgagee to redeem a prior mortgagee is not an absolute right but arises when he comes into Court to obtain his remedy for his own mortgage (*n*), nor is it restricted to redemption of the next prior mortgage for it is open to him to redeem any mortgage prior to his own (*o*), even though it be his own (*p*). But he cannot insist on payment under circumstances which would not give such a right to the mortgagor. The right is not analogous to that of a surety

(*d*) *Durga Charan Chandra v. Amica Charan Chandra* (1927) 54 Cal. 424.

(*e*) *Tufail Fatma v. Bitola* (1905) 27 All. 400; *Perianna Servaigaran v. Masudainayagam Pillai* (1899) 22 Mad. 332; *Kuppmia Sahib v. Chidambaram Chetty* (1896) 19 Mad. 105; *Perumal v. Kaveri* (1893) 16 Mad. 121.

(*f*) *Chidambara Nadan v. Muni Nagendrayyan* (1920) 39 M. L. J. 445; *Dinobundhu Shaw v. Jogmaya Dasi* (1901) 29 Cal. 154, 29 I. A. 9; *Shafiq-ullah v. Sami-Ullah* (1930) 52 All. 139.

(*g*) *Kandasami Nayakhar v. Venkata Reddiar*, A. I. R. (1925) Mad. 1219; *Mohesh Lal v. Mohant Bawan Das* (1882) 961, 10 I. A. 62.

(*h*) *Sivathi Odayan v. Ramasubbayyar* (1898) 21 Mad. 64, *Davis v. Banett* (1851) 14 Beav. 542, 51 E. R. 394; *Shaw v. Bunny* (1864) 34 L. T. Ch. 257, 46 E. R. 456; *Dobson v. Land* (1850) 8 Hare. 216, 68 E. R. 337.

(*i*) *Phillips v. Vaughan* (1685) 1 Vern. 336, 23 E. R. 504.

(*j*) *Bappu v. Venkatachalapathi*, A. I. R. (1934) Mad. 227; *Nagayyar v. Govindayya*, A. I. R. (1923) Mad. 349; *Ram Sahai v. Kunwar Sah*, A. I. R. (1932) Oudh 314; see *Ramchandra v. Narayanaswami* (1928) 51 Mad. 810.

(*k*) *Akhara Panchaiti v. Suba Lal* (1896) 18 All. 83.

(*l*) *Bissessur v. Lala Sarnam Singh* (1907) 6 C. L. J. 134; *Cracknall v. Janson* (1879) 11 Ch. D. 1.

(*m*) *Perianna Servaigaran v. Marudainayagam Pillai* (1899) 22 Mad. 332.

(*n*) *Duber v. Ram Sahai*, A. I. R. (1924) Oudh 56.

(*o*) *Chhota Lal v. Bansidhar*, A. I. R. (1926) All. 953; *Duber v. Ram Sahai*, A. I. R. (1924) Oudh 56; *Mahomed Ibrahim v. Ambika Pershad* (1912) 39 Cal. 527, 39 I. A. 68; *Tota Ram v. Ram Lal* (1932) 54 All. 897.

(*p*) *Kankhaiya Lal v. Gulab Singh*, A. I. R. (1933) Oudh 9.

S. 92 who acquires the benefit of all the security held by the creditor, for he cannot acquire any higher right than the prior mortgagee and, therefore, cannot claim to recover the money paid by him in order to discharge the first mortgage by sale or foreclosure against all the property originally comprised in that mortgage, notwithstanding the fact that portions of the property may have been lost by partial destruction or otherwise (q). By subrogation he only acquires the rights and powers of the redeeming mortgagee as such so that other subsidiary rights as that of lessor or otherwise, which come to an end with the redemption, do not pass (r), but where there is an outstanding lease in favour of the mortgagor, subrogation can only be allowed subject to the rights under the lease (s). The puisne mortgagee is not subrogated to the rights of the first mortgagee where the intention of the parties to the transaction is to extinguish the first mortgage by the execution of the second (t). Extinction of the first mortgage is not, however, prejudicial to the second mortgagee, for he becomes the first mortgagee and if he be a third or fourth mortgagee he steps higher on the ladder. There is no extinction, however, if the subsequent mortgagee obtains the actual mortgage document even without obtaining a transfer or getting a receipt (u). The puisne mortgagee is subrogated to the charge in the form which it has assumed when his assignor in equity is by legal fiction supposed to make the assignment (v), so that if he pays off the prior encumbrancer before the Court sale becomes absolute he is subrogated to the decree charge (w). But the satisfaction of the decree precludes him from proceeding with the execution proceedings for no one can execute a satisfied decree. His only remedy, therefore, is to file a suit and obtain a fresh decree (x), as his rights are brought into existence by the decree, for the contractual rights between the mortgagor and the redeemed mortgagee are merged in the decree (y), unless the decree is set aside, in which case he, being a purchaser in execution proceedings, is relegated to the position of the prior mortgagee.

A puisne mortgagee paying between the date of sale and the date of confirmation, the price of property sold at an auction sale held on a prior mortgage, is subrogated to the decree charge in spite of the fact that the mortgage in favour of the puisne mortgagee was a sham as having been created by a person having no title to do so (z). The position of a puisne mortgagee differs from a co-mortgagor. The latter is entitled to contribution only, the former is not a co-debtor and stands on a higher footing (a). The right of subrogation was denied when a puisne mortgage was collusive and fraudulent (b). Where a puisne mortgagee satisfies a decree obtained by a prior mortgagee who has drawn out moneys paid by the former into Court, he is subrogated to the rights and remedies of the prior mortgagee, but his

- (q) *Muhammad Mahomed Ali v. Kalyan Das* (1896) 18 All. 189.
 (r) *Alagiriswamy Mudali v. Akkulu Naidu* (1921) 41 Mad. L. J. 462.
 (s) *Pallikandi Kalapmath Mammad v. Malancheri Mammad* (1917) M. W. N. 789.
 (t) *Kuppmia Sahib v. Chidambaram Chetty* (1896) 19 Mad. 105; *Perumal v. Kaveri* (1893) 16 Mad. 121; *Tufail Fatma v. Bitola* (1905) 27 All. 400; *Said Ahmad v. Raja Narain*, A. I. R. (1932) Oudh 255.
 (u) *Narayan Budhaji v. Posha Jama* (1921) 45 Bom. 1112; *Mahomed Ibrahim v. Ambika Pershad* (1912) 39 Cal. 527 (P.C.).
 (v) *Parvati Ammal v. Venkatarama Iyyer*, A. I. R. (1925) Mad. 80.
 (w) *Parvati Ammal v. Venkatarama Iyyer*, A. I. R.

- (1925) Mad. 80.
 (x) *Avudai Ammal v. Chinna Ramasami Naik*, A. I. R. (1925) Mad. 129; *Parvati Ammal v. Vakatarama Iyyer*, A. I. R. (1925) Mad. 80; *Kolappa v. Raghavayya* (1927) 50 Mad. 626; *Gopi Narain Khauna v. Bansidhar* (1905) 27 All. 325, 32 I. A. 123.
 (y) *Narayan v. Nathmal* (1921) 17 Nag. L. J. 200; *Sibanand v. Jagmohan* (1922) 1 Pat. 780.
 (z) *Parvati Ammal v. Venkataram Iyyer*, A. I. R. (1925) Mad. 80.
 (a) *Muhamad Tabarak v. Dulip Narain*, A. I. R. (1927) Pat. 117.
 (b) *Gulzari Lal v. Aziz Fatima* (1919) 41 All. 372.

remedy to enforce his lien is by suit and not in execution proceedings, for his discharge of the prior encumbrance amounts to satisfaction of the decree and no one can execute a satisfied decree (c).

S. 92

A person who makes the payment cannot claim to be substituted for the plaintiff in the mortgage decree obtained by a prior encumbrancer, for the decree having been paid off there is no decree which can be realized by execution. To work out his rights a new decree is required and hence a suit is the only remedy (d). Section 47 of the Code of Civil Procedure, 1908, is no bar to such a separate suit. An exception is, however, made when no order absolute has been made, for then the security is not extinguished and the lender is subrogated on payment of the decree to the mortgagee's rights and powers (e). But this view, it is submitted, is not correct, for foreclosure is by the decree directed only in the event of the sum named not being paid on or before the prescribed date, for on payment of the same into Court by the subrogated mortgagee before the expiry of the enlarged time and acceptance of that sum by the prior mortgagee the decree was spent and became discharged and satisfied. The rights of the subsequent mortgagee merge in the decree because the contractual relations between the mortgagor and the prior mortgagee who has obtained the decree came to an end on the decree being obtained, so that the rule of *Dam Dupat* will not apply as between the mortgagor and the subsequent mortgagee (f), as the rule only applies when the relation of the debtor and creditor subsists (g). What, then, is the nature of that suit? Is it to be a suit to enforce the original mortgage merged in the decree or a suit declaring the puisne mortgagee's right to execute that decree? It must be a suit not to establish a right to execute the first mortgagee's decree but to establish the right to enforce the charge under the original first mortgage, even though it had at that stage become merged in a decree (h). Thus the puisne mortgagee's remedy is a suit on his subrogated rights under the first mortgage charge (i). There is, however, a difference when the decree on the prior mortgage is paid out of moneys advanced by the subsequent mortgagee to the mortgagor and paid by the latter in satisfaction of the mortgage decree or the decree is satisfied by the subsequent mortgagee as the mortgagor's agent in which case no subrogation can arise. For such a payment is not a tender within the meaning of section 83 so as to give rise to subrogation (j) unless the case falls within paragraph 3 and the mortgagor has by registered instrument agreed that such person shall be subrogated to the rights of the prior mortgagee. Repealed section 74 (present section 92) was confined to the case when a subsequent mortgagee paid off a prior mortgagee. The rule contained in the section is also covered by section 75 (now section 94), but both these sections apply only to the case of a subsequent mortgagee. The principle of subrogation, however, ought to apply generally to all cases other than those of a mortgagor who pays off his own debt or of a mere volunteer. In *Bissessar Prasad v. Lala Surnam Singh* (k), it is observed as follows:—"The doctrine of subrogation is a doctrine of equity in jurisprudence. It

(c) *Gopi Narain Khauna v. Bansidhar* (1905) 27 All. 325, 32 I. A. 123; *Sundara Reddiar v. Subbiah Koundan* (1913) 24 M. L. J. 28.

(d) *Avudai Ammal v. Chinna Ramaswami Naik*, A. I. R. (1925) Mad. 129; *Parvati Ammal v. Venkatarama Iyer*, A. I. R. (1925) Mad. 80; *Kotappa v. Raghavayya* (1927) 50 Mad. 626.

(e) *Lutar Ram v. Lal Ranjit Singh*, A. I. R. (1924) Oudh 85; *Premsukdas v. Peer Khan* (1927) 23 Nag. L. R. 86.

(f) *Narayan v. Nathmal* (1921) 17 Nag. L. R. 200.

(g) *In the matter of Hari Lall Mullick* (1906) 33 Cal. 1269; *Nanda Lall Roy v. Dhirendra Nath Chakravarti* (1913) 40 Cal. 710.

(h) *Gopi Narayan Khauna v. Bansidhar* (1905) 27 All. 325, 32 I. A. 123; *Bansidhar v. Gaya Prasad* (1902) 24 All. 179 reversed.

(i) *Kotappa v. Raghavayya* (1928) 50 Mad. 626.

(j) *Tufail Fatma v. Bitola* (1905) 27 All. 400.

(k) (1907) 6 C. L. J. 134, 137.

S. 92 does not depend on privity of contract, express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice. While, therefore, the doctrine will be applied in general, whether any person other than a mere volunteer pays a debt or a demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities."

Subsequent mortgage.—As the doctrine is based on redemption, no subrogation can arise by a prior mortgagee discharging a subsequent mortgage. As to a posterior mortgage, a prior mortgagee has no right of redemption. His only right is under section 94 (old section 75) of the Transfer of Property Act.

One suit only on both mortgages.—A subsequent mortgagee who makes payment of a prior mortgage debt and acquires the rights and powers of the prior mortgagee must be taken to have done so subject to his position as holder of his own mortgage. When, therefore, he sought to enforce, by suit, his original mortgage against the security which by his payment of the former mortgage he has protected and made more valuable for the realization of his debt, he is bound under O.2, r.2 of the Code of Civil Procedure, to join in that suit any further claim which he had against that property by reason of payments made by him under section 92, the sum so paid being treated as an addition or accretion to the claim on his original mortgage (*l*).

Right of usufructuary mortgagee who satisfies a prior mortgage.—A subsequent usufructuary mortgagee redeeming a prior usufructuary mortgagee and obtaining possession is entitled by subrogation to the rights and powers of the prior mortgagee. A puisne mortgagee whose mortgage is usufructuary and who satisfies a prior mortgage is entitled to retain possession until the amount paid by him as well as the amount due in respect of his own mortgage has been realized. In one case the heirs of the usufructuary mortgagee had been ousted from possession by a decree obtained by the heirs of the first mortgagee who were sued for redemption by the heirs of the puisne mortgagee who obtained a decree and recovered possession (*m*). In another case the usufructuary mortgagee had satisfied a decree for sale on a prior mortgage affecting the property mortgaged to him (*n*).

Upon subrogation suit on personal covenant by subsequent mortgagee.—The point involved, namely, whether the subsequent mortgagee is restricted to his right of suit under section 92 of the Transfer of Property Act, or can independently maintain a suit in the present form and obtain a personal decree, is not altogether free from doubt. The Calcutta High Court has held that both remedies are available (*o*). It is submitted that unless he exhausts his remedy against the mortgaged

(*l*) *Hari Narain Banerjee v. Kusum Kumari Dasi* (1910) 37 Cal. 589; *Sundar Singh v. Bholu* (1898) 20 All. 332 distinguished; *Dorasami v. Venkataswamy* (1902) 25 Mad. 108; *Keshavram v. Ranchhod Fakira* (1906) 30 Bom. 156; *Nathu Krishnamma Chariar v. Annangara Chariar* (1907) 30

Mad. 353, 38 Mad. 927 F.B.
 (*m*) *Kirat v. Debi Singh* (1905) 27 All. 309.
 (*n*) *Abdul Qayyum v. Sadr-ud-din Ahmad Khan* (1905) 27 All. 403.
 (*o*) *Durga Charan Chandra v. Ambica Charan Chandra* (1927) 54 Cal. 424.

property he cannot proceed on the personal covenant (*p*). The point, as to whether a puisne mortgagee redeeming a prior encumbrance can sue the mortgagor on the personal covenant for the deficit, was decided in the affirmative by the Allahabad High Court (*q*) which proceeded on section 65 (*c*) of the Transfer of Property Act.

Tacking.—As tacking is prohibited by section 93, a subsequent mortgagee redeeming a prior mortgage gains no advantage in respect of his own encumbrance so as to entitle him to claim any additional advantage in respect of his mortgage against any encumbrances between his mortgage and the prior encumbrance. Subrogation, therefore, does not enlarge the scope of his original security.

On redeeming shall have the same rights as the mortgagee, etc.—Although the section gives the redeeming second mortgagee the rights and powers of the redeemed mortgagee as such, the consequences incidental on redemption, nevertheless, must follow so that the mortgagee's rights as lessor do not pass and come to an end with redemption (*r*). A person who accepts a lease from a mortgagee in possession is presumed to know that his lessor's rights are liable to be determined on redemption. The tenancy thus created continues till redemption (*s*). A mortgagee agreeing to purchase the equity of redemption and discharging prior encumbrances is entitled to be subrogated, for no question as to whether the payment is for the benefit of the mortgagor or mortgagee arises in cases where the section has to be applied. All that one has to see in applying the section is whether the person claiming its benefit was a mortgagee at the time of his payment (*t*).

Need not be next prior mortgage.—These qualifying words "next prior mortgage" which are to be found in the repealed section 74 are omitted, so that the right given by the section is not restricted to redemption of the mortgage immediately prior to that of the person redeeming, and a subsequent mortgagee can redeem any mortgage which is prior to his even if there be mesne encumbrances (*u*).

When does the right arise.—The right of a puisne mortgagee to redeem a prior mortgage is not an absolute right, but arises when the latter comes into Court to obtain his remedy for his own mortgage (*v*).

Puisne mortgagee's omission.—If a person, being a party to a suit on a mortgage prior to his own, omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he omits to plead (*w*).

Expectant heirs.—A testator bequeathed certain properties to his foster-son. His widows and the foster-son after his death lived together and the latter, without any directions in the will, discharged encumbrances on the properties other than those bequeathed to him. On his death a contest arose between the widow and his legal representatives. The Court came to the conclusion that had he survived the widow, he would have got the properties, that, therefore, he was not a volunteer, and as the payment was not made by him gratuitously he was entitled to be reimbursed the amount spent in removing the encumbrances (*x*).

Auction purchaser and his assignees.—First and third mortgage on property, and second mortgage on crops also, having been effected, the mortgagors were sued

(*p*) See sec. 68 of the Transfer of Property Act.
 (*q*) *Ali Jan v. Manian Bibi* (1904) 26 All. 93.
 (*r*) *Alagiriswami Mudali v. Akkulu Naidu* (1921) 41 M. L. J. 462; *Ram Chand v. Raj Hans* (1906) 3 A. L. J. 517.
 (*s*) *Seshamma Shettati v. Chickaya Hegade* (1902) 25 Mad. 507, 512.
 (*t*) *Nagayyar v. Thudukuchi Govindayyar*, A. I. R. (1923) Mad. 34.
 (*u*) *Mahomed Ibrahim v. Ambika Pershad* (1912)

39 Cal. 527, 39 I. A. 68; *Duber v. Ram Sahair*, A. I. R. (1924) Oudh 56; *Chhota Lal v. Bansidhar*, A. I. R. (1926) All. 953.
 (*v*) *Duber v. Ram Sahai*, A. I. R. (1924) Oudh 56.
 (*w*) *Duber v. Ram Sahai*, A. I. R. (1924) Oudh 56; *Sri Gopal v. Pirthi Singh* (1902) 24 All. 429, 29 I. A. 118; *Nathu Krishnamma v. Annangara Chariar* (1907) 30 Mad. 353.
 (*x*) *Piramu Ammal v. Scrunatha Ammal*, A. I. R. (1925) Mad. 1175.

S. 92

by some creditors for ordinary debts, and their lands sold in execution of the decree but subject to the mortgages. The purchaser of the equity of redemption was one Pingala who paid Rs. 1,000 out of which the judgment debt was satisfied. The second mortgagee then filed a suit against the original mortgagors, the third mortgagee, and Pingala who sold his interest in the course of the proceedings to the assignees who paid the second mortgagee sums of moneys from time to time and saved the crops from seizure. Whilst this was going on the third mortgagee brought a suit against the original mortgagors and Pingala and his assignees. In this suit the lands were sold freed and discharged from the mortgages. After payment of the amount of the first mortgage a sum of Rs. 1,327 remained in Court to the credit of the cause. The third mortgagee claimed this amount as against the auction purchaser and his assignees. The Judicial Committee held that the auction purchaser and his assignees were entitled to subrogation of the rights of the second mortgagee. So far as they could be supposed to purchase his rights at various times, so far they would be entitled to stand in his shoes, and claim priority over the third mortgagee apart from the amount realized by him by the sale of the crops (y).

Reversioner during continuance of the limited estate.—A testator having mortgaged land in fee, devised it to his wife during the minority of his two sons and directed that when they were of age the property should be equally divided between his wife and children, whichever of them might be living at that time. After the testator's death the widow mortgaged her interest under the will to the original mortgagee and died while the sons were still infants. The infants by a next friend brought an action against the mortgagee to redeem the testator's mortgage. Held, on the authority of *Ravald v. Russell* (z), that during the continuance of the widow's limited estate the plaintiffs were not entitled to redeem the testator's mortgage without the consent of the mortgagee as owner of the limited estate. The reversioner is not entitled forcibly to redeem the tenant for life (a). The right of a reversioner to redeem and thus to be subrogated was discussed at great length in a Madras case (b), where V. hypothecated certain land to M. in 1898 and died in 1904, leaving two widows (defendants 1 and 2) and five daughters (defendants 3 to 7). M. obtained his decree against the widows and certain purchasers from them. While the sale in execution of the decree was going on, N., one of the plaintiffs in this suit, paid the amount of the decree into Court. The daughters executed a mortgage in favour of two plaintiffs for the amount paid by them for discharging the debt due to M. It was contended that the daughters having discharged their burden on V.'s estate in the hands of the widows, the land in their possession became liable for the amount paid by them. In support of this argument the judgment of Warrington, J., in *Butler v. Rice* (1910), 2 Ch. 277, was relied on. In that case Mrs. Rice was the owner of a house in Bristol and property at Cardiff which were together mortgaged to secure £450 and interest. The title-deeds of both the properties were deposited with the bank. At the request of Mrs. Rice, Butler agreed to lend the amount upon a legal mortgage of £300 on the Bristol house and guarantee of £150 by Mr. and Mrs. Rice's solicitor who was to hold the title-deeds for him in the meantime. Money was paid and the title-deeds of the

(y) *Mallireddi Ayyareddi v. Adusumilli Gopal-krishnayya* (1924) 26 B. L. R. 204 (P.C.); *Gokaldas Gopaldas v. Rambux Seochand* (1884) 11 I. A. 126; *Dinobundhu Shaw Chowdhri v. Jogmaya Dasi* (1901) 29 I. A. 9; *Mahomed Ibrahim Hoosein Khan v. Ambika Persad Singh* (1911) 39 I. A. 68

followed; *Kesri Mal v. Mumbarak* (1911) 8 A. L. J. 663.

(z) (1830) You. 9, 159 E. R. 884.

(a) *Prout v. Cock* (1896) 2 Ch. 808.

(b) *Narayana Kutti v. Pechiammal* (1913) 36 Mad. 426.

Bristol house and the property at Cardiff were recovered from the bank and passed into the custody of the solicitor. Mrs. Rice did not know the transaction and refused to execute the mortgage in favour of the plaintiff. In that case the learned Judge appeared to hold that though the plaintiff had no previous interest in the property to sustain his action, in paying off the previous mortgage and claiming a charge for the amount paid by him he was entitled to stand in the shoes of the bank whose charge he had discharged. He observed that as there was an existing charge in favour of the bank, the concurrence of the mortgagor was immaterial. The decision almost goes to the length of holding that even a volunteer who pays off an existing mortgage would be entitled to a charge on the mortgaged property for the amount he paid. The decision was not based on any agreement between Butler and the debtor that the former should have the rights of the latter. It was also observed that the judgment in *Patten v. Bond* (1889), 60 L.T. 583, and the decision in *Chetwynd v. Allan* (1899), 1 ch. 353, were consistent with the view expressed by him. In *Patten v. Bond* the amount was lent at the request of the trustees for the purpose of preserving the trust estate. In such cases a right of subrogation has undoubtedly been recognized in English Law. In *Chetwynd v. Allan* the person who claimed the right of subrogation, paid the money at the request of the trustee for the owner of the property who was the trustee's wife, in order to discharge a mortgage executed on her property with her consent. He was, therefore, entitled to bind her interest by an agreement which he entered into for discharging the mortgage according to English Law. In India the scope of the rule is narrow. A mere agreement either with the creditor holding a mortgage or with the debtor owing it, cannot give a person lending money to discharge the property, a lien over the property. (See section 54 of the Transfer of Property Act.) In England it may be that the principle of equity would enable the Court to treat the agreement for mortgage as giving the lender an equitable interest in the property agreed to be mortgaged, but equitable interests are not recognized in this country as distinct from legal interest. In *Gurdeo Singh v. Chandrikah Singh* (c), the rule of subrogation is thus stated that payment made with agreement by the debtor or creditor that he should receive and hold the assignment of the debt as security would be sufficient to entitle the lender to the benefit of subrogation. In *Jagatdhar Narain Prasad v. A. M. Brown* (d), it was held that an agreement to give a mortgage is enough to create a charge by way of subrogation though the decision of the case itself does not seem to have required the enunciation of the principle. It appears that the important distinction between the English and Indian Laws pointed out above was overlooked in these cases. The principle is also recognized in *Kushal v. Punamchand* (e) where the transaction took place in the town of Bombay; the lender having paid the prior mortgage could, therefore, claim an equitable mortgage. There are two kinds of cases which must be distinguished from the class under notice. No conveyance would be required in cases where a person who having a previous interest in the property, pays off the prior mortgage, or where the owner of the equity of redemption paying off a mortgage, claims priority over a subsequent encumbrancer. So also in cases where one claiming a void or voidable conveyance or *bona fide* believing himself to have a title to the property discharges an encumbrance on it and claims a charge as against the owner. The principle contended for by the appellant that the mere payment of a mortgage debt by a stranger would entitle him to the mortgagee's rights by subrogation has always been negatived in India. On the

(c) (1907) 5 Cal. L. J. 611.

(d) (1906) 33 Cal. 1133.

(e) (1898) 22 Bom. 164; *Ram Tupal Singh v.**Biseswar Lall* (1875) 23 W. R. 305, 2 I. A. 131.

- S. 92 above authorities it was held that it was not open to any meddler to claim a lien by discharging a mortgage with which he had no concern and, therefore, the plaintiff could not claim to be subrogated (*f*). The third paragraph of the section puts an end to such discussion as above by requiring in such cases a written instrument registered and signed by the debtor and the person making the advance (*g*).

Stranger or volunteer.—The result of the Indian cases is that the doctrine of subrogation is never applied in aid of volunteers who pay off other people's debts without having any concern in them (*h*). In a later case, however, the Bombay High Court, on the principle laid down in *Butler v. Rice* (*i*), held that a person paying a subsisting mortgage, was entitled to be subrogated to the position of the mortgagee (*j*)—a case which, as already pointed out, proceeded on the distinction known in English Law between legal and equitable interests, unknown to this country. In a later case, the Bombay High Court (*k*), following *Butler v. Rice* (*l*), admitted a stranger to the right of subrogation when he had discharged a subsisting mortgage. The case of *Butler v. Rice*, however, proceeded on the English doctrine that if a stranger pays off a mortgage on an estate he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. In India, section 70 of the Indian Contract Act enacts that a gratuitous payment does not create any obligation on the part of the person enjoying the benefit (*m*).

Rent decree.—A rent decree is not a mortgage decree, therefore, there is no right of subrogation to a person advancing money to pay off the same (*n*).

Maintenance decree.—A person satisfying a decree for maintenance whereby a charge is created on the property subject to a mortgage, is entitled to be subrogated (*o*).

Judgment debtor.—Where disputes relating to a mortgage were referred to arbitration and a decree passed thereon, a redemption by one mortgagor as judgment debtor entitled him to be subrogated in the same way as a co-mortgagor (*p*).

Extinction of prior mortgage.—The rule applies where the payment operates as a purchase or equitable assignment. It does not apply where the intention of the parties was to extinguish the first mortgage by the execution of the second, for the existence of the two mortgages at one and the same time is the essence of the doctrine of subrogation, as also the independent action of the subsequent mortgagee

(*f*) *Narayana Kutti v. Pechiammal* (1913) 36 Mad. 426.

(*g*) *Narayana Kully Goundan v. Pechiammal* (1913) 36 Mad. 426.

(*h*) *Gurdeo Singh v. Chandrika Singh* (1909) 36 Cal. 193; *Apaji Bhivrao v. Kavji* (1882) 6 Bom. 24; *Vishnu v. Rango* (1894) 18 Bom. 382; *Khushal v. Punamchand* (1898) 22 Bom. 164; *Chama Swami v. Padala Anandu* (1908) 31 Mad. 439; *Gulzari Lal v. Aziz Fatima* (1919) 41 All. 372; *Umrai Lal v. Rukmin Kuar* (1916) 14 A. L. J. 953 (960); *Avudai Ammal v. Chinna Ramaswami Naick*, A. I. R. (1925) Mad. 129; *Govinda v. Lokanatha* (1921) 40 M. L. J. 114; *Brijmohan v. Dakhan*, A. I. R. (1931) Pat. 33; *Narayana Kutti Goundan v. Pechiammal* (1913) 36 Mad. 426; *Ram Tuhul Singh v. Biseswar Lal* (1875) 2 I. A. 131; *Gurdeo Singh v. Chandrika Singh* (1909) 36 Cal. 193; *Fatch Chand v. Moti Singh* (1935) 16 Lah. 1065; *Velayudhan Pandaram v. Nallathambi Nadan*, A. I. R.

(1928) Mad. 541; *Nangunni v. Nedungadi*, A. I. R. (1929) Mad. 860; *Pichaiyappa v. Govindaraja*, A. I. R. (1931) Mad. 110.

(*i*) (1910) 2 Ch. 277.

(*j*) *Tangya Fala v. Trimbak Daga* (1916) 40 Bom. 646; *Nangunni Kovi Umma v. Nedungadi*, A. I. R. (1929) Mad. 860 (redemption by a member of *tarwad*); *Govinda Kangani v. Muragesa Mudali*, A. I. R. (1931) Mad. 720.

(*k*) *Tangya Fala v. Trimbak Daga* (1916) 40 Bom. 646.

(*l*) (1910) 2 Ch. 277.

(*m*) *Ram Tuhul Singh v. Biseswar Lal* (1875) 23 W. R. 305, 2 I. A. 131; *Nobin Krishna Bose v. Mon Mohun Bose* (1881) 7 Cal. 573; *Upendra Chundra v. Tara Prosenna* (1903) 30 Cal. 794.

(*n*) *Ramanadan v. Ram Das*, A. I. R. (1934) Pat. 70.

(*o*) *Mt. Savitribai v. Nanhelal* (1934) 30 Nag. L. R. 148.

(*p*) *Jairam v. Bhilaji*, A. I. R. (1930) Nag. 300.

to put an end to the prior mortgage (*q*). If the second mortgagee pays off the first mortgagee without obtaining an assignment of the mortgage and without getting a receipt for the amount paid, but in lieu thereof obtains the actual mortgage document, it cannot be said that the first mortgage is extinguished (*r*).

Subrogation by estoppel.—On the execution of a mortgage by a person having no title to the property over which he subsequently acquires a charge, such interest is sufficient to feed the grant under section 43 and thus give the lender a right of subrogation as sub-mortgagee (*s*).

Possession.—Both the old section 74 and the section 92 are silent on the point. It is, however, not necessary to state, with reference to possession, that the redeeming mortgagee shall be entitled thereto if the redeemed mortgagee be in possession at the time of redemption as he acquires all the rights of the mortgagee whose mortgage he redeems. It must be noted that redemption or sale are remedies which extinguish the mortgage. Possession does not. Subsistence of the mortgage is the essence of subrogation. Extinction of the security leaves no occasion for the right.

Void mortgage.—A mortgagee discharging a prior encumbrance on property under the management of the Collector, made without his sanction, is not entitled to subrogation as the mortgage is void. He has no valid assignment of the property and is under no legal obligation to discharge the encumbrances to protect his own interests (*t*). Such a mortgagee would have a right under section 70 of the Contract Act to proceed against the mortgagor personally.

On redeeming.—These words indicate, as has been noticed above, that subrogation can only be had through redemption. In other words, unless the period of the mortgage to be redeemed has expired, no steps can be taken to acquire the rights conferred by this section.

On redeeming shall have the same rights as the mortgagee, etc.—Although the section gives the redeeming second mortgagee the rights and powers of the redeemed mortgagee as such, the consequences incidental on redemption, nevertheless, must follow so that the mortgagee's rights as lessor do not pass and come to an end with redemption (*u*). A person who accepts a lease from a mortgagee in possession is presumed to know that his lessor's rights are liable to be determined on redemption. The tenancy thus created continues till redemption (*v*). The section places no restrictions or limitations and gives the puisne mortgagee in such a case the right to be subrogated to the position of the prior mortgagee as to redemption, foreclosure or sale. It is said that the puisne mortgagee must ask for contribution. But contribution and subrogation are separate and collateral remedies, and no authority has been shewn in support of the proposition that a mortgagee of an undivided share held in common, who redeems the whole property, is not entitled to enforce the prior mortgage against the whole property (*w*).

(*q*) *Kuppmia Sahib v. Chidambaram Chetty* (1896) 19 Mad. 105 (both usufructuary mortgages); *Perumal v. Kaveri* (1893) 16 Mad. 121; *Tufail Fatma v. Bitola* (1905) 27 All. 400; *Koopmia v. Chidambaram* (1896) 19 Mad. 105.
(*r*) *Narayan Budhaji v. Posha Jama* (1921) 45 Bom. 1112; *Mahomed Ibrahim v. Ambika Pershad* (1912) 39 Cal. 527 (P.C.).
(*s*) *Mohan Singh v. Sewa Ram*, A. I. R. (1924)

Oudh 209.
(*t*) *Akbar Husain v. Shahanshah Begum*, A. I. R. (1924) Oudh 302.
(*u*) *Alagiriswami Mudali v. Akkulu Naidu* (1921) 41 M. L. J. 462; *Ram Chand v. Raj Hans* (1906) 3 A. L. J. 517.
(*v*) *Seshamma Shettali v. Chickaya Hegade* (1902) 25 Mad. 507, 512.
(*w*) *Muhammad Tabarak Ali Khan v. Dalip Narain Singh*, A. I. R. (1927) Pat. 117.

S. 92

Interest.—Interest is allowed to a person discharging a prior encumbrance (x). It is only by fiction of law that the mortgagor who redeems is substituted in the place of the original creditor (y). As to interest he cannot claim it for any period antecedent to the redemption. Subrogation does not place him precisely in the same position as the original mortgagee for all purposes as pointed in *re. Hewitt* (z). The Courts in India are, however, not uniform on the subject of allowing interest to a redeeming co-mortgagor nor as regards the period for which it is to be allowed. The Allahabad High Court allowed reasonable interest from the date of redemption (a). The Calcutta High Court in one case considered that the co-mortgagor was not bound by the rate of interest in the mortgage deed and that he was entitled to ordinary rate of interest at 12 per cent. per annum (b). While in a subsequent case, interest was allowed at the rates stipulated in the mortgage when the decree of the first Court was made and from that date upto realization at the Court rate of 6% per annum (c). The Privy Council, without any discussion on the point at the Bar, allowed interest on the redemption money at the Court rate only at the date of the institution of the suit, although the mortgage carried interest at a very high rate and was redeemed nearly three years prior to the co-mortgagor's suit. It appears from that case that the claim for interest from the date of redemption was disallowed (d). The Madras High Court allowed interest at 6% on the sum due to the co-mortgagor seeking contribution from the date of payment till the date of the suit (e), whilst the Bombay High Court has held, that his claim to interest must arise on notice to the co-mortgagor (f). In this case the word "expenses" has been used as meaning price of redemption.

On intention.—The presumption of law that a person paying or discharging a mortgage intends to keep it alive if it is for his benefit (g) is not irrebuttable (h). The question of intention is a question of fact. It has been laid down in numerous cases that certain acts or certain facts, are not sufficient to rebut the presumption; but when we consider the intention of a person doing an act, that act under one set of circumstances may shew a certain intention, whereas the same act under a different set of circumstances may shew a different intention, so that the inference in all cases has to be drawn from the circumstances of the cases themselves (i). The rule of intention before the Amending Act, 20 of 1929, was a crucial test in the application of section 101. It was also imported in the doctrine of subrogation as applied by sections 74 and 75 which have now been repealed. As the law then stood, the contractual relations between the mortgagor and his co-mortgagees were liable to be altered in one of four ways:—

- (1) Puisne encumbrancer discharging a prior encumbrance.
- (2) Co-mortgagor discharging an encumbrance.
- (3) Purchaser of the whole or part of the equity of redemption discharging an already subsisting mortgage.
- (4) A mortgagee purchasing the equity of redemption.

(x) *Pichai Konar v. Narasimha*, A. I. R. (1930) Mad. 471; *Bappu v. Venkatachalapathi*, A. I. R. (1934) Mad. 227; *Ramchandra v. Paralayammal*, A. I. R. (1935) Mad. 360; *Malireddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140.
 (y) *Har Prasad v. Raghunandan* (1909) 31 All. 166.
 (z) (1874) 25 N. J. Eq. 210.
 (a) *Kanee v. Amir Baksh* (1898) 18 A. W. N. 39.
 (b) *Roushan Ali Khan Chowdhury v. Kali Mohan Moitra* (1906) 4 C. L. J. 79.
 (c) *Digamber Das v. Harendra Narain Panday* (1910) 11 C. L. J. 226.

(d) *Malik Ahmed v. Musammat Shamsi Jahan Begam* (1906) 28 All. 482, 33 I. A. 81.
 (e) *Ramchandra v. Narayanaswami* (1928) 51 Mad. 810.
 (f) *Gafur Imam v. Amir Isab* (1925) 49 Bom. 591.
 (g) *Gokaldas Gopaldas v. Puranmal Premeekhdas* (1883) 10 Cal. 1035, 11 I. A. 126.
 (h) *Moesh Lal v. Mohant Bawan Das* (1882) 9 Cal. 961, 10 I. A. 62; *Sundaramayya v. Yanadamma* (1911) 21 M. L. J. 180; *Govindaswami Tevan v. Doraiswami Pillai* (1911) 34 Mad. 1919.
 (i) *Tiruvengadam Pillai v. Sabapathi Pillai*, A. I. R. (1925) Mad. 1217.

Where a purchaser of the whole of the equity of redemption discharged a subsisting mortgage or a mortgagee purchased the equity of redemption, the case fell within section 101, as to whether there was a fusion of the two rights, or whether it was the intention of the purchaser of the equity of redemption in one case, and the mortgagee in the other case, to keep the two rights apart, and prevent a merger. This rule of intention has, however, now been abrogated by the amendment of section 101. This rule of intention, however, was imported into the doctrine of subrogation as understood prior to the introduction of the present section, where a puisne encumbrancer discharged a prior encumbrance or a co-mortgagor or purchaser of part of the equity of redemption discharged an encumbrance. This led to the inquiry whether it was for the benefit of the person discharging the encumbrance to keep the mortgage alive. Section 92 as now framed makes it unnecessary to inquire into the question of intention, which is now regarded as not a necessary ingredient for the application of the doctrine of subrogation.

Limitation.—Subrogation does not give a fresh start of limitation, and the subrogee is entitled to the residue of the period to which the mortgagee on subrogation would have been entitled (*j*). The older cases proceeded on the basis of a fresh charge being created in favour of the subrogee on subrogation (*k*). The subrogee is an assignee in equity and stands on the same footing as an assignee at law. The right to reimbursement stands on a different footing from the right to enforce a security by virtue of subrogation. The former right arises on a contract, express or implied, to reimburse, while the latter is a right which equity concedes to a person who not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor (*l*). When a personal right of reimbursement is acquired and sought to be enforced under section 69 of the Contract Act, a period of three years from the date of payment would be available (*m*) under article 61 of the Indian Limitation Act.

Purchaser when subrogated to the rights of original mortgagee.—When a purchase is found to be invalid, the purchaser in possession of the land purchased who pays off an encumbrance on it, is entitled to stand in the shoes of the mortgagee whom he has paid off although his interest turned out to be illusory (*n*). And even so where he had ante-dated his sale deed for the purpose of supporting his title against a party with whom his vendor had entered into a previous agreement for sale, on the ground that his illegal act did not vitiate the payment subsequently made in discharging an encumbrance on the property which in itself was legal, there being no want of *bona fides* and certainly no fraud in the act of discharging the encumbrance (*o*). A purchaser of the equity of redemption is entitled to the benefit of the section (*p*). Certain lands being subject to three simple mortgages, of which the second mortgage was on the crops also, were sold in execution of a money decree. The purchaser of the equity of redemption paid to the second mortgagee moneys to

(*j*) *Mahomed Ibrahim v. Ambika Persad* (1912) 39 Cal. 527 P.C.; *Bansidhar v. Shiv Singh* (1934) 56 All. 134; *Sibanand v. Jagmohan* (1922) 1 Pat. 780; *Kotappa v. Raghavayya* (1927) 50 Mad. 626; *Gopi Narain v. Bansidhar* (1905) 27 All. 325 P.C.; *Parvati Ammal v. Venkatarama Iyer* (1924) 47 M. L. J. 316.
(*k*) *Shib Lal v. Munni Lal* (1922) 44 All. 67; *Aziz Ahmad v. Chhota Lal* (1928) 50 All. 569; *Bhagwan Das v. Karam Husain* (1911) 33 All. 708; *Yakub Ali v. Kishan Lal* (1906) 28 All. 743.

(*l*) *Sibanand v. Jagmohan* (1922) 1 Pat. 780.
(*m*) *Bansidhar v. Shiv Singh* (1934) 56 All. 134.
(*n*) *Nasiruddin v. Alimahomed Husain* (1927) 25 A. L. J. 20 P.C.; *Chama Swami v. Padala Anandu* (1908) 31 Mad. 439; *Syamalarayudu v. Subbarayudu* (1898) 21 Mad. 143; *Ammami Ammal v. Ramaswami Naidu* (1919) 37 M. L. J. 113.
(*o*) *Syamalarayudu v. Subbarayudu* (1898) 21 Mad. 143; *Palamalai Mudaliyar v. The South Indian Export Co., Ltd.* 33 Mad. 334.
(*p*) *Umed Singh v. Babu Ram*, A. I. R. (1934) All. 1035.

S. 92

save the crops from a sale under a decree which he had obtained to enforce his own mortgage. In a suit by the third mortgagee the lands were sold out and out, freed and discharged from the mortgages. From the sale proceeds the first mortgagee was paid, as also expenses of the sale and so forth, and there remained in Court to the credit of the cause a sum of Rs. 1,327. The assignees from the purchaser, therefore, claimed to be subrogated to the second mortgagee and in right of the latter, to receive this amount out of Court. The decree of the High Court provided that in respect of any payment made by the owner of the property to the second mortgagee he should acquire the rights of the second mortgagee. It is now settled law that where in India there are several mortgages on a property the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, that is, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property has covenanted to pay the later mortgage debt. It is further to be presumed, and indeed the Transfer of Property Act, section 101, so enacts, that if there is no indication to the contrary, then the owner has intended to have kept alive the previous charge if it would be for his benefit. So far, therefore, the purchaser or his assignees are supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far as they are entitled to stand in the shoes of the second mortgagee and claim priority over the third mortgagee (q). Here there was no encumbrance upon a composite security of land and crops, so that when proceedings are taken against one of them only, and money paid to stave off such proceedings, might certainly be considered as purchase-money and not redemption money, so that sums paid by the purchaser or the assignee to save the sale of crops, should be deemed to be *pro tanto* purchase of his second mortgage, not as a discharge of it. The fact that the third mortgage did not include the crop was immaterial and, accordingly, it was held that the assignee of the purchaser was entitled in respect of the payments to priority over the third mortgagee (r). So also a purchaser of a portion of the mortgaged property paying the amount of the first mortgagee (s). And even a purchaser at a sale in execution of a mortgage decree is entitled to subrogation although the money has been deposited in Court by the mortgagor himself (t). Again, a purchaser from a guardian where the purchase turned out to be invalid was entitled to subrogation in respect of money paid in discharge of a mortgage (u). If through want of title of the vendor no interest passes by the deed of sale to the transferee or where through default of the purchaser under the contract of sale the transaction falls through, no right of subrogation arises by payment in discharge of a mortgage (v). So also where a person claims under a share or *benami* transaction (w). It is only an unreal or void sale and not a voidable sale that precludes subrogation (x).

- (q) *Gokaldas Gopaldas v. Puranmal Premeekhdas* (1881) 10 Cal. 1035, 11 I. A. 126; *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1900) 29 Cal. 154, 29 I. A. 9; *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (1910) 39 Cal. 527, 39 I. A. 68.
 (r) *Malireddi Ayyareddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140; *Pichai Konar v. Narasimha* (1930) 58 M. L. J. 343; *Mata Din v. Istikhar Husain* (1930) 5 Luck. 53; *Rama Krishnayya v. Venkata*, A. I. R. (1934) Mad. 31.
 (s) *Gadiram v. Poonamchand*, A. I. R. (1933) Nag. 171.
 (t) *Abdul Razah v. Abdul Rahiman*, A. I. R. (1933)

- Mad. 715.
 (u) *Ammani Ammal v. Ramaswami Naidu* (1919) 37 M. L. J. 113.
 (v) *Ponnammal v. Pichai Thevan* (1927) 52 M. L. J. 33; *Pichaiyappa v. Govindaraja*, A. I. R. (1931) Mad. 110; *Adari Sanyasi v. Mookalamma* (1931) 54 Mad. 708; *Govinda Padayachi v. Lokanatha Aiyar* (1920) 40 M. L. J. 114.
 (w) *Velayudhan v. Nallathambi*, A. I. R. (1928) Mad. 541.
 (x) *Narayan v. Murti* (1936) Nag. L. R. 183; *Ramprasad v. Seth Jaskaran* (1925) 21 Nag. L. R. 21.

If A purchases a property subject to three successive charges, X, Y and Z, with full knowledge of their existence, and retains a portion of the purchase-money in his hands with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot, on satisfaction of the mortgage X, use it as a shield against the mortgage Y (y). But where the purchaser found on enquiry that there were only two subsisting charges, Y and Z, to be satisfied, and discovered after his purchase that there was a prior charge X, which was falsely described as satisfied in the mortgage instrument of Y (in a suit upon bond X), it was held that the purchaser was entitled to priority in respect of the payment made by him to satisfy the first mortgage X (z).

Indian Contract Act.—The right of a person interested in the payment of money which another is bound by law to pay is recognized by section 69 of the Indian Contract Act,—a right which is separate and independent of the present section (a).

A person discharging a prior mortgage in pursuance of his covenant and not for his own protection is not entitled to the benefit of subrogation (b).

Covenant to pay.—The payment must be made under an agreement either with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected (c). The rule of subrogation would not apply if the owner of the property had covenanted to pay the later mortgage debt (d). A puisne mortgagee can claim subrogation on the discharge of a prior encumbrance which is paid by his own hand and not by the hand of the mortgagor (e). It must be the independent act of the subsequent mortgagee, and not where the mortgagor executes a subsequent mortgage in his favour. An express agreement to discharge the prior encumbrances cannot be treated as conclusive evidence of an intention to extinguish the charge (f). The rule does not apply when the first mortgage was to be extinguished by the execution of the subsequent mortgage (g). A purchaser who retains the bulk of the price to discharge two or more mortgages to which the property is subject cannot, on discharge of the one, hold it as a shield against the claim of the other mortgagee or mortgagees inasmuch as payment by him is really a payment by the mortgagor (h). The same rule applies

(y) *Har Shyam Chowdhuri v. Shyam Lal Sahu* (1916) 43 Cal. 69; *Biseswar Prosad v. Lala Sarnam Singh* (1907) 6 C. L. J. 134.

(z) *Har Shyam Chowdhuri v. Shyam Lal Sahu* (1916) 43 Cal. 69; *Mohesh Lal v. Mohant Bawan Das* (1883) 9 Cal. 961, 10 I. A. 62.

(a) *Savitribai v. Seth Nanhelal* (1934) 30 N. L. R. 148; *Ramlal Mondal v. Khiroda Mohini Dasi* (1913) 18 C. W. N. 113; *Prosunno Kumar Bose v. Jamaluddin Mahomed* (1912) 18 C. W. N. 327; *Babu Bhagwati v. Maiyan Murat* (1931) 10 Pat. 528; *Kangal Chandra Pal v. Gopi Nath Pal* (1920) 24 C. W. N. 1068; *Bhagwati v. Banarsi Das* (1928) 50 All. 371 (P.C.); *Serafat Ali v. Issan Ali* (1917) 45 Cal. 691; *Durga Charan v. Ambica Charan* (1927) 54 Cal. 244; *Ma Mya May v. Ma Lon*, A. I. R. (1933) Rang. 112.

(b) *Har Shyam Chowdhuri v. Shyam Lal Sahu* (1915) 22 C. L. J. 227; *Surjiram v. Bharamdeo* (1905) 2 C. L. J. 288; *Mt. Jaidevi v. Shripati*, A. I. R. (1934) Oudh 129.

(c) *Gandao Singh v. Chandrika Singh* (1907) 36 Cal. 193; *Mohesh Lal v. Mohant Bawan Das* (1883) 9 Cal. 961, 10 I. A. 62; *Mohanlal v. Mohammad Sujat* (1934) 30 Nag. L. R. 164.

(d) *Gokaldas Gopaldas v. Puranmal Premsukhdas* (1881) 10 Cal. 1035, 11 I. A. 126.

(e) *Tufail Fatma v. Bilola* (1905) 27 All. 400; *Perianna Servaigaran v. Marudinayagam Pillai* (1899) 22 Mad. 332; *Kuppmia Sahib v. Chidambaram Chetty* (1896) 19 Mad. 105; *Perumal v. Kaveri* (1893) 16 Mad. 121.

(f) *Kandasami Nayakhan v. Venkata Reddiar*, A. I. R. (1925) Mad. 1219; *Mohesh Lal v. Mohant Bawan Das* (1882) 9 Cal. 961, 10 I. A. 62; *Mohanlal v. Mohammad Sujat* (1934) 30 Nag. L. R. 164.

(g) *Kuppmia Sahib v. Chidambaram Chetty* (1896) 19 Mad. 105; *Perumal v. Kaveri* (1893) 16 Mad. 121.

(h) *Tulsi Ram v. Radha Kishen*, A. I. R. (1933) Lah. 810; *Maksude Ali v. Sheikh Abdullah*, A. I. R. (1928) All. 77; *Muhammad Sadiq v. Ghaus Muhammad* (1911) 33 All. 101; *Abdul Razak v. Abdul Rahiman*, A. I. R. (1933) Mad. 715; *Biseswar Prosad v. Lala Sarnam Singh* (1907) 6 C. L. J. 134; *Surjiram Marwari v. Barhamdeo Persad* (1905) 2 C. L. J. 288; *Har Shyam Chowdhuri v. Shyam Lal Sahu* (1916) 43 Cal. 69; *Govindasami v. Dorasami* (1911) 34 Mad. 119; *Lakshmi Achi v. Narayansami* (1930) 53 Mad. 188.

S. 92

to the owner of the equity of redemption or a purchaser from him or a transferee from such purchaser (*i*). A contrary view has, however, been taken, that the right of subrogation belongs to a person who under an agreement has paid off the mortgage. A view which it is submitted is erroneous under the present section (*j*).

Agency.—The section does not recognize the doctrine of agency. Hence in agreeing to discharge a prior encumbrance a purchaser is not the mortgagor's agent (*k*).

Advanced to a mortgagor.—Subrogation is denied when money is paid by a lender to the mortgagor on his personal security to discharge a prior encumbrance. Obviously a mortgagor or a transferee from him who has undertaken the liability cannot claim subrogation although the Court may presume an agreement to substitute the lender in place of the mortgagee discharged. The Legislature has thought it desirable to avoid the difficulties arising in such cases. Hence, in order to sustain a claim to subrogation, the Act requires a registered agreement between the borrower and the lender that the latter shall be subrogated to the rights of the mortgagee whose encumbrance is discharged and to all the benefits thereof. This is conventional subrogation contained in the third paragraph of the section. The rule as to conventional subrogation does not, however, control the rule in paragraph 1 dealing with legal subrogation, so that a purchaser of mortgaged property, who discharges a previous mortgage out of the consideration and entitled to legal subrogation, need not have a registered instrument in his favour, with the mortgagor, that he shall be entitled to subrogation (*l*). A third mortgagee agreeing to discharge a first mortgage by agreement in the mortgage itself is entitled to claim subrogation (*m*).

Exception to the rule.—An exception to the principle laid down in the section is made by the last paragraph whereby it is enacted that the right of subrogation cannot be claimed by a person unless the mortgage in respect of which he makes the claim, is discharged in full. The paragraph has been added to avoid any complication and the difficulty of apportioning the claims arising from subrogation. By the last paragraph of section 60 of the Transfer of Property Act, a mortgage security is single and indivisible and cannot be broken up at the mere will of the mortgagor or mortgagee and part redemption is not permitted. A claim for enforcement of a part of the mortgage will not ordinarily lie. Again, subrogation can only be through redemption. Unless, therefore, the debt is paid in full no redemption can be claimed and unless there is redemption it is not easy to perceive how subrogation can arise. In other words, subrogation is by redemption and unless there is redemption no subrogation can take place (*n*). In order to avoid complicity and difficulty of apportioning claims arising in subrogation, this rule has been enunciated. Therefore, a partial or *pro tanto* payment cannot be recognized if subrogation is to be claimed. A subsequent purchaser could claim subrogation only when he has discharged in full a prior charge. Where there are two mortgages on a property and a person advances money for the payment of the first mortgage and that debt is satisfied, the lender is not entitled to stand in the shoes of the first mortgagee and to claim priority if he had no interest in the mortgaged property either as purchaser of the equity of redemption or as mortgagee at the time of the advance unless the

(i) *Lakshumi Achi v. Narayanasami* (1930) 53 Mad. 188.

(j) *Jagdeo Sahu v. Mahabir Prasad* (1934) 13 Pat. 111; *Mohanlal v. Mahomed Sujat*, A. I. R. (1933) Nag. 155; *Krishnamurthy v. Sathappa* (1933) 56 Mad. 517.

(k) *Ramgopal v. Nanakram* (1935) 31 Nag. L. R. 169 (Supp.).

(l) *Ramgopal v. Nanakram* (1935) 31 Nag. L. R. 169 (Supp.).

(m) *Mohanlal v. Mohammad Sujat*, A. I. R. (1933) Nag. 155.

(n) *Gurdeo Singh v. Chandrika Singh* (1907) 36 Cal. 193; *Udit Narain v. Asharfi Lal* (1916) 38 All. 502.

first mortgage is extinguished. It is necessary that the first mortgage should be entirely discharged before the claim to priority over the second mortgage can be sustained. Before one creditor can be subrogated to the rights of another, the demand of the latter shall be entirely satisfied. "It would not subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which would only be to give distinct interests in the same debt to both creditor and surety." This view is in no way inconsistent with that taken by the High Court of Bombay (o). Hence a person who makes the payment cannot, by simply paying the interest as it accrues, or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an encumbrance which is prior to his own. The contrary view would lead to endless difficulties. Also a number of persons would be entitled to rank as first encumbrancers with reference to different sums of money advanced by them, and it would be impossible to work out the rights of the parties (p). But this principle has no application to cases where the mortgage security has become split up. The question, whether a partial discharge of a prior encumbrance with the consent of the prior encumbrancer entitled the purchaser of the equity of redemption to stand in the shoes of the prior encumbrancer, was decided by the Allahabad High Court in the affirmative (q). It is submitted that in view of the last paragraph of section 92 this judgment must be regarded as obsolete and so also the subsequent cases which adopted this view (r). A subsequent mortgagee must, if he wishes to exercise the right of redemption left open to him, pay to the prior mortgagee the full amount due to him upon his prior mortgage and not the amount paid by the prior mortgagee at an auction sale held in execution of his decree, whether that was a high price or low price (s).

Under the first paragraph of section 60 a mortgagor has a right to redeem on payment or tender of the mortgage-money. But a lien created in favour of a purchaser at an execution sale under a compromise can be used only to the extent of the price paid and not to the full extent of the amount for which the lien was granted (t). Hence in this case the rule is that before one creditor can be subrogated to the rights of another the demand of the latter must be entirely satisfied. He must pay the entire amount of the senior encumbrancer (u).

Of what payment should consist.—In order to claim the benefit of subrogation payment must not only be of the mortgage-money but all costs, charges and expenses which the mortgagee has incurred or expended and to which he is entitled

(o) *Lomba Gomaji v. Vishvanath* (1893) 18 Bom. 86.

(p) *Hanumathaiyan v. Meenatchi Naidu* (1912) 35 Mad. 183; *Venkata Lakshmi Narayana Rao v. Allameni Venkayya* (1922) 43 M. L. J. 284; *Ma Lon v. Ma Nyo* (1923) 1 Rang. 714; *Jai Pragash Singh v. Rupmanjari Dasi*, A. I. R. (1923) Pat. 199; *Kanhiya Lal v. Ikram Fatima*, A. I. R. (1932) Oudh 268; *Narain Pershad v. Narain Singh* (1930) 52 All. 1037.

(q) *Udit Narain v. Asharfi Lal* (1916) 38 All. 502.

(r) *Swaminath Pillai v. Krishna Iyer* (1915) 38 Mad. 54; *Muthammal v. Razu Pillai* (1918) 41 Mad. 513, 515; *Rupabai v. Audimulam* (1888) 11 Mad. 345; *Premasukhdas v. Peerkhan* (1927) 23 Nag. L. R. 86; *Ram Sarup v. Ram Richhpal* (1929) 51 All. 920.

(s) *Phulmani Chaudhrai v. Nageshwar Prasad* (1911) 33 All. 370; *Dip Narain Singh v. Hira Singh* (1897) 19 All. 527; *Ganga Parshad Sahu v. The Land Mortgage Bank* (1894) 21 Cal. 366; *Dadoba Arjunji v. Damodhar Raghunath* (1892) 16 Bom. 486; *Wahid-un-nissa v. Gorbandhan Das* (1903) 25 All. 388; *Dina Nath v. Lachmi Narain* (1903) 25 All. 446; *Delhi and London Bank, Ltd. v. Bhikari Das* (1902) 24 All. 185; *Anandi Prasad v. Krishna Chandra* (1922) 44 All. 9; *Danoba v. Danodhar* (1889) 16 Bom. 486; *Dip Narain v. Har Singh* (1897) 19 All. 527; *Sri Ram v. Kesri Mal* (1904) 26 All. 185.

(t) *Baldeo Bharthi v. Hushiar Singh* (1895) W. N. 45.

(u) *Gurdeo Singh v. Chandrika Singh* (1907) 36 Cal. 193.

Ss. 92-93

under section 60 and section 72 of the Transfer of Property Act (v). See notes to these sections under which it is clear the price of redemption is not the mortgage-money only.

Exception to the rule in the last para.—The rule should be confined to cases which could not be covered by any one of the numerous exceptions engrafted on it. The rule does not extend to the following cases :—When the item of property becomes completely released from further obligation under the prior mortgage (w). When the property is lost in pre-emption proceedings after payment by a purchaser on account of a mortgage decree (x). Where money was raised from a puisne mortgagee to discharge the earlier encumbrance, and for the balance the mortgagor executed a *hundi* in favour of the prior mortgagee and transferred to the puisne mortgagee. When property comprised in a second mortgage is a fraction of that in the first mortgage, which is paid off by the third mortgagee and another together, the third mortgagee gets priority over the second to the extent of a corresponding fraction of his contribution (y). When a surety for a part of the debt has discharged the same before realization of the mortgage (z). And where land subject to three simple mortgages, of which the second included crops, was sold and the purchaser's assignee paid to the second mortgagee moneys to save the crops from sale under his decree, it was held that it was a purchase *pro tanto* of the second mortgage and that the assignee was entitled in respect of the payment to priority over the third mortgagee (a).

93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Prohibition of tacking.

Changes in the law.—Section 93 was originally section 80 and as such grouped among the priority sections, but by the Transfer of Property Amendment Act, 20 of 1929, it has been transferred from the priority group to the subrogation group, as the principle of "tacking" is akin to subrogation. There is no change in the section except as to the marginal note.

Generally.—Founded on preference given to legal estates, the English Law of tacking is based on the principle that a third mortgagee having lent his money without knowing that the second had any claim upon the estate, has in conscience as good a right to be paid the whole money lent as the second mortgagee has to the payment of what he advanced, and having by the assignment of the first mortgage got a right to hold the estate absolutely at law and having possession of the title-deeds without which the estate cannot be sold, the Court ought not to take from

(v) *Fulse v. Khubchand* (1891) A. W. N. 193.
 (w) *Venkataramana Reddi v. Rangiah Chetti* (1922) M. W. N. 15.
 (x) *Ma Lon v. Ma Myo* (1923) I. Rang. 714
 (y) *Ram Sarup v. Ram Richhpal* (1929) 51 All.

920.
 (z) *Mitchell v. Phillips* (1931) 59 Cal. 320, 58 I. A. 306.
 (a) *Malireddi Ayyareddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140.

him his legal protection of an honest debt (b). A different rule, however, obtains in this country, and except in the single instance provided in section 79 (c), the English doctrine of tacking is not recognized (d), its extension having been specifically denied to the mofussil (e). The first part of the section deals with a subsequent mortgagee obtaining an assignment of a prior mortgage and thus excluding the intermediate mortgagee. The latter part of the section deals with a subsequent advance made by a prior mortgagee after an intermediate mortgage has come into existence.

Ss. 93.

Subsequent advance.—In their Lordships' opinion the words of the section are destructive of the argument that when a mortgage was to secure further advances, any advance when made was not truly a subsequent advance. "Subsequent" from the context must mean subsequent to the intermediate mortgage, and if that is so, then in the sense of the section an advance when made after another mortgage granted becomes a subsequent advance (f).

Preservation of the security.—Moneys paid for the preservation of the security by a mortgagee entitle him to a charge and they being really in the nature of salvage payments on behalf of all persons interested, entitle him to tack such payments to the mortgage debt (g).

94. *Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.*

Rights of mesne mortgagee.

New section.—This section has been inserted into the Act by section 47 of the Amending Act, 20 of 1929. It is founded on the latter part of section 75 and the repealed Order 34, rule 11 of the Code of Civil Procedure, 1908. It enacts the latter half of the principle embodied in the familiar phrase "redeem up foreclose down."

Foreclosure or sale.—These are the two remedies open to a mortgagee against his mortgagor and have been dealt with in section 67 of this Act. The present section enacts that a mortgagee shall have against another mortgagee subsequent to him, the same rights which he has against his mortgagor.

Foreclosure by prior mortgagee.—A prior mortgagee has no right to foreclose a subsequent mortgagee except on obtaining a decree absolute for foreclosure, wherein a subsequent mortgagee is not a party. He is entitled to redeem the latter for he thereby acquires the rights of a mortgagor (h).

Foreclosure followed by redemption.—This occurs when there are cross claims. A mortgage by conditional sale was executed in favour of the defendant and thereafter, a usufructuary mortgage was made in favour of the plaintiff. The defendant prior mortgagee sued for foreclosure and obtained a decree and possession.

(b) *Belchier v. Renforth* (1764) 5 Bro. Parl. Case. 292, 2 E. R. 686.

(c) *Dalip Narayan Singh v. Chait Narayan Singh* (1912) 16 C. L. J. 344.

(d) *Udaya Chandra Rana v. Bhajahari* (1869) 2 Beng. L. R. 45; *Mithu Lal v. Kishan Lal* (1890) 12 All. 546; *Unni v. Nagammal* (1895) 18 Mad. 568.

(e) *Gain Narayan Mazumdar v. Braja Nath Kundu* (1870) 5 Beng. L. R. 463; *Narayan*

Venkoba v. Pandurang Kamat (1883) 7 Bom. 526.

(f) *Imperial Bank of India v. U Rai Gyaw Thu & Co., Ltd.* (1921) 51 Cal. 86, 98, 50 I. A. 283.

(g) *Monohar Das v. Hazarimull* (1931) 35 C. W. N. 1040, 58 I. A. 341; see sec. 72 of the Act.

(h) *Hasanbhai v. Umaji* (1904) 28 Bom. 153.

Ss. 94-95

Thereupon plaintiff, subsequent mortgagee, sued to redeem the defendant as prior mortgagee and the latter sought to redeem the plaintiff. It was held that equities demanded that defendant should be allowed to redeem the plaintiff (i). Here there were cross claims, and the equity of redemption had vested in the prior mortgagee, who as owner of the equity of redemption, was preferred (j).

Dismissal of redemption action.—Dismissal of such an action for non-payment of the mortgage-money does not operate as foreclosure (k).

95. *Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.*

Right of redeeming co-mortgagor to expenses.

Amendment.—Section 95 was substituted for the original section 95 by section 48 of the Amending Act, 20 of 1929.

Changes in the section.—Instead of providing for a separate charge as under the old section, it has now been enacted that one of several co-mortgagors shall be entitled to add the expenses properly incurred to the mortgage-money, as is attributable to the shares of the co-mortgagors while enforcing his rights of subrogation under section 92. Unlike the old section, it is now no longer necessary to obtain possession by the redeeming co-mortgagor unless the mortgagee was in possession, for till then he cannot be said to have redeemed. This change is due to the observations of the Judicial Committee on the construction of the old section made in *Malik Ahmad Wali Khan v. Musammatt Shamsi Jahan Begum* (l). The rule in the section flows from the right of subrogation given to a co-mortgagor under section 92 of the Transfer of Property Act, by providing that upon redemption he shall be entitled to add to the mortgage-moneys all expenses properly incurred by him in such redemption as is attributable to the share of the co-sharer in the property.

Retrospective effect.—The section applies to transactions prior to 1st April 1930 (m). The Courts of Nagpur (n) and Calcutta (o) have taken a different view. It is not specified in section 63 of the Amending Act, 20 of 1929.

Expenses properly incurred.—Sections 60, 72 and 76 of the Act provide for expenses of a mortgagee redeemed. No provision having been made for the expenses of a redeeming co-mortgagor, the section has been enacted to indemnify a redeeming co-mortgagor, against expenses in enforcing his right of subrogation. The word "expenses" is retained in the amended section. Formerly it was intended to include the price of redemption, that is, principal, interest and costs, now it can only mean costs. It is difficult to see why this section has been retained in its present form. The expenses to which a co-mortgagor is given a right by this section,

(i) *Paras Ram Singh v. Pandobi* (1922) 44 All. 462.

(j) *Ram Baran Chaube v. Bhagwati Pande* (1925) 47 All. 751.

(k) *Raghunath Singh v. Mt. Hunsraj Kunwar* (1934) 56 All. 561 P.C.; *Sita Ram v. Madho Lal* (1901) 24 All. 44; *Hari Ram v. Indraj* (1922) 44 All. 730; *Maina Bibi*

v. Chaudri Vakil Ahmed (1924) 27 Bom. L. R. 796, 52 I. A. 145.

(l) (1906) 28 All. 482, 33 I. A. 81.

(m) *Jhuma Lal v. Sham Narayan*, A. I. R. (1933) Pat. 33.

(n) *Ramkaran v. Jageshwar* (1934) 30 Nag. L. R. 1.

(o) *Umar Ali v. Asmat Ali* (1931) 58 Cal. 1167.

could have been recovered under section 92, unless it be, that he being entitled to claim from the joint owners a proportion of their debt, it must follow that he can only claim a proportion of the expenses, which is the only purpose it is serving by remaining in the Act. Even for such there is hardly any justification. A redeeming co-mortgagor is an assignee under section 59A of the mortgagee.

One of several mortgagors.—The words “one of several mortgagors” in section 95 of the Transfer of Property Act which enables one of them to redeem a mortgage and claim contribution from others, mean not only one of the original mortgagors, but also his heirs or assigns, such as purchasers of his interest in execution (p).

Limited right.—Under the section a redeeming co-mortgagor is not entitled to enforce the mortgage terms, as the section confers a limited right of subrogation. Therefore, on discharge of a mortgage debt, he cannot claim interest at the specified rate and the question of the amount of interest, the date from which it is to be calculated and the amount on which it is payable, are in the discretion of the Court (q). His claim must be based outside the section, as, for instance, by notice given to the mortgagors that he would claim interest against them on the expenses so incurred if they wished to redeem their shares (r).

96. *The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.*

The old section.—This related to sale of property subject to a prior mortgage. It was repealed by the Code of Civil Procedure and re-enacted as Order 34, rule 12.

New section.—This has been added by the Act, 20 of 1929, to meet a long-felt want as to the rights and liabilities of a mortgage by deposit of title-deeds. A similar provision has been added to section 100.

Mortgages by deposit of title-deeds.—See commentaries on section 58 (f).

97. (Application of proceeds.) Repealed by the Code of Civil Procedure, 1908 (Act V of 1908).

Anomalous Mortgages.

98. In the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Amendment.—The original section has been split up by the Amending Act 20 of 1929. The definition forms part of section 58 and the rights and liabilities are prescribed in this section.

(p) *Ramachandra v. Narayanaswami* (1928) 51 Mad. 810; *Nainappa Chetti v. Chidambaram Chetti* (1898) 21 Mad. 18.
(q) *Birendra v. Bahuria* (1934) 13 Pat. 356;

Digamber Das v. Harendra Narayan (1910) 14 C. W. N. 617.
(r) *Gaffur Imam v. Amir Isab* (1925) 49 Bom. 591.

Ss. 98-100

"Kanom."—A *kanom* partakes of the nature of a usufructuary mortgage and a lease, and that is an anomalous mortgage (*s*).

Clog.—Section 98 deals with the residuary class of mortgages which prior to the amendment, included the definition which now forms clause (g) of section 58. Its position in the Act prior to the amendment, was responsible for those decisions and observations of the Madras High Court which led to the exclusion of the rule about the invalidity of clogs on redemption (*t*). When the subject arose before the Privy Council, their Lordships pointed out that the rights and liabilities of the parties must depend on their written instrument, as controlled by the Act, for even if the mortgage be anomalous, its provisions cannot be allowed to offend the statutory right of redemption conferred by section 60 and the provisions of the one section cannot be used to defeat those of another, unless it was impossible to effect reconciliation between them. Section 60 is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary (*u*).

Rights and liabilities of the parties.—The rights and liabilities are determined by the terms of the contract, as evidenced by the mortgage deed (*v*). These are regulated by sections 60 to 66 as to mortgagors and 67 to 77 as to mortgagees. The applicability of these sections would be regulated by the decisions of the Privy Council above referred to (*w*). The Calcutta High Court refused to apply to an anomalous mortgage the provisions of sections 67 and 68 and denied, in the absence of a clause in the instrument, the right of sale to the mortgagee (*x*). To the same effect is a decision of the Chief Court of Oudh (*y*). The Privy Council decision does not appear to have been referred to in either of these cases (*z*). Though in a later case the Chief Court of Oudh, relying on another Privy Council decision (*a*) where the mortgage was not anomalous, passed a decree for sale in favour of an anomalous mortgagee (*b*).

99. (Attachment of mortgaged property.) Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), section 156 and Schedule V.

Charges.

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

(*s*) *Kanna Kurup v. Sankara Varma* (1921) 44 Mad. 344.

(*t*) *Hakeem Patte Muhammad v. Sheikh Davood* (1916) 39 Mad. 1010; *Kandula Venkiah v. Donga Pallaya* (1920) 43 Mad. 589.

(*u*) *Muhammad Sher Khan v. Raja Seth Swami Dayal* (1922) 44 All. 185, 49 I. A. 60.

(*v*) *Chan Yin v. Mg. Aung*, A. I. R. (1934) Rang. 159.

(*w*) *Muhammad Sher Khan v. Raja Seth Swami Dayal* (1922) 44 All. 185, 49 I. A. 60.

(*x*) *Gajadhar Agarwalla v. Sibananda*, A. I. R.

(1924) Cal. 592; *Qadir Parast Khan v. Mir Mohammad* (1935) 16 Lah. 612 *contra*.

(*y*) *Ram Sarup v. Gaya Prasad*, A. I. R. (1932) Oudh 178.

(*z*) *Muhammad Sher Khan v. Raja Seth Swami Dayal* (1922) 44 All. 185, 49 I. A. 60; but see *Madho Ram v. Gulam Mohiuddin* (1919) 15 Nag. L. R. 134 P.C.

(*a*) *Narsingh Partab v. Mohammad Yacub* (1924) 4 Luck. 363, 56 I. A. 299.

(*b*) *Mahabir Singh v. Kishori*, A. I. R. (1935) Oudh. 254.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, *and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.*

Changes in the section.—See section 50 of the Transfer of Property Amendment Act, 20 of 1929. In paragraph 1 an addition has been made by which the rights and liabilities of parties to a charge correspond to those of a mortgagor and mortgagee in a simple mortgage. Addition to paragraph 2 sets at rest the conflict of decisions with regard to enforcement of a charge against a *bona fide* transferee for value without notice, for while the Calcutta and Allahabad High Courts held that it could not be enforced, the Madras High Court took a contrary view. Consequently, it has been enacted that no charge shall be enforced against a transferee for value without notice of the charge unless otherwise provided by any law for the time being in force. This addition will also ensure the safety of a transferee for value without notice of the charge, particularly in cases where the charge is created by *operation of law* or by decree which will not necessarily be registered.

Retrospective effect.—The amendment in paragraph 2 has no retrospective effect (c).

Nature of a charge.—The section does not state how a mortgage right could be charged or any immoveable property could be charged. It does not limit or define the ways in which the property could be made security for the payment of money (d). It may be created by parol or by a deed *inter vivos* or by will by a decree or order of the Court (e). The form of expression or the literal sense is not to be regarded so much as the real intention of the parties, which the transaction discloses. If the documents shew an intention to make land security for payment of the debt, a charge arises (f). A charge does not involve a transfer of interest in the property, and arises from circumstances, that certain property or interest therein is indicated as the fund out of which the claim is to be satisfied. No technical terms are required, but the parties should indicate with certainty that a definite fund should be employed for the discharge of a definite debt (g). The definition in the section is partly of a positive and partly of a negative character (h). It is not a necessary condition that there should be a pre-existing liability. It can be validly created for the discharge of a future contingent liability (i). The authorities establish that it is not necessary to employ any technical terms (j). Intention of the parties to create a valid charge must be clearly expressed (k). It may be

(c) *Chhaganlal Sakham v. Chunilal Jagmal* (1934) 36 Bom. L. R. 277; *Suleman v. Patell* (1933) 35 Bom. L. R. 722 dissented from.

(d) *Imperial Bank of India v. Bengal National Bank, Ltd.* (1931) 58 Cal. 136, overruled by (1932) 59 Cal. 377, 58 I. A. 323; *Mulraj Khatau v. Vishwanath* (1912) 37 Bom. 198, 40 I. A. 24.

(e) *Bibhuti Bhusan v. Baikuntha* (1935) 62 C. L. J. 55.

(f) *Janardhan v. Anant* (1908) 32 Bom. 386.

(g) *Nathan Lal v. Durga Das* (1930) 52 All. 985.

(h) *Mohan Singh v. Sewa Ram*, A. I. R. (1924) Oudh 215.

(i) *Kesri Mal Umrao Singh v. Tansukh Rai-Kidar Nath* (1935) 16 Lah. 137.

(j) *Nathan Lal v. Durga Das* (1930) 52 All. 985; *Narain Dass v. Murli Dhar*, A. I. R. (1929) Oudh 539.

(k) *Venkata Jagannatha Rao v. Maharaja Rava* (1931) 60 M. L. J. 56; *Narain Das Murli Dhar*, A. I. R. (1929) Oudh 539.

S. 100

created orally or in writing (*l*). In the latter case registration is necessary (*m*). There is no transfer of property which must be specifically described, and the property be made security for the payment of money to another though the transaction should not amount to a mortgage. It may come into existence immediately (*n*) or may be created to discharge a future or contingent liability (*o*). Future produce may be charged (*p*). It is not a condition precedent that there should be a pre-existing liability (*q*). If the instrument be ambiguous or defective, it would fail to establish a charge on the ground of vagueness. A general hypothecation is too indefinite to be acted upon. Under section 29 of the Indian Contract Act, an agreement is void if its meaning is not certain or capable of being made certain, and under section 93 of the Evidence Act where the language of a deed is on its face ambiguous or defective, no evidence can be given to make it certain (*r*).

Description of the property.—The section requires both the specification of the property, and that it must be made security for the payment of money to another (*s*). The description must be such as to meet the requirements of the Registration Act, 1908, sections 21 and 22. The property must be capable of identification (*t*). Mere general words are insufficient. Hence a covenant that the obligee could recover from the “person and property” of the debtor is too wide to create a charge (*u*).

Charge created by act of parties.—A person redeeming a mortgaged property with the knowledge and consent of the mortgagor is entitled to a charge on the property (*v*). Where a covenant in a bond ran as follows :—“To secure this money we have mortgaged a 5 candeeshare out of 10 candeeshare. So long as the principal amount with interest is not paid to the aforesaid bankers, the hypothecated share will not be sold or mortgaged to any one.” The Full Bench (Petheram, C. J., dissenting) construed the instrument as a simple mortgage, while Petheram, C.J., held it to be a charge (*w*). A partition deed between two brothers provided for payment of a certain debt by one of the brothers and contained the following clause, “If either of the parties should fail to observe the provision the party in default shall pay to the other party who has sustained loss twice the amount from his properties.” Held—a charge was created on the properties (*x*). An agreement worded as follows was held to be a charge—“As my father Shivram Valad Keshav is dead, it has been arranged that I should succeed to his estate. Part of this estate at Vagoda, consisting of a house, fields, cattle and a cart have been given into your possession for use and enjoyment. The reason thereof is that you have undertaken to pay Rs. 450 found due on an adjustment of *khata* from my father to Gopaldas.

- (*l*) *Mirza Ahmad Baig v. Model Mills Nagpur, Ltd.*, A. I. R. (1926) Nag. 262; *Bibhuti Bhusan v. Bai Kuntha* (1935) 62 C. L. J. 55.
 (*m*) *Tulsiram v. Anusuya*, A. I. R. (1924) Nag. 360; *Mirza Ahmad Baig v. Model Mills Nagpur, Ltd.*, A. I. R. (1926) Nag. 262.
 (*n*) *Mohini Debi v. Purna Sashi* (1932) 36 C. W. N. 153.
 (*o*) *Kesri Mal Umrao Singh v. Tansukh Rai-Kidar Nath* (1935) 16 Lah. 137.
 (*p*) *Jugal Kishore v. Ram Narain*, A. I. R. (1923) All. 199.
 (*q*) *Kesri Mal Umrao Singh v. Tansukh Rai-Kidar Nath* (1935) 16 Lah. 137.
 (*r*) *Deojit v. Pilamber* (1879) 1 All. 275.
 (*s*) *Chob Singh v. A. J. Williams*, A. I. R. (1926) Oudh 230; *Mohini Debi v. Purna Sashi* (1932) 36 C. W. N. 153; *Tulsiram v. Anusuya*, A. I. R. (1924) Nag. 360;

- Collector of Etawah v. Beti Maharani* (1892) 14 All. 162; *Jagatdhar Narain v. Brown* (1906) 33 Cal. 1133.
 (*t*) *Tulsiram v. Anusuya*, A. I. R. (1924) Nag. 360.
 (*u*) *Tulsiram v. Anusuya*, A. I. R. (1924) Nag. 360; *Batchu Ramajogayya v. Vajjula Jagannadhan* (1919) 42 Mad. 185; *Dejoit v. Pilamber* (1879) 1 All. 275.
 (*v*) *Sambhu v. Nama bin Narayan Naikde* (1911) 35 Bom. 438; *Muhammed Sumsool v. Shewukram* (1874) 22 W. R. 409, 14 Beng. L. R. 226, 2 I. A. 7; *Lomba Gomaji v. Vishvanath Amrit* (1894) 18 Bom. 86, now see sec. 92 of the Act.
 (*w*) *Sheoratan Kuar v. Mahipal Kuar* (1885) 7 All. 258.
 (*x*) *Manickam Pillai v. Audinarayana Pillai* (1911) 20 M. L. J. 407.

I am unable to pay off this debt ; and so you have been put into possession of this property. I shall pass to you a sale deed in respect of this property, and shall transfer the fields to your name from the year 1888-89 ” (y). Where an estate is sold for arrears of revenue, the mortgage of a share of such estate executed between the date of default and the date of sale is invalid as against a purchaser, but the mortgagee has a charge on the surplus (z). Where one of two co-mortgagors pays the debt he has a charge on the share of his co-mortgagor (a). There can be no *wakf* in Mahomedan Law of the profits of the land apart from the land itself. Such a dedication creates at best a charge on the land and does not render it non-heritable, non-transferable or impartible (b). On purchase of the equity of redemption a first mortgagee can set up his security as a shield against a subsequent encumbrancer (c). When Government fails to realize Court fees from a debt in a pauper suit in which the plaintiff has succeeded, the amount due becomes a charge on the subject-matter of the suit and Government is entitled to realize, even though the subject-matter has passed into the hands of the decree-holder. In such a case the Government claim should be dealt with under section 479 of the Civil Procedure Code (d). Enhanced assessment is a charge on the land (e). On 7th May 1890, in execution of a decree against two out of three brothers who had mortgaged their property, one A. purported to purchase the whole property which he redeemed on 6th April 1892 by paying off the mortgage and A. remained in possession for 19 years until a suit was filed by an assignee of the share of the remaining brother K. for redemption of K.’s one-third share. Held, that A. had a charge on the one-third share of K. (f).

Although a Mahomedan *wakf* be not valid on the ground that it was for the benefit of the settlor’s family and not charity, it is competent to the Court to declare the charitable trusts constituted by the document to form a valid charge on the property (g). Where in an *ekrarnama* between A and B it was agreed that A would receive Rs. 150 per month during life as maintenance from the share which he inherited from her son, that B would pay the said sum every month, and if he did not pay it, A would be entitled to recover it from the said share, held that the annuity was a charge upon the share (h). A purchaser has a charge on property in respect of which part of the purchase-money is paid which may be lost only by his failure to perform the contract. The charge may be enforced against a purchaser for value with notice (i). Where on a partition, two of the parties were to pay a certain debt and in the event of their omission, others, and those paying were to recoup themselves from the properties going to the share of those liable, the arrangement created a charge (j). A person who has advanced money on an agreement to mortgage and been put in possession of the land as part of his security for the advance, has a charge on the land promised to be mortgaged, and cannot be ousted by the person who put him in possession and

(y) *Vani v. Bani* (1896) 20 Bom. 553.

(z) *Umatara Gupta v. Uma Charan Sen* (1906) 3 C. L. J. 52.

(a) *Raushan Ali Khan Chowdhury v. Kali Mohn Moitra* (1906) 4 C. L. J. 79; *Kinu Ram Das v. Mozaffer Hosain Saha* (1887) 14 Cal. 809 distinguished; now see sec. 92 of the Act.

(b) *Mofazzal Karim v. Mohammed* (1905) 2 C. L. J. 166.

(c) *Ram Nath Mukhopadhyaya v. Brahmamoyi Debya* (1905) 1 C. L. J. 531; *Surjiram Marwari v. Brahmadeo Persad* (1905) 2 C. L. J. 202.

(d) *Babui Giriya Kuer v. The Secretary of State for India in Council* (1919) 4 Pat. L. J. 166; *Ram Das v. The Secretary of State*

for India in Council (1896) 18 All. 419; *Puthia Valappil Barga v. Veloth Assenar* (1902) 25 Mad. 733.

(e) *Mahammad Khali v. Alathadi Maloor Kunhi Kannan Nair* (1920) M. W. N. 477.

(f) *Purna Chandra Pal v. Baroda Prosanna* (1918) 22 C. W. N. 637; now see sec. 92 of the Act.

(g) *Kauinunnessa Choudhrani v. Ekina Banoo* (1918) 22 C. W. N. 568.

(h) *Shyampeary Dasya v. The Eastern Mortgage and Agency Co., Ltd.* (1918) 22 C. W. N. 226.

(i) *Mt. Kesai v. Mt. Munna* (1917) 13 Nag. L. R. 19.

(j) *Imbichi v. Avukoya Haji* (1917) 33 M. L. J. 58.

S. 100

made the agreement (*k*). A mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate (*l*).

An allowance enjoyed for more than three-quarters of a century out of land specified in certain documents justifies the conclusion of a valid charge (*m*). Court fees are a first charge (*n*). The costs of an appeal having been advanced under an agreement which provided as follows :—" You should first take out of the amount which may be collected from the defendants, the whole of the amount incurred on account of the said costs," was held to constitute a charge (*o*). On a sale of a share in immoveable property the deed expressed that, " The said vendee is at liberty either to retain possession himself or to sell it to someone else ; and he is to pay Rs. 25 of the Queen coin to me annually (as *malikana*) which he has agreed to pay." Held a charge (*p*). A trustee has a lien on property for trust funds lent to a *cestui que trust* wherewith he purchased the property (*q*). A creditor has a general lien on the deeds of his debtor contained in a box, in which the debtor had deposited certain deeds as security for the debt and subsequently abstracted them (*r*). In a suit by an illegitimate son of a zemindar of the Sudra class, their Lordships while declaring that he was entitled to maintenance left it to the High Court to determine the private property of the zemindar upon which it could be charged (*s*). Moneys lent to an agent for the purchase of immoveable property on behalf of a principal is a charge on the property (*t*). A partition deed between two brothers contained a covenant by one of them to pay a certain debt and a clause that " If either of the parties should fail to observe the provision the party in default should pay to the other party who has sustained loss twice the amount from his properties." Held that the words created a charge on the properties (*u*). Where an agreement for sale of property was cancelled by a compromise decree which provided " Let the claim of the plaintiff for the sum of Rs. 600 be decreed against the defendants and hypothecated property with interest at Rupee 1 per cent. per annum in two years in accordance with the deed of compromise," it was held that as the decree contained no order for sale, it operated as a charge (*v*). In case of covenant to settle lands, although no lands are mentioned in the articles, yet the covenant is a lien upon the land whereof the covenantor is seised unless he had purchased and settled other lands within the time limited by the articles (*w*). But a covenant creates no specific lien where no lands are mentioned (*x*), or on lands of which the covenantor is not then seised (*y*). Plaintiffs paying the amount payable by themselves and their co-sharers in order to set aside a sale under a rent decree were not entitled to a charge on the share of the others (*z*).

A mortgage deed ran as follows : " In default I shall on the security of the house site belonging to me pay and make good the principal and interest." Held

(*k*) *Aung Dun v. Maung Tun Ya*, A. I. R. (1923) Rang. 22.

(*l*) *Ganga Ram v. Natha Singh* (1924) 26 Bom. L. R. 750; *Hukmichand v. Pioneer Mills, Ltd.* (1927) 2 Luck. 299; *Manghi v. Dial Chand* (1926) 7 Lah. 559; *Lodha Singh v. Sundar Singh*, A. I. R. (1926) Lah. 530.

(*m*) *Mana Vikrama v. Karnavan Gopalan Nair* (1907) 30 Mad. 203.

(*n*) *Puthia Valappil Barga v. Kunhunka Umma* (1902) 25 Mad. 733.

(*o*) *Palaniappa v. Lakshmanan* (1893) 16 Mad. 429.

(*p*) *Churaman v. Balli* (1887) 9 All. 591.

(*q*) *Birds v. Askey* (No. 2) (1858) 24 Beav. 618, 53 E. R. 497; *Lilford (Lord) v. Powys Keck* (1865) 35 Beav. 79, 55 E. R. 823.

(*r*) *Mason v. Morley* (No. 2) (1865) 34 Beav. 475, 55 E. R. 7.

(*s*) *Muthusawmy Jagavera Yettappa Naicker, Zemindar of Yettayapooram v. Vencataswara Yettaya* (1868) 12 M. I. A. 203.

(*t*) *Bhagwati Prasad v. Radha Kishen Sewak Pande* (1893) 15 All. 304 P.C.

(*u*) *Manickam Pillai v. Audinarayana Pillai* (1911) 20 M. L. J. 407.

(*v*) *Rameshwar Upadhyaya v. Subbkaran Upadhyaya* (1911) 8 A. L. J. 418.

(*w*) *Roundell v. Breary* (1704) 2 Vern. 482, 23 E. R. 909.

(*x*) *Fremoult v. Dedric* (1718) 1 P. Wms. 429, 24 E. R. 458; *Williams v. Lucas* (1789) 2 Cox. Eq. Ca. 160.

(*y*) *Ravenshaw v. Hollier* (1835) 4 L. J. Ch. 119.

(*z*) *Gopi Nath Bagdi v. Ishur Chundra Bagdi* (1895) 22 Cal. 800; *Kinu Ram Das v. Mozaffer Hosain Shaha* (1887) 14 Cal. 809.

that the instrument created a mortgage (a). To make a partition complete and effective an arbitrator could by his order create a charge (b). On a partition one brother could create a charge in favour of another to operate in default of payment of a stipulated amount (c). In a suit for recovery of money due on a *bhai khata* accounts, a compromise declaring immoveable properties specified therein as security for the realization of the amount, was held to create a charge (d). A lease, whereby certain specified properties had been rendered as security for rent, and were not to be transferred by the lessee while the rent remains unpaid, creates a charge (e).

Personal liability.—In preparing a charge care must be taken not to include the personal covenant for payment as the security thereby savours of a mortgage. The section does not create a personal liability (f). Personal liability may, however, arise in case of a contract in writing registered within the meaning of Act 116 of the Indian Limitation Act, 1908, as if a purchaser under a registered conveyance of sale (g). In the case of an unpaid vendor, apart from the charge created by section 55, clause (4) (b) of the Act, clause (5) (b) of the same section makes a purchaser personally liable (h).

Intention to make land security for payment of debt.—In equity no charge could be created unless there was an intent to charge (i). No special words are necessary (j). Documents executed in the mofussil come within the statement of the Privy Council in *Hanoomanpersaud Panday v. Mussamat Babooee Munraj Koonwaree* (k), where it was said that “deeds and contracts of the people of India ought to be liberally construed.” The form of the words used is immaterial. All we have to be satisfied of is, that the documents shew an intention that the person in whose favour they were executed should have the benefit of the security of the land (l). A charge was deemed to have been created on properties specified in the schedule to a deed of partition which were made liable for payment of certain amounts in default of non-performance of covenants contained in it (m). A mere possibility of a charge will create no security (n).

Operation of law.—The section applies both to charges created by the act of parties as well as by operation of law. It has been suggested in a Calcutta case (o) that it is not easy to understand (p), that charges created by operation of law have been included in the section. But for the fact that there are other sections (q) in the Act which refer to such charges one would have thought that they had been included by inadvertence, because the Act relates to transfer of property by act of parties, as is made expressly clear by the preamble.

Bengal Revenue Sales Act, XI of 1859.—A mortgagee who has paid arrears of Government revenue to prevent a sale is entitled, under section 9 of the Bengal

- (a) *Balasubramania Nadar v. Sivaguru Asari* (1911) 21 M. L. J. 562.
 (b) *Kanhaiya Lal v. Jangi*, A. I. R. (1926) All. 527.
 (c) *Manickam Pillai v. Audinarayana Pillai* (1910) 34 Mad. 47.
 (d) *Govinda Chandrav v. Dwarka Nath* (1908) 35 Cal. 837.
 (e) *Raja Sri Sri Shiva Prasad v. Beni Madhab* (1922) 1 Pat. 387.
 (f) *Raghukul v. Pitam Singh* (1930) 52 All. 901; *Srinivasa Raghava v. Ranganatha Aiyangar* (1918) 30 M. L. J. 618; *Raj Raghubar Singh v. Jai Indra* (1920) 42 All. 158.
 (g) *Ram Raghur Lal v. United Refineries (Burma), Ltd.* (1933) 35 Bom. L. R. 753, 60 I. A. 183; *Tricumdas Cooverji v. Gopinath* (1917) 19 Bom. L. R. 450, 44 I. A. 65; *Raghukul v. Pitam Singh* (1930)

- 52 All. 901.
 (h) *Raghukul Tilak v. Pitam Singh* (1930) 52 All. 901.
 (i) *Omrao Begum v. The Secretary of State for India in Council* (1892) 19 Cal. 584, 19 I. A. 950.
 (j) *Maina v. Bachchi* (1906) 28 All. 655.
 (k) (1856) 6 M. I. A. 393, 411.
 (l) *Janardhan Vishnu Kulkarni v. Anant Lakshmanshet* (1908) 32 Bom. 386.
 (m) *Manikkam Pillai v. Audinarayana Pillai* (1911) 20 M. L. J. 407, *Sesha Ayyar v. Sreenivasa Ayyar* (1921) 41 M. L. J. 282.
 (n) *Harjas Rai v. Naurang* (1906) 3 A. L. J. 220.
 (o) *Corporation of Calcutta v. Arunchandra Singha* (1934) 61 Cal. 1047.
 (p) See sec. 2 (d) of the Act.
 (q) See secs. 55 (4) (b) and 55 (6) (b).

S. 100

Revenue Sales Act, to add the amount paid to the mortgage debt, and where the genuineness of the mortgage is questioned, his lien, if in fact, is not a mortgage, it is a charge under section 100 of the Transfer of Property Act (r).

Rates and taxes.—According to section 147 of the Calcutta Municipal Act, 1899, four different classes of rates are specified, which the corporation is authorized to impose upon lands and buildings, and to levy as one consolidated rate, which is made a first charge on the premises under section 228, subject only to arrears of land revenue (s). Section 67A of the Transfer of Property Act does not apply to statutory charges created under the provisions of section 205 of the above Act (t).

Madras Estates Land Act, I of 1908.—A charge created by section 5 of the Madras Estates Land Act is not a charge within the meaning of section 100 of the Transfer of Property Act so as to attract to it the provisions of Order XXXIV of the Code of Civil Procedure (u).

Landholder.—The landholder's right of first charge on the holding is available if the decree is executed in a Revenue Court and not when transferred to a Civil Court (v). Payment of the decretal amount to avert arrest of himself and another co-sharer under the Madras Estates Land Act does not entitle him to a charge under sections 5 and 128 of that Act or under the general law or by virtue of sections 82 and 100 of the present Act. A charge under section 5 is for the benefit of the landlord and that under section 128 for the benefit of persons other than the landlord, for a sum different from the rent (w).

Lease.—A stipulation in a lease empowering the lessee to appropriate a part of the rent in repayment of the debt due by the lessor creates a charge (x).

Public Demands Recovery Act, 1914.—The effect of service of notice under section 7 of the Public Demands Recovery Act is to create a charge on the properties of the certificate debtor in favour of the Secretary of State for the arrears of cess due in respect thereof (y).

“And the transaction does not amount to a mortgage.”—These words signify that if the relation created by the instrument is not that of mortgagor and mortgagee and immoveable property has been made security for the payment of money, there is a charge on the property; they do not mean that an invalid mortgage is converted into a charge (z). This view has been uniformly maintained by the Calcutta High Court (a) and appears to have been adopted by the Bombay High Court (b). The Madras High Court, after taking a contrary view as appears from

(r) *Rajkumar Lal v. Jaikaran Das* (1924) 5 Pat. L. J. 248.

(s) *Akhoy Kumar Bannerjee v. Corporation of Calcutta* (1915) 42 Cal. 625.

(t) *Corporation of Calcutta v. Arunchandra Singha* (1934) 61 Cal. 862.

(u) *Suramma v. Jogapathirazu* (1919) 42 Mad. 114; *Follick Chander Dey Sircar v. Foley* (1885) 15 Cal. 492; *Royzuddi Sheik v. Kali Nath Mookerjee* (1906) 33 Cal. 985.

(v) *Venkata v. Seelayya* (1920) 43 Mad. 786; *Suryanarayana v. Ramchenbrudu*, A. I. R. (1932) Mad. 716.

(w) *Vyaperumal v. Alagappa* (1932) 55 Mad. 468.

(x) *Nathan Lal v. Durga Das* (1930) 52 All. 985.

(y) *Bhekdhari v. Srimati Radhika* (1934) 13 Pat. 364.

(z) *Royzuddin Sheik v. Kali Nathi Mookerjee* (1906) 33 Cal. 985 (absence of attestation).

(a) *Kani Kumari Bibi v. Srinath Roy* (1897) 1 C. W. N. 81 (one witness's attestation); *Debendra v. Behari* (1912) 16 C. W. N. 1075 (attestation by executant); *Tofaluddi Peada v. Mohar Ali Shaha* (1899) 26 Cal. 78 (attested by one witness); *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* (1899) 26 Cal. 246 (attested by one witness); *Prannath Sarkar v. Jadu Nath Shaha* (1905) 32 Cal. 729 (absence of attestation); *Ram Narayan Singh v. Adhindra Nath Mukherji* (1917) 44 Cal. 388 P.C. (want of attestation).

(b) *Narayan v. Lakshmandas* (1905) 7 Bom. L. R. 934 (absence of attestation).

the observation of the learned Judges, followed the other High Courts (c). Under the English Law where an attempt to make a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. No doubt *Ross v. Army and Navy Hotel Co.* (d), *In re Queensland Land and Coal Co.* (e), and *In re Johnston Foreign Patent Co.* (f) shew that a security, though defective as a legal mortgage, may be enforceable in equity, if it shews an intention to create a charge. See *Mathews v. Goodday* (g) and *Marshall v. Shrewbury* (h), which are authorities, for the proposition that the right of an equitable mortgagee is to have his security perfected by the execution of a legal mortgage and he can combine this remedy with an action for foreclosure. In face of the statutory provision contained in section 100 of the Transfer of Property Act, the general equitable principles upon which these cases are based cannot be applied indiscriminately in India (i). Moreover, equitable mortgages in this country are recognized to a limited extent (j). A Full Bench of the Allahabad High Court refused to recognize as a charge an instrument failing to operate as a mortgage for want of formalities prescribed therefor (k). To the like effect are the decisions of the Nagpur (l), Rangoon (m) and Sind (n) Courts.

Distinction between mortgage and charge.—It is not very easy to draw a sharp line between a mortgage and a charge. But the real difference is that the latter is a much wider term than the former. A mortgage involves a transfer of interest in specific immoveable property while a charge does not necessarily. Whilst by a charge a title is not transferred and only the repayment of money is secured out of a particular fund, the property hypothecated remains charged in the other, with liability to repay the debt (o). A charge need not be attested but a mortgage must be attested by two witnesses. Either may be created by act of parties. The distinction between a mortgage and a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgages in the definition given in section 58 has somewhat obliterated the distinction in India. A charge may be created by operation of law, but not a mortgage. In a charge there is no personal covenant to pay, in a simple mortgage there is. A document given "by way of charge" is not one which absolutely transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property without transferring that fund or property. A charge differs altogether from a mortgage. By a charge the title is not transferred, but the person

(c) *Rangasami v. Muttukumarappa* (1887) 10 Mad. 509; *Mithiram Bhat v. Somanath Naickar* (1901) 24 Mad. 397; *Neelakantam Iyer v. Maddasamy Tevan* (1909) 17 M. L. J. 39 (absence of attestation); *Anantarama v. Yussifji Oomer Sahib* (1916) 31 M. L. J. 133 (attested by one witness); *Shamu Patter v. Abdul Kadir Ravuthan* (1912) 35 Mad. 607 (not attested as required by sec. 59).

(d) (1886) 34 Ch. D. 43.

(e) (1894) 3 Ch. 181.

(f) (1904) 2 Ch. 234.

(g) (1861) 31 L. J. Ch. 282.

(h) (1875) 10 Ch. 250.

(i) *Rayzuddi Sheik v. Kali Nath Mookerjee* (1906) 33 Cal. 985.

(j) *Konchadi Shan Bhogue v. Shiva Rao* (1905) 28 Mad. 54.

(k) *The Collector of Mirzapur v. Bhagwan Prasad* (1913) 35 All. 164 F.B. (one witness's attestation).

(l) *Khanchand v. Malloo* (1915) 10 Nag. L. R. 81.

(m) *Maung Tub Ya v. Mung Aung Dun* (1924) 2 Rang. 313 (oral usufructuary mortgage); *Somasundaram Chettiar v. Nacheappa Chettiar* (1924) 2 Rang. 429 (not complying with sec. 59).

(n) *Official Receiver v. Tirathdas Mercaram*, A. I. R. (1927) (Sind) 66 (failure to comply with sec. 59).

(o) *Atlas Begam v. Brij Narain* (1929) 51 All. 612; *Sambasiva v. Venkatarama* (1927) 51 M. L. J. 95; *Hunter v. Nissar Ahmad*, A. I. R. (1932) Oudh 336; *Raja Sri Sri Shiva Prasad v. Beni Madhab Chowdhary* (1922) 1 Pat. 387, 392; *Akhoy Kumar Bannerji v. Corporation of Calcutta* (1915) 42 Cal. 625; *Narayana Ayyar v. Venkata Ramana* (1902) 25 Mad. 220; *Royzuddi Sheik v. Kali Nath Mookerjee* (1906) 33 Cal. 985; *Gobinda Chandra v. Dwarka Nath* (1908) 35 Cal. 837; *Dalip Singh v. Bahadur Ram* (1912) 34 Cal. 446; *Sheoratan Kuar v. Mahipal Kuar* (1885) 7 All. 258; *Khemchand v. Malloo* (1914) 10 Nag. L. R. 81.

S. 100

creating the charge merely says that out of a particular fund he will discharge a particular debt. But a charge differs from an assignment. A charge on a debt confers rights on the person to whom the charge is given to have it enforced by assignment not by action against the debtor, but by proceedings against the person who created the charge to assign the debt (*p*).

A mortgage is for a fixed term, whereas a charge may be in perpetuity. A mortgage can ultimately be redeemed whilst a charge in perpetuity cannot (*q*). In a simple mortgage, a power of sale is conferred upon the creditor, expressly or impliedly, by the instrument, but not in a charge (*r*). A mortgage being a transfer of an interest, the obligee is entitled not merely to the benefit of an obligation annexed to the ownership of property contemplated by section 40 of the Transfer of Property Act (*s*), but to an interest in the property, and where there is no such transfer, as where land is merely appropriated or hypothecated for the discharge of a debt, only a charge is created (*t*). That a distinction is made in the Act between a mortgage and a charge may be determined by a reference to sections 58 and 100. While certain formalities are required for a mortgage under section 59, none of them are made applicable to a charge. That a distinction is contemplated is further clear from the words of section 100, "and the transaction does not amount to a mortgage." A charge, however, very nearly approaches a simple mortgage and it is this tendency to resemble each other, that has blurred the distinction between the two and led to a diversity of views between the different Courts in this country (*u*) for in English Law the distinction is keenly appreciated. No difficulty arises in respect of a charge created by operation of law or where a charge is created for the payment of a legacy or annuity or maintenance money or by will or settlement. Section 59 requires certain formalities to be observed in execution of a mortgage, none of which are required in case of a charge. Section 100, however, makes it clear that an instrument which fails to take effect as a mortgage for failure to comply with obligations imposed by section 59 will not take effect as a charge, while in the case of a charge the absence of formalities required by section 59 would not bar the relief, which may be obtained under section 100. A charge may be created by parol, whilst a mortgage of property, if not under Rs. 100, invariably must be in writing. A mortgage is always created by the act of parties, a charge is created either by act of parties or operation of law. Both a mortgage and a charge, when in writing, must be registered unless created by decree or order of a Court. In both, the mode of granting relief and the nature of the relief that may be granted are similar. A clause which entitles the creditor to attach and sell the property lends support to the view that a charge was intended. An undertaking by the debtor not to alienate the property would be intelligible as meant for the necessary protection of the creditor, if a mere charge was intended to be created. Such a covenant, on the other hand, would be wholly needless for the protection of a mortgagee who can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas a charge can be enforced against the transferee only if it is shewn that he

(*p*) *Burlinson v. Hall* (1884) 12 Q. B. D. 347, 350.

(*q*) *Mallub Hasan v. Mt. Kalawati*, A. I. R. (1933) All. 934.

(*r*) *Aliba v. Nanu* (1886) 9 Mad. 218; *Kishan Lal v. Ganga Ram* (1891) 13 All. 28.

(*s*) *Srinivasa Raghava Iyengar v. K. R. Ranganatha Iyengar* (1919) 36 M. L. J. 618; *Motiram v. Vitai* (1889) 13 Bom. 90.

(*t*) *Jawahir Mal v. Indomati* (1914) 36 All. 201.

(*u*) *Khemji Bhagwan Das Gajar v. Rama* (1886) 10 Bom. 519; *Motiram v. Vitai* (1889) 13 Bom. 97; *Rangasami v. Muthuka Marappa* (1887) 10 Mad. 509; *Nabin Chund Nashar v. Raj Coomar Sarkar* (1905) 9 C. W. N. 1001; *Prannath Sarkar v. Jadu Nath Saha* (1905) 32 Cal. 729; *Kishan Lal v. Gangaram* (1891) 13 All. 28.

has taken with notice of the charge (v). In a plea of purchase for value without notice the onus is on the defendant (w).

S. 100

The common incidents of a mortgage and charge are :—

- (a) Immoveable property is security for the debt.
- (b) A right in the debtor that the property be declared discharged and freed from the debt.

So far as may be.—Section 100 purports to deal primarily with the incidents of the security and not with the method of enforcing it and declares that provisions thereinbefore contained which apply to simple mortgages shall apply to charges only “so far as may be” (x).

Charge how enforced.—The holder of a charge is entitled to bring the property over which he has a charge to sale, as his rights and liabilities are by the section as amended and by Order 34, rule 15 of the Code of Civil Procedure similar to that of a simple mortgagee. Such a sale cannot, however, take place without the interposition of judicial proceedings. Dealing with a vendor's lien for unpaid purchase-money and for a personal decree against the vendee for deficiency, the Privy Council observed that a preliminary decree for sale as in a suit on a mortgage should be passed under the section read with O. 34, r. 15 of the Code of Civil Procedure (y).

Charge enforced by proceedings in execution and not by sale.—Under Order 34, rule 14 of the Civil Procedure Code, a mortgagee who has obtained a decree for the payment of money in satisfaction of a claim arising under a mortgage is not entitled to bring the mortgage property to a sale without instituting a suit for sale for enforcement of the mortgage. The rule applies to a charge as well (z). The Bombay High Court has held that where a money decree imposing a liability on the defendant to pay a sum of money to the plaintiff declared that the plaintiff had a first charge and a lien on certain immoveable properties of the defendant, the plaintiff had a right to bring the property charged to a sale in execution proceedings, and that it was not necessary to bring a separate suit for sale of the property (a). A similar view is taken by the Madras High Court (b). A contrary view has, however, been adopted in Calcutta where it has been held that the decree-holder's only course is to institute a suit for sale (c). The Rangoon High Court (d) and the Patna High Court (e), however, followed the view adopted by the Bombay and Madras High Courts and so has the Allahabad High Court (f). Even in a mortgage in certain instances it is not necessary that a final decree should be passed, for Order 34, rule 5 of the Civil Procedure Code does not apply to an award decree or to a compromise decree if it is clear from the decree that the sale was ordered, and it was in

(v) *Royzuddi Sheik v. Kali Nath Mookerjee* (1906) 33 Cal. 985; *Akhoy Kumar Banerjee v. Corporation of Calcutta* (1915) 42 Cal. 625.

(w) *Akhoy Kumar Banerjee v. Corporation of Calcutta* (1915) 42 Cal. 625; *Attorney-General v. Biphosphated Guano Co.* (1878) 11 Ch. D. 327; *Wilkes v. Spooner* (1911) 2 K. B. 473.

(x) *Corporation of Calcutta v. Arunchandra Singha* (1934) 61 Cal. 1047.

(y) *Ram Raghobir Lal v. United Refineries (Burma), Ltd.* (1933) 35 Bom. L. R. 753, 60 I. A. 183.

(z) *Venkata v. Menda* (1920) 43 Mad. 786; *Raj Kumar Lal v. Jai Karan* (1924) 5 P. L. J. 248; *Aubhoyessury v. Gouri Sunkar*

(1895) 22 Cal. 859.

(a) *Shankar Kondappa v. Ganpat Shankarshet* (1929) 31 Bom. L. R. 439; *Ambalal v. Narayan* (1919) 43 Bom. 631; *Hari Sankar Rai v. Tapai Kuer* (1923) 4 Pat. 693; *A. C. Dastoor v. H. A. Kandawalla* (1933) 60 Cal. 1467.

(b) *Ramaswami Naidu v. Subbaraya Tevar* (1925) 49 M. L. J. 490; *Subramaniam Chettyar v. Raja of Ramnad* (1917) 41 Mad. 327.

(c) *Gobinda Chandra Pal v. Kailas Chandra Pal* (1918) 45 Cal. 530.

(d) *Daw Ohn v. U. Bah*, A. I. R. (1929) Rang. 126.

(e) *Hari v. Musammat Tapas* (1925) 4 Pat. 693.

(f) *Mahalakshmi v. Badan Singh* (1923) 45 All. 649.

S. 100

itself a final decree (g). A hypothecation bond was executed by the predecessors in title of the appellants secured on certain villages of their estate. No obliger was named in the bond. It was given "so that any order that might be passed by the Appellant Court be made binding on the securities." It was held to be a charge. In such cases in Calcutta the officer to whom the bond is given sues, or he under an order of the Court, assigns the bond and the assignee sues. But here no officer was named. The Court is not a juridical person. It cannot be sued. It cannot take the property and cannot assign it. The mode of enforcing would be that the property charged be sold unless before a day named the sureties paid the money (h). This form was adopted in (i). In Bombay the officer, under an order of the Court, assigns the bond and the assign sues. In Calcutta it was held that the properties could be sold in execution and no fresh suit was necessary (j).

Limitation.—To enforce payment of money charged upon an immoveable property the time limit is 12 years from the date the money sued for becomes due under article 132 of the Indian Limitation Act (k). The same rule applies where the charge is by operation of law (l).

Limit of time to redeem a charge.—The period of limitation for a suit to redeem a charge is 12 years from the date the charge comes into existence (m).

Proviso.—The section exempts from its operation a charge arising by virtue of section 32 of the Indian Trust Act, II of 1882, by providing that the provisions of this section shall not apply to the charge of a trustee on trust property for expenses properly incurred in the execution of his trust. The words "expenses properly incurred in the execution of his trust" also occur in section 32 of the Indian Trust Act, which gives the trustee a right to reimburse himself out of the trust property for all costs, charges and expenses incurred by him in the administration of the trust and for the realization, preservation and benefit of the trust property or for the protection or support of the beneficiary, and for those expenses incurred out of his own pocket together with interest thereon a trustee is given a first charge on both the capital and income of the estate (n). A trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges and expenses properly incurred (o). Such an indemnity is the price paid by *cestui que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred" (p). A trustee of a public trust has a

- (g) *Nripendranath Chatterji v. Jhumak Mandar* (1924) 3 Pat. 221; *Hemendra Lal Singh Deo v. Takir Chandra Datta* (1923) 50 Cal. 650; *Sital Singh v. Baijnath Prasad* (1922) 44 All. 668; *Kashi Chandra v. Priya Nath* (1924) 28 C. W. N. 550.
 (h) *Raj Raghobar Singh v. Jai Indra* (1920) 42 All. 158, 46 I. A. 228.
 (i) *Janki Kuar v. Sarup Rani* (1895) 17 All. 99.
 (j) *Sakumari v. Mugneeram Bhanger & Co.* (1927) 54 Cal. 1.
 (k) *Ram Din v. Kalka* (1885) 7 All. 502, 12 I. A. 12; *Chunilal v. Bai Jethi* (1898) 22 Bom. 846; *Sitab Chand v. Hyder* (1897) 24 Cal. 281; *Maharaja of Vizianagaram v. Sitaram* (1896) 19 Mad. 101; *Chattar Mal v. Thakuri* (1898) 20 All. 512; *Kallu v. Ram Das* (1929) 26 A. L. J. 53; *Lachmi Narain v. Turahunnissa* (1912) 34 All. 246.
 (l) *Authinarayana v. Krishnaswamy* (1924) M.

- W. N. 755.
 (m) *Purna Chandra Pal v. Barada Prosanna* (1919) 46 Cal. 111; *Vasudeo Bhikaji v. Balaki Krishna* (1902) 26 Bom. 500.
 (n) *Stott v. Milne* (1884) 25 Ch. D. 710; *Re. Exhall Coal Co., Ltd. v. Bleckley* (1866) 35 Beav. 449, 55 E. R. 970; *Re. Pooley Hall Colliery Co.* (1869) 21 L. T. 690; *Re. Owen, Frisby Dyke & Co. v. Owen* (1892) 66 L. T. 718; *St. Thomas's Hospital v. Richardson* (1910) 1 K. B. 271.
 (o) *Darke v. Williamson* (1858) 25 Beav. 622, 53 E. R. 774; *Peary Mohun Mukerjee v. Narendra Nath Mukerjee* (1910) 37 Cal. 229, 37 I. A. 27.
 (p) *Re. Beddoe, Downes v. Cottam* (1893) 1 Ch. 547; *Re. England's Settlement Trusts, Dobb v. England* (1918) 1 Ch. 24; *In the Estate of Plant, Wild v. Plant* (1926) P. 139.

first charge on the trust properties for reimbursement of advance made to the trust (q).

Transferee without notice of the charge.—Prior to amendments made by Act, 20 of 1929, the enforceability of a charge against a subsequent transferee for value was not invariably dependent on notice. Where successive rights are created on immoveable property by different transactions at different times, they take effect in order of priority. On the other hand, under section 40 a right to restrain the enjoyment of property and obligations arising out of contract but not amounting to an interest or easement could not be enforced against a transferee for value without notice. Where a decree created a charge on property in favour of the decree-holder and the property was sold at an auction sale held under a subsequent decree and purchased by one who had notice of the charge, it was held that the charge could be enforced against the purchaser (r). Had the Legislature intended that a charge under section 100 was not to be enforced against transferees for value, section 100 would have contained a provision similar to that contained in section 40. So where maintenance awarded by a compromise decree was charged on certain properties, the charge was considered as binding not only on the party to the decree and donees from such party but also on transferees for value from either of them (s). There are, however, two cases of the Calcutta High Court which lay down that a charge cannot be enforced against a transferee for value without notice, but in neither of them the decision actually turned on the question. In the one case (t) the document relied on as creating a charge was held invalid and in the other (u) the transferee was found to have notice of the charge. A mortgage of future produce is a charge enforceable against transferees for value with notice but not without notice, as it is difficult to identify crops when cut. In the undernoted cases a transferee for value without notice was held not bound by a charge previously made (v). The amendment, however, sets at rest the above conflict of decisions and so does section 48 of the Indian Registration Act, 1908.

Particular classes of cases which do not constitute a charge.—For arrears of assessment an inamdar is not entitled to a charge on the lands (w). Arrears of rent due to a prior mortgagee from the mortgagor are not a charge on the land as against a subsequent (x) encumbrancer. An attachment before judgment does not create in favour of the plaintiff any charge on the property attached (y). Where it is clear from the terms of a decree for maintenance that it was intended to create a charge on immoveable property, it is immaterial that the decree does not specify the property by metes and bounds, if the property can be otherwise identified (z). A landlord who has obtained a decree for arrears of rent of an under-tenant is under section 65 of the Bengal Tenancy Act, 1885, entitled to proceed either against the person or property of the tenant. The "charge" referred to in the said Act is not such a "charge" as is defined by section 100 of the Transfer of Property Act (a).

(q) *Abkan Sahib v. Soran Bivi* (1915) 38 Mad 260.

(r) *Mahdeo Prasad v. Anandi Lal* (1925) 47 All. 90.

(s) *Maina v. Bachehi* (1906) 28 All. 655.

(t) *Royzuddin Sheikh v. Kali Nath Mookerjee* (1906) 33 Cal. 985.

(u) *Akhoy Kumar Banerjee v. Corporation of Calcutta* (1915) 42 Cal. 625.

(v) *Churaman v. Balli* (1887) 9 All. 591; *Kishan Lal v. Ganga Ram* (1891) 13 All. 28; *Gur Dayal v. Karam Singh* (1916) 38 All. 254; *Royzuddi Sheikh v. Kali Nath Mukerjee* (1906) 33 Cal. 985; *Sheonandan Lal v.*

Zainal Abidin (1915) 42 Cal. 849; *Akhoy Kumar Banerjee v. Corporation of Calcutta* (1915) 42 Cal. 625.

(w) *Vinayak v. Lakshman* (1904) 28 Bom. 92.

(x) *Sivarama v. Subramanya* (1886) 9 Mad. 57.

(y) *Sewdut Roy v. Sree Cantr Maity* (1906) 33 Cal. 639.

(z) *Minakshi Achi v. Chinnappa Udayan*, and *Minakshi Achi v. Sadasiva Udayan* (1901) 24 Mad. 689.

(a) *Fotick Chunder Dey v. E. G. Foley* (1888) 15 Cal. 492; *Lalit Mohan Roy v. Binodas Dabee* (1887) 14 Cal. 14; *Royzuddi Sheikh v. Kali Nath Mookerjee* (1906) 33 Cal. 985.

S. 100

To the latter section the provisions of section 68 do not apply. A writing by which the debtor deposited his title-deeds with the creditor and undertook to execute a legal mortgage when called upon to do so, does not create a charge, the deposit having been made out of the town of Madras and not being registered (*b*). Under the Mitakshara Law maintenance of a Hindu widow is not a charge upon the estate of her deceased husband (*c*). The solicitor of the executrix having paid a sum which was due to a third party who had a lien on title-deeds belonging to the testator's estate for the amount, gave a receipt for the deeds in the name of the executrix, and as her solicitor carried into the master's office her examination in which the sum paid by him was stated as paid by the executrix and allowed accordingly. Held he could not claim a lien upon the deeds for the amount (*d*). On a bill filed for a partition, money laid out in improving the premises does not create a lien (*e*). Without agreement or contract you cannot charge the land or follow the money though invested in land or applied to pay off an encumbrance (*f*). A co-sharer paying the decretal amount and auction purchaser's fees to set aside a sale of the share of a defaulting co-sharer, becomes entitled to contribution, which being a personal liability, he does not acquire a charge on the share of the defaulting co-sharer (*g*). A transaction intended to be a mortgage and not reduced to writing or registered so that it cannot operate as a mortgage, is not a charge, nor does a document whereby a charge is to come into operation at a future date create a charge (*h*). Nor can a mortgage attested by one witness only create a charge (*i*).

As collateral security the debtor by an unattested deed mortgaged his properties specified by boundaries and until repayment, undertook not to alienate by gift, sale or otherwise. There was no actual transfer of any interest. Held neither a mortgage nor charge (*j*). As a general rule unsolicited expenditure in respect of property of another, even if made for the purpose of its preservation, gives no lien outside Maritime Law. The mere fact that the plaintiff was obliged to pay the assessment for the defendant's land in order to save his own right, gives him no charge (*k*), and so a gratuitous expenditure on property by one who is not the owner thereof does not give him a lien on it (*l*) unless made under an erroneous belief in the title or with the knowledge and permission of the other party (*m*), or acquiesced in by the owner (*n*). No lien, however, can be claimed for a future or apprehended liability (*o*). A vendee taking a promissory note for part of the purchase-money has no charge (*p*). *Poruppu* or rent due to a zemindar from the grantee of a *magnum* or division of a zemindari is not a charge upon the *magnum*. It is a debt due to zemindar and nothing more (*q*). A dower of a Mahomedan widow does not give her a charge on the estate of her husband (*r*).

(*b*) *Konchadi Shanbhogue v. Shiva Rao* (1905) 28 Mad. 54.

(*c*) *Digambari Devi v. Dhan Kumari Bibi* (1906) 10 C. W. N. 1074.

(*d*) *Christian v. Field* (1842) 2 Hare. 177, 67 E. R. 74.

(*e*) *Swan v. Swan* (1820) 2 Price 516, 14 E. R. 1281; *Sinclair v. James* (1894) 3 Ch. 556; *Hill v. Hickin* (1897) 2 Ch. 581.

(*f*) *Hooper v. Eyles* (1704) 1 Eq. Ca. Abr. 262.

(*g*) *Gopi Nath Bagdi v. Ishur Chandra Bagdi* (1895) 22 Cal. 800; *Jinu Rani Das v. Moxaffer Hosain Shaha* (1887) 14 Cal. 809.

(*h*) *P. R. P. R. Somasundaram Chettiar v. Y. P. N. Nachiappa Chettiar*, A. I. R. (1925) Rang. 55.

(*i*) *Sreenuthy Rani Kumari Bibi v. Rajah Sri Nath Roy* (1897) 1 C. W. N. 81.

(*j*) *Nabin Chand v. Raj Coomar* (1905) 9 C. W. N. 1001; *Tafawddi Peada v. Mahar Ali Shaha* (1899) 26 Cal. 78; *Guindra Nath Mukerjee*

v. Bejoy Gopal Mukerjee (1899) 26 Cal. 246; *Abdul Karim v. Saliman* (1910) 27 Cal. 190; *Rani Kumari Bibi v. Srimath Roy* (1897) 1 C. W. N. 81.

(*k*) *Shivrao Narayan v. Pundlik Bhaire* (1902) 26 Bom. 437.

(*l*) *Ridgway v. Roberts* (1844) 4 Hare. 106, 67 E. R. 580.

(*m*) *Dawn v. Spurrier* (1802) 7 Ves. 231, 32 E. R. 94.

(*n*) *Unity Joint Stock Mutual Banking Association v. King* (1858) 25 Beav. 72, 53 E. R. 563.

(*o*) *Dyson v. Peat* (1917) 1 Ch. 99; *Sheth Chitor v. Shib Lal* (1892) 14 All. 273; *Kinu Ram Das v. Moxaffer Hosain Shaha* (1887) 14 Cal. 809.

(*p*) *Kristnaswami Iyengar v. Subramania Ganapathigal* (1918) 35 M. L. J. 304.

(*q*) *Zamindar of Ramnad v. Ramamany Ammal* (1879) 2 Mad. 234.

(*r*) *Kaniz Fatmia Begam v. Ram Nandam Dhar Dube* (1923) 45 All. 384.

Contingent charge.—The Courts of Calcutta (*s*) and Oudh (*t*) have held that a contingent charge is not a charge within the meaning of the section. The Courts of Madras (*u*), Patna (*v*) and Lahore (*w*) have held the contrary. The latter Courts hold that it is not a mere possibility of a charge but a present charge on existing property enforceable on the happening of a contingency.

Equitable charge.—An agreement between a company and a person as *banian* of the company to advance necessary funds to the company upto a certain limit on being allowed the sole right to collect all sums due to the company and repay himself advances made, as also his remuneration, creates an equitable charge on the company's outstanding bills for the amount owing to the *banian* (*x*). It may be made without writing (*y*). To constitute a charge in equity by deed or writing, it is not necessary that any general words should be used. It is sufficient if the Court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security (*z*).

Floating charge.—A floating charge is a charge plus a contract to allow the business to go on until the happening of a prescribed event when it becomes a fixed charge (*a*). It is nonetheless a charge because power is reserved to dispose of the property if necessary (*b*). It is the default which converts a floating into a fixed charge (*c*). It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created, intervenes (*d*). It retains its character until the appointment of a receiver or a winding-up order (*e*). It then crystallizes into a fixed charge. It is a floating charge until the occurrence of the stipulated events; a fixed charge when any of the events occurs (*f*). Mere variability of the amount and the subject-matter of the charge does not make a floating security. A charge on the sub-soil right in a coal mine or on *kuthi* boats, machineries, pumps, pillars, etc., is not a floating charge (*g*). Nor is a charge on the stock-in-trade, machinery, etc., that did or would belong to the debtor company, the deed providing that the lender company would be in possession and be entitled to sell the goods in the usual course of business, a floating charge (*h*). Similarly, a mortgage of specific effects with licence to the mortgagor to dispose of them in the course of business, subject to prescribed conditions, is not a floating charge (*i*).

Indian Companies Act, VII of 1913, section 109.—Like a mortgage, a charge under this section needs registration, otherwise it is absolutely void against any creditor or liquidator of the company. Though it remains valid as an admission

- (s) *Mado Misser v. Sidh Vinaik* (1887) 14 Cal. 687.
- (t) *Raja Ram v. Jagannath, A. I. R.* (1926) Oudh 209.
- (u) *Imbichi v. Achampat* (1917) 33 M. L. J. 58.
- (v) *Murat Singh v. Pheku Singh* (1928) 7 Pat. 584; *Nand Lal v. Dharmadeo, A. I. R.* (1925) Pat. 288.
- (w) *Kesri Mal Umrao Singh v. Tansukh Rai Kidar Nath* (1935) 16 Lah. 137.
- (x) *Probodh Chandra v. Road Oils (India), Ltd.* (1929) 34 C. W. N. 570; *Amrattal v. Keshavlal* (1931) 28 Bom. L. R. 939.
- (y) *Official Assignee v. Fakirji Cowasji, A. I. R.* (1930) Sind. 77; *Palaniappa v. Lakshmanan* (1893) 16 Mad. 429.
- (z) *Romer, J., in Cradock v. The Scottish Provident Institution* (1894) 69 L. T. J. (N. S.) 380, 382.
- (a) *In re Florence Land and Public Works Co.* (1878) 10 Ch. D. 530.

- (b) *Driver v. Broad* (1893) 1 Q. B. 744.
- (c) *In re. Horne & Bellard* (1885) 29 Ch. D. 736.
- (d) *Governments Stock, etc. v. Manila Railway Co., Ltd.* (1897) A. C. 81; *Illingworth v. Houldsworth* (1904) A. C. 355; *Imperial Bank of India v. Bengal National, Ltd.* (1931) 58 Cal. 136, overruled by (1932) 59 Cal. 377, 58 I. A. 323; *Tailby v. Official Receiver* (1888) 13 A. C. 523.
- (e) *Evans v. Rival Granite Quarries* (1910) 2 Q. B. 979; *Re. Crompton & Co., Ltd.* (1914) 1 Ch. 954.
- (f) *Imperial Bank of India v. Bengal National Bank* (1932) 59 Cal. 377, 58 I. A. 323.
- (g) *H. V. Low & Co., Ltd. v. Pulinbihari Lal Singha* (1932) 59 Cal. 1372.
- (h) *J. D. Jones & Co., Ltd. v. Ranjit Roy* (1927) 54 Cal. 513.
- (i) *Bank of Baroda v. Shivdasani* (1926) 50 Bom. 547.

S. 100

of debt, it creates no valid charge on the company's property. It is open to the Court to extend the time for registration under section 120 of the Companies Act upon which the deed takes effect from the date of execution subject to the conditions imposed by the Court in extending the time (*j*). In a case before the Privy Council as security for a loan, the respondent bank issued to the appellant bank debentures creating a floating charge upon their whole undertaking, properties, assets and interest, present and future. The debentures were registered under the Indian Companies Act but not under the Indian Registration Act. The respondent bank having suspended payment, the charge became fixed. An admission precluded the appellant bank from contending that the debentures gave them a charge upon the immoveable properties. It was held that nevertheless the appellant bank had a charge over the debts due to the respondent bank, whether secured on immoveable property (the title-deeds of which were deposited with the respondent bank and re-deposited with the appellant bank) or not, and that the appellant bank were not left without any right in the debts which the title-deeds secured, as there was no difficulty in a transfer of a debt without the security, and that while the Imperial Bank had no interest in the immoveable property of the bank including those over which the respondent bank held security, they had a charge over debts due to the respondent bank and were entitled to the benefit of all sums received in reduction of the debts, whether from the realization of securities or otherwise (*k*).

Further charge.—Such a transaction is between the original creditor and the debtor, entered into subsequent to a mortgage between the same parties. It is designated a further charge as it cannot amount to a mortgage during the subsistence of the original mortgage between the parties, for on a further advance there is no transfer of interest (*l*).

Other varieties of lien.—Besides the non-possessory lien dealt with by the section, there are several other varieties of lien which, however, depend upon possession. Although these liens are on moveable properties they indirectly affect immoveable properties, a common instance being, bailment of deeds of immoveable property to secure one's debts. The Indian Contract Act, IX of 1872, deals with several liens which are enumerated below, though this list is by no means exhaustive :—

1. Lien of finder of lost goods (section 168).
2. Bailee's particular lien for services rendered, involving exercise of labour and skill (section 170).
3. General lien of bankers, factors, wharfingers, attorneys of a High Court and policy-brokers (section 171).
4. Pawnee's right of retainer (section 173).
5. Agent's lien on principal's property (section 221).

Under section 48 the unpaid seller has a lien on the remainder.

(*j*) *Lala Ram Narain v. Radha Kishen* (1929) 34 C. W. N. 557; *Pudumjee & Co. v. Moos* (1925) 27 Bom. L. R. 1218.

(*k*) *Imperial Bank of India v. Bengal National Bank, Ltd.* (1932) 59 Cal. 377, 58 I. A. 323.

(*l*) *Sher Singh v. Daya Ram* (1932) 13 Lab. 660; *M. Aditya Prasad v. Ram Ratan* (1930) 5 Luck. 365, 57 I. A. 173; *Ganga Prasad*

v. Rachpal, A. I. R. (1923) Oudh 29; *Lallu Singh v. Ram Nandan* (1930) 52 All. 281; *Ranjit Khan v. Ramdhan Singh* (1909) 31 All. 482; *Mt. Rais-un-nissa v. Zorawar Sah*, A. I. R. (1926) Oudh 228; *Ashaaf Ali v. Chandrapal Singh*, A. I. R. (1925) Oudh 506; also refer to commentaries under sec. 58 under the same caption.

Building contractor.—A building contractor has no charge on a building if he be unpaid, unless his agent, with the owner of the land, creates a charge in his favour and it is registered. Neither has he a lien. Interest is a charge (m).

Attachment.—It has been held by the Privy Council in *Suraj Bansi Kuar v. Sheo Proshad Singh* (n) that an attachment and an order for sale constitute in favour of the judgment-creditor a valid charge upon the land. The charge comes into existence as it renders the decree realizable by sale. In a later case (o) the same tribunal, commenting on the Madras (p) and Calcutta (q) decisions and applying the test in *Galbraith's* case (r), observed it was unnecessary to consider whether attachment created a lien or charge or conferred title. A lien attaches from the date of attachment and an order of release set aside by a subsequent decree in a regular suit is not destructive of the lien (s).

An invalid mortgage cannot be converted into a valid charge.—An instrument by which payment of money is secured on land must be taken to create a mere charge, unless there is an indication in it that some interest in specific immoveable property was transferred; a clause entitling the creditor to recover his dues by attachment and sale of the property and a clause against alienation, lent support to the view that a mere charge was intended to be created (t). A transaction which falls short of a mortgage for want of necessary formalities cannot operate as a charge (u).

Maintenance.—Maintenance charged by decree may be enforced by a separate suit or in execution, according to the form of the decree. Where the decree is executory, the future maintenance awarded and charged by it can be recovered when falling due in execution of that decree without further suit (v), but where the decree is declaratory, charging property to secure future maintenance, the remedy is to enforce it by a suit. Where the decree, after declaring future maintenance and that it should be a charge upon a house being a specified item in the general estate, directed the execution of a deed in favour of the plaintiff, charging the house on her executing a release of all her right and interest in the general estate, it was regarded as declaratory and not executory (w). A female member of a joint Hindu family has a personal claim for maintenance which can be made the subject of a charge by an order of the Court or by a properly executed document (x). Maintenance secured by a decree creating a charge can be realized without a suit (y). Claim to maintenance charged by decree could be enforced against a *bona fide*

- (m) *Hukmichand v. Pioneer Mills, Ltd.* (1927) 2 Luck. 299; *Manghi v. Dial Chand* (1926) 7 Lah. 559; *Lodha Singh v. Sundar Singh*, A. I. R. (1926) Lah. 530; *Ganga Ram v. Natha Singh* (1924) 26 Bom. L. R. 750.
 (n) (1880) 5 Cal. 148, 6 I. A. 88, 109.
 (o) *Anantapadmanabhaswami v. Official Receiver* (1933) 37 C. W. N. 553, 60 I. A. 167.
 (p) *Kristnasamy v. Official Assignee* (1903) 26 Mad. 673.
 (q) *Frederick Peacock v. Madon Gopal* (1902) 29 Cal. 428.
 (r) (1910) A. C. 508, 510.
 (s) *Ali Ahmad v. Bansidhar* (1909) 31 All. 367; *Ram Chandra v. Mandeshwar* (1906) 33 Cal. 1158; *Lalu v. Kashi* (1886) 10 Bom. 400.
 (t) *Royzuddi Sheik v. Kali Nath Mookerjee* (1906) 33 Cal. 985.
 (u) *Phattechand v. Uma* (1933) 35 Bom. L. R. 1138; *Hukumchand v. Radha Kishen* (1930) 32 Bom. L. R. 533 P.C.; *P. R. P. R. Somasundram Chettiar v. Y. P. N. Nachiappa*

- Chettiar* (1924) 2 Rang. 429.
 (v) *Ashutish Bannerjee v. Lukhimoni Debya* (1892) 19 Cal. 139; *Pearneenath Brohmo v. Juggessuree* (1870) 15 W. R. 128; *Mansa Debi v. Jivan Lal* (1887) 9 All. 33; *Lakshman Ramchandra Joshi v. Satyabhamabai* (1878) 2 Bom. 494; *Vishnu Shambog v. Manjamma* (1885) 9 Bom. 108; *Shintayee v. Thanakpudayen* (1868) 4 Mad. H. C. 183; *Muthia v. Virammal* (1887) 10 Mad. 283.
 (w) *Matangini Dassee v. Chooney Money Dassee* (1895) 22 Cal. 903; *Aubhoyessury Dabea v. Gouri Sunkur Panday* (1895) 22 Cal. 859, followed.
 (x) *Parvati Devanna Jagadal v. Shrinivas Ramchandra Patil* (1920) 22 Bom. L. R. 110; *Mohini Devi v. Purna Sashi* (1932) 36 C. W. N. 153; *Ram Kunwar v. Ram Dei* (1900) 22 All. 326; *Sham Lal v. Banna Lal* (1882) 4 All. 296.
 (y) *Abdul Muhammad v. Seethalakshmi*, A. I. R. (1931) Mad. 120.

S. 100

transferee for value without notice (z). An agreement to pay maintenance allowance from generation to generation made a charge valid as a charge but not as a mortgage for the rule of perpetuity does not apply, as it is not a transfer of an interest within the meaning of sections 13 and 14 (a).

Unsecured creditor.—A creditor has no charge over property purchased out of money advanced (b).

Unsecured debts.—Unsecured debts contracted by a limited owner, bind the estate if incurred for purposes which will justify a charge (c).

Agreement to mortgage.—An oral agreement to execute a mortgage does not create a charge (d).

Annuity.—The owner of a property made a grant from it of an annuity to his sister and her heirs which contained a proviso that on failure to pay, the grantee and her heirs could take possession of the property. By a subsequent mortgage he declared the property as his own. On his sister's death he was the heir and consequently the charge was merged and extinguished, so that the mortgagor could not set it up against the mortgagees and their purchasers (e).

Escheat.—Where there is a failure of heirs, the Crown by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it (f).

Co-sharer.—The doctrine, whether a part-owner in a revenue-paying estate, who has made payment of the revenue in order to save it and so does save the estate, thereby obtains a charge or not upon the share of his co-owner to the extent of the latter's share of the revenue, has had a somewhat varied career. No such charge is given by any express statutory enactment. The question must, therefore, be decided on general principles. In England no such general rule as is being considered exists (g). The English authorities have been reviewed at great length and explained by Fry, L.J., in *In re Leslie v. French* (h) by the Court of Appeal in *Falcke v. Scottish Imperial Insurance Co.* (i), the latter of which cases authoritatively rejected the doctrine of what is called Salvage Lien, acted upon in some Irish cases (j). In 1867 the case of *Nugenderchunder Ghose v. Kaminee Dasee* (k) came before the Privy Council where the payment of revenue was made by a mortgagee to save the estate. At page 258 of that report, it was said, "Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the taluk as entitled him to pay the revenue due to the Government and did actually pay it, was thereby entitled to a charge on the taluk as against all persons interested therein for the amount of the moneys so paid." On this dictum rested the decision in *Enayet Hossein v. Muddun Moonee Sagoon* (l) which decided in favour of such a

(z) *Mania v. Bachchi* (1906) 28 All. 655.

(a) *Mallub Hasan v. Mt. Kalawati*, A. I. R. (1933) All. 934.

(b) *Annapurna Co., Ltd., In the matter of*, A. I. R. (1926) All. 397.

(c) *Mahraj Sree Rao v. Raja Kaminayani* (1912) 35 Mad. 108.

(d) *Ram Hait v. Pohkar*, A. I. R. (1932) Oudh 54; *Hukumchand v. Radha Kishan* (1929) 34 C. W. N. 506 P.C.

(e) *Radhay Lal v. Mahesh Prasad* (1885) 7 All. 864.

(f) *Sonet Kuer v. Himmul Bahadoor* (1874) 1

Cal. 391, 2 I. A. 92; *The Collector of Masulipatam v. Cavalry Vencata* (1860) 8 M. I. A. 500.

(g) *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234, 241.

(h) (1883) 23 Ch. D. 552.

(i) (1886) 34 Ch. D. 234.

(j) *Kehoe v. Hales* (1843) 5 Ir. Eq. 597; *Featherstone v. Mitchell* (1849) 11 Ir. Eq. 35; *Locke v. Evans* (1849) 11 Ir. Eq. 52.

(k) (1867) 11 M. I. A. 242.

(l) (1875) 14 Beng. L. R. 155.

charge on general principles of equity. The principle laid down in this decision was acted upon in *Nobin Chunder Roy v. Rup Lall Das* (m), in *Ram Dat Singh v. Horakh Narain Singh* (n), in *Mohesh Chunder Bannerji v. Ram Prosunno Chowdry* (o), and in *Deo Mundun Agha v. Desputty Singh* (p). On the other hand, in *Kristo Mohinee Dasi v. Kaliprosono Ghose* (q), Garth, C.J., and Pontifex, J., expressed great doubt as to the existence of any such charge. In this state of the law, the matter came up for decision before a Full Bench of the Calcutta High Court consisting of five Judges, in which the majority held that the dictum of the Privy Council only applied to the case of a mortgagee and that a co-sharer acquired no charge on the share of the defaulting co-sharer. The minority, however, held the contrary (r). The decision of the Full Bench was followed by a Division Bench of the High Court of Bombay (s), a Full Bench of the Allahabad High Court (t) of Rangoon (u) and Patna (v), but the dissenting view was adopted by a Full Bench of the Madras High Court (w). The same Court has, however, made a distinction, where one person is the real owner of a share in land and another is the registered proprietor of the whole and the latter and not the former is the defaulter within the meaning of the Revenue Recovery Act (x).

Mahomedan Law.—Under Mahomedan Law, a charge on an unknown share of property of the heirs, defeats the provisions of Mahomedan Law, and hence it is illegal and invalid and cannot be enforced (y).

Contents of a Deed of Charge.—The usual contents of a Deed of Charge are the date and place of execution, the names of the parties to the deed, recitals, if any, including the indebtedness of the borrower to the lender, the operative part witnessing that in pursuance of the agreement of the parties and in consideration of the money paid or due the borrower covenants with the lender that the hereditaments and premises described in the schedule and all the estate, right, title, interest, claim and demand of the borrower into and upon the premises shall stand charged with the payment by the borrower to the lender on a date named and the sum advanced or due with interest at the rate specified, shall be paid as agreed between the parties with a proviso, that on the borrower repaying the amount to the lender with interest down to the date of the repayment the lender shall, at the request and cost of the borrower, release the hereditaments and premises from the charge thereby created. Then follows an agreement between the parties whereby the borrower agrees in default of payment on due date to give three months' notice before repaying the amount and liberty to the lender to capitalise the interest. The borrower also covenants to keep the premises in proper repair and for insurance, followed usually by a clause that the principal moneys shall be payable immediately and the security enforced immediately in the event of default in payment of the principal money on due date, or in default in payment of interest punctually if the premises appear to be in jeopardy or be so destroyed as to impair the security, or

(m) (1882) 9 Cal. 377.

(n) (1879) 6 Cal. 549.

(o) (1878) 6 C. L. R. 28.

(p) (1879) 8 C. L. R. 210 note.

(q) (1881) 8 Cal. 402.

(r) *Kinu Ram Das v. Mozaffer Hossain Shaha* (1887) 14 Cal. 809 F.B.; *Enayet Hossein v. Muddun Moonee Sagoon* (1875) 14 Beng. L. R. 155, overruled; *Mogender Chunder Ghose v. Kamini Dasi* (1867) 11 M. I. A. 242; *Kristoni Mohini Dasi v. Kaliprosono Ghose* (1881) 8 Cal. 402; *In re Leslie, Leslie v. French* (1883) 23 Ch. D. 552.

(s) *Shivrao v. Pundluk* (1902) 26 Bom. 442.

(t) *Sheth Chitor Mal v. Shib Lal* (1892) 14 All. 273.

(u) *U' Shwe Bwa v. Maung Thauk Kya*, A. I. R. (1928) Rang. 278.

(v) *Bhubneshwari v. Manir Khan*, A. I. R. (1928) Pat. 641.

(w) *Raja of Vizianagram v. Raja Setucherla Somasekhararev* (1903) 26 Mad. 686; *Seshagiri v. Pichu* (1888) 11 Mad. 452; *P. Amman Pariyayi v. M. P. Pakran Haji* (1912) 36 Mad. 493; *Kotayya v. Kotappa*, A. I. R. (1926) Mad. 141.

(x) *Subramaniam Chetty v. Mahalingasami Sivan* (1910) 33 Mad. 41; *Jagatpati Raju v. Sadrusannama Arad* (1916) 39 Mad. 795.

(y) *Matlub Hasan v. Mt. Kalawati*, A. I. R. (1933) All. 934.

Ss. 100-
101

if the lender shall commit any breach of the covenants and obligations on his part to be performed and observed, or if the property be notified for acquisition and if the premises are leasehold, on failure on the part of the borrower to pay the ground rent or upon breach of any of the obligations of the lease. Lastly, the witnessing clause, the schedule of the property and the signature of the borrower.

Attestation.—The formality of attestation required for the validity of a mortgage under section 59 does not extend to a charge (z).

Registration.—Charge may be created in several ways either by parol or by a deed *inter vivos* or by will or by decree or order of the Court. In the case of a will no registration is necessary. Section 17 of the Indian Registration Act, XVI of 1908, enumerates what documents are compulsorily registrable, but clause 6 of sub-section (2) excepts decrees and orders of Courts and awards registration whereof is optional. The Privy Council has declared that the provisions of section 17 of the Registration Act do not apply to orders and decrees made by a Court (a). The High Courts of Allahabad and Madras have adopted this view (b). And the same view has been taken by the Calcutta High Court (c). Registration, however, must be in accordance with the provisions of the Registration Act, otherwise registration would be of no avail (d). As to charge created by deed *inter vivos* the document would fall under section, 17 clause (1), sub-clause (b), and registration would be compulsory (e). Unless the amount secured be less than Rs. 100. In case of a statutory charge, that is to say, a charge created by operation of law, the deed which is sought to be relied upon in support of such a charge must be registered. As where an agreement to sell immoveable property acknowledges payment by the purchaser of earnest money he has a lien under section 35. If the agreement is not registered he cannot rely upon it in support of his charge. Similarly, in the case of an unpaid vendor.

Stamp duty.—The definition of “mortgage deed” in section 2 (17) of the Indian Stamp Act, 1899, is wide enough to include a charge. Hence stamp duty on a charge is the same as on a mortgage under article 40 of the Indian Stamp Act of 1899.

Release of charge.—The deed of charge is usually by a deed. It is necessary that the release should also be by a deed in order to discharge the debt, it being a safer course, so as to avoid questions as to what is an effectual discharge. It should be stamped and registered.

101. *Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be,*

No merger in case of subsequent encumbrance.

(z) *Ramasami Iyengar v. Kuppusami Iyer* (1921) M. W. N. 472.

(a) *Bindesri Naik v. Ganga Saran Sahu* (1898) 20 All. 171, 28 I. A. 9; *Pranal Anni v. Lakshmi Anni* (1899) 22 M. 508; 26 I. A. 101.

(b) *Raghubans Mani Singh v. Mahabir Singh* (1906) 28 All. 78; *Patha Muthammal v. Esup Rowether* (1906) 29 Mad. 365.

(c) *Gupta Narain Das v. Bijoya Sunderi Debya* (1898) 2 C. W. N. 663; *Govinda Chandra Pal v. Dwarka Nath Pal* (1908) 35 Cal. 837.

(d) *Indra Bibi v. Jain Sardar Ahiri* (1908) 35 Cal. 845.

(e) *Bengal Banking Corporation v. Mackertich*

(1883) 10 Cal. 315; *Bai Narmada v. Bhagvantrai* (1888) 12 Bom. 505; *Yani v. Bani* (1896) 20 Bom. 553; *Konchadi Shanbhogue v. Shiv Rao* (1905) 28 Mad. 54; *Tulsiram v. Anusuya*, A. I. R. (1924) Nag. 360; *Rangampudi v. Venkateswarlu*, A. I. R. (1934) Mad. 713; *Imperial Bank of India v. Bengal National Bank* (1931) 58 Cal. 136 reversed in (1932) 59 Cal. 377; 58 I. A. 323 on another point; *Gobinda Chandra v. Dwarka Nath* (1908) 35 Cal. 837 (case of a decree); *Amrattal v. Keshavlal* (1926) 28 Bom. L. R. 939; *Janardan v. Anant* (1908) 32 Bom. 386 (amount below Rs. 100); *Bibhuti Bhusan v. Baikuntha* (1935) 62 C. L. J. 55.

without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto. S. 101

Amendment.—Section 101 was substituted for the original section by section 51 of the Amending Act, 20 of 1929, to give effect to the long course of decisions in England as well as of the Judicial Committee, referred to hereafter. The principle is that it may generally be taken to be the intention of a creditor and to his benefit, to keep his own encumbrances as well as those which he has paid off alive against subsequent encumbrances.

Analysis of the section.—

1. Any mortgagee, or
2. Person having a charge upon immoveable property, or
3. Any transferee from such mortgagee, or
4. Any transferee from such charge-holder
 - (a) may purchase or otherwise acquire the rights in the property of the mortgagor or owner
 - (b) without thereby causing the mortgage or charge to be merged
 - (c) as between himself and any subsequent mortgagee or person having a subsequent charge upon the same property
 - (i) And no such subsequent mortgagee or
 - (ii) Charge-holder

shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge or otherwise than subject thereto.

Retrospective effect.—The Rangoon High Court (*f*) has held that section 101 has, while the Allahabad High Court (*g*) has held, that it has not, a retrospective effect.

Old section 101.—Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares by express words or necessary implication, that it shall continue to subsist or such continuance would be for his benefit.

Section 101 as it originally stood enacted the rule of merger with a saving clause, if intention were proved to negative such merger. This intention rule rested on the principle of equity of the English Courts which had not found its way into this country. The section has, therefore, been redrafted, converting what was

(f) *Ko Po Kun v. C. A. M. A. L. Firm* (1932) 10 Rang. 465.

(g) *Tota Ram v. Ram Lal* (1932) 54 All. 897.

S. 101 engrafted as an exception on the rule of merger, into a rule prohibiting merger in all cases unless the contract of the properties leads to an opposite conclusion (h).

Saving the charge.—The charge was preserved (i) under the old section when the owner of the charge, having become entitled to the property, declared (a) by express words, or (b) by necessary implication, that it should continue to subsist, or (c) where such continuance would be for his benefit.

Doctrine of merger.—Charge is defined by section 100 of the Act. It is annihilated when the same person becomes the owner in fee of an estate and is also entitled to a charge on it. The section deals with what is known as the doctrine of merger and prevents the charge from perishing, by enacting that an encumbrancer or the person having a charge on immoveable property or any transferee from either of them, may on acquiring the equity of redemption if he so choose, prevent the charge from merging in the inheritance. Merger depends upon intention, express or presumed. The section now abrogated, was based on the doctrine of *Toulmin v. Steere* (j), a case decided in the year 1817. The saving clause is based on the case of *Tyrwhitt v. Tyrwhitt* (k), wherein the three tests of ascertaining whether a charge was kept alive have been laid down. The rule laid down by Sir William Grant in *Toulmin v. Steere* (j) was that a purchaser who took a conveyance purporting to be free from encumbrances, could not set up a mortgage which had been paid off out of the purchase-money against an encumbrance subsequent in date, of which he had constructive notice. The same Judge in deciding the case of *Forbes v. Moffatt* (l) said: "The question is upon the intention, actual or presumed, and the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and where this is the case it will be held to sink, unless something shall have been done by him to keep it on foot. Where no intention is expressed or the party is incapable of expressing any, the Court considers what is most advantageous to him." The soundness of the decision in *Toulmin v. Steere* (m) has been questioned in numerous English cases. Various Equity Judges have expressed their disapproval. In that case either the great Judge was wrong or else he erred in laying down the principles in *Forbes v. Moffatt* (n). For whilst the principle laid down in the former case has not been accepted, the latter case has always been adopted, for in it lies expressed the true principles of the law. In *Toulmin v. Steere* (o), the plaintiff, Mrs. Holme, in 1805 purchased from one Witts an annuity of £180 for £2,000, to be secured on the estate which was subject to a mortgage to one Harrison for £5,000. In 1808 Witts made a mortgage for £3,000 to Wilby. In 1810, under orders of the Court of Chancery, the estate was purchased by trustees on behalf of a minor from Witts, who paid all the other encumbrances. The purchase was effected through the vendor's agent who had notice of the annuity. The contest was between the annuitant and the trustee purchasers. It was contended for the purchasers that the encumbrances should be regarded as still subsisting as against any person claiming under Witts. It was held that the agent having notice of the annuity, actual notice to him was constructive notice to those on whose account the purchase was made, that the purchasers were in no worse situation than they would have been, if they had bought an estate on which there was no mortgage but which

(h) *Kanhaiya Lal v. Ikram Fatima*, A. I. R. (1932) Oudh 268.

(i) *Ram Sarup v. Seth Ram Lal* (1922) 44 All. 659; *Sonaulla v. Abu Sayad* (1930) 57 Cal. 473.

(j) (1817) 3 Mer. 210, 36 E. R. 81.

(k) (1863) 32 Beav. 244, 55 E. R. 96.

(l) (1811) 18 Ves. 384, 34 E. R. 362.

(m) (1817) 3 Mer. 210, 36 E. R. 81.

(n) (1811) 18 Ves. 384, 34 E. R. 362.

(o) (1817) 3 Mer. 210, 36 E. R. 81.

turned out to be encumbered with an annuity not known to them in fact but constructively known to them, by means of notice to their agent and that, therefore, the annuitant could claim a charge upon the property on which the encumbrances must be deemed to have been extinguished. In his judgment Sir William Grant said, the cases of *Greswold v. Marsham* (p) and *Mocatia v. Murqatroyd* (q) are express authorities to shew that one, purchasing an equity of redemption, cannot set up a prior mortgage of his own nor consequently a mortgage which he has got in, against subsequent encumbrances of which he had notice.

The effect of the doctrine originally enunciated in *Toulmin v. Steere* (r) was stated by Sir George Jessel, M.R., as follows:—That where the purchaser of an estate pays off an encumbrance upon it, the encumbrance paid off is merged unless the contrary intention appears, and he pointed out its application in the case of an owner in fee, or in tail, or of a purchaser (s). Commenting on the same case, Lord Macnaghten in *Thorne v. Cann* (t) said: "The authority in that case cannot nowadays be treated as going beyond the actual decision." It is, however, a matter of great importance to the profession to know whether this much canvassed case of *Toulmin v. Steere* (u) is still to be regarded as a binding authority. It has never been overruled, though severely criticized by Kay, L.J., in *Liquidation Estates Purchase Co. v. Willoughby* (v) and by Sir Richard Couch in giving the judgment of the Privy Council in *Gokaldas's* case (w). The task of determining whether it was or was not rightly decided was avoided by Lord Dunedin in *Whiteley v. Delaney* (x). It is clear, however, that there has been, to say the least, a great reluctance on the part of Judges learned in equity to extend the principle of *Toulmin v. Steere* (y) beyond the limits of its own facts and there are several authorities which say that this doctrine is not to be carried further. It is, however, rendered innocuous by conveyancers defeating its principle by saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off (z). The observations of Parker, J., as he then was in the trial Court, reported in *Marks v. Whiteley* (a), are instructive with regard to this question. All seem agreed that in debatable cases merger takes place or not, according to intention. Taking the cases cited as a whole, the general rule comes to this; where by appropriate conveyancing, the charge could be preserved (this excludes all cases of which *Otter v. Lord Vaux* is a type) then it will be for the party alleging the charge to be dead, to shew an intention to that effect. What have been called the presumptions arising from the continued existence of the charge, being to the benefit of the person who has paid it off, e.g., in the case of payment by a limited owner, are just other ways of expressing the same rule (b). The rule was first enunciated in India by Mr. Justice Holloway in *Ramu Naikan v. Subbaraya Mudali* (c), in which that learned Judge disapproved the doctrine laid down by the English Courts in *Toulmin v. Steere* (d) which had for some time been followed by the Calcutta High Court in *Gaur Narayan v. Brajanath* (e), by the Bombay High Courts in *Itcharam Dayaram v. Raiji Jaga* (f), and *Appaji Bhivrao v. Kanji* (g) till a Full Bench of that Court in *Mulchand Kuber v. Lallu Trikam* (h) adopted the view of the Madras High Court.

(p) (1685) 2 Ch. Cas. 170, 22 E. R. 898.
 (q) (1717) 1 P. Wms. 393, 24 E. R. 440.
 (r) (1817) 3 Mer. 210, 36 E. R. 81.
 (s) *Adams v. Angell* (1877) 5 Ch. D. 634.
 (t) (1895) 1 A. C. 11.
 (u) (1817) 3 Mer. 210, 36 E. R. 81.
 (v) (1896) 1 Ch. 726-737.
 (w) (1883) 10 Cal. 1035, 11 I. A. 126.
 (x) (1914) A. C. 132.
 (y) (1817) 3 Mer. 210, 36 E. R. 81.

(z) *Stevens v. Mid-Hants Railway Co.* (1873) 8 Ch. App. 1064.
 (a) (1911) 2 Ch. 448.
 (b) *Whiteley v. Delaney* (1914) A. C. 132.
 (c) (1873) 7 Mad. H. C. 229.
 (d) (1817) 3 Mer. 210, 36 E. R. 81.
 (e) (1870) 5 Beng. L. R. 463.
 (f) (1874) 11 Bom. H. C. 41.
 (g) (1882) 6 Bom. 64.
 (h) (1882) 6 Bom. 404.

S. 101

The rule was again followed in *Shantapa v. Balapa* (i) and in *Dullabhdas v. Lakshmandas* (j) by a Division Bench of the same Court, and by the Allahabad High Court in *Har Prasad v. Bhagwan Das* (k) and *Gaya Prasad v. Salik Prasad* (l), *Ali Hasan v. Dhirja* (m), and also by the Madras High Court (n) that when it was the manifest intention of the mortgagee to keep alive the mortgage or it was for his benefit to do so, it should be held that it subsists after the purchase. The doctrine has now been settled by the ruling of the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas* (o) in which the English cases on the subject were considered (p). In that case the firm of Puranmal Premsukhdas executed a mortgage and further charge in favour of a mortgagee, who was put into possession of six out of nine houses mortgaged, subject to a lien of the bank. Goculdas, in execution of his money decree, caused the right, title and interest of Puranmal in the nine houses to be sold and purchased it himself. Thereafter he paid off the balance due to the bank and obtained possession of the houses. In a suit by the subsequent mortgagee for possession, the Privy Council held that the mortgage to the bank was not extinguished as it was to the interest of the decree-holder to have kept it alive. Their Lordships observed that the obvious question to ask is, What was the intention of the party paying off the charge, was it to extinguish it or to keep it alive? If there is no express evidence of such intention, the ordinary rule in such cases is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. They refused to apply the doctrine of *Toulmin v. Steere* as resting on no intelligible principle, as it was defeated by declarations of intentions or formal devices of conveyancers. Moreover, as the act of conveyancing differed in this country, to apply the doctrine of *Toulmin v. Steere* would lead to confusion, multiplication of documents and to litigation (q). The English doctrine of merger has never been held to apply to land tenures in India in their entirety. On the other hand, very eminent Judges have doubted that it does (r). It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgage may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor; or to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt. It is further to be presumed, and indeed the Transfer of Property Act, section 101, so enacts, that if there is no indication to the contrary, the owner has intended to have kept alive the previous charge, if it would be for his benefit (s). Recently, the Bombay High Court has held that the doctrine of *Toulmin v. Steere* (t) does not apply to India (u).

Three tests.—Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance, at the time when he became entitled to the absolute interest of the charge. Firstly, any actual expression of that intention; secondly, where the form and character

- (i) (1882) 6 Bom. 561.
- (j) (1886) 10 Bom. 88.
- (k) (1882) 4 All. 196.
- (l) (1881) 3 All. 682.
- (m) (1882) 4 All. 518.
- (n) *Vencalachella v. Panjanadien* (1881) 4 Mad. 213; *Krishna v. Mulla* (1884) 7 Mad. 127; *Rupabai v. Audimulum* (1888) 11 Mad. 345.
- (o) (1883) 10 Cal. 1035, 11 I. A. 126.
- (p) *Sirbadh Rai v. Raghunathprasad* (1885) 7 All. 568; *Sonaula v. Abu Sayad* (1930) 57 Cal. 473.
- (q) *Goculdas Gopaldas v. Puranmal Premsukhdas* (1883) 10 Cal. 1035, 11 I. A. 126; *Mohesh*

- Lal v. Mohunt Bhawan Das* (1883) 9 Cal. 961, 10 I. A. 62; *Dinobundhu Shaw v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9; *Mahomed Ibrahim v. Ambika Pershad* (1912) 39 Cal. 527, 39 I. A. 68.
- (r) *Amaloo v. Sheik Muksud Ali* (1915) 19 C. W. N. 435.
- (s) *Malireddi Ayyareddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140; *Ko Po Kun v. C. A. M. A. L. Firm*, A. I. R. (1932) Rang. 197.
- (t) (1817) 3 Mer. 210, 36 E. R. 81.
- (u) *Allisaheb v. Shesho* (1933) Bom. L. R. 1238.

of the acts done are only consistent with keeping the charge on foot : and thirdly, such an intention may be presumed, when, though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance (v). Each of the above are dealt with hereafter.

Merger of lower security.—It is a general rule of law that a party by taking or acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security or cause of action, that is to say, the taking of a bond or covenant or the acquiring a judgment for a simple contract debt, merges and extinguishes the simple contract (w). So where a mortgagee recovers judgment on his bond or covenant, so long as the judgment remains in force, although he cannot sue his debtors upon the bond or covenant, he does not lose his collateral security (x). And so where in an equitable mortgage with agreement for a legal mortgage the bankruptcy of the mortgagor supervenes, although the latter is invalid, the equitable mortgage, which is the lower security, is not merged but revived (y). But a creditor having a security on the funds of his debtor for part of his debt, does not surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds for the whole of the debt. Neither is the separate security relinquished, nor is its precedence altered (z). There is a merger if the remedy given by the higher security is co-extensive with that which the creditor has upon the lower security (a). But where the two remedies remain separate there is no merger, as where one of two (b) or three (c) makers of a joint and several promissory note gives the holder a deed of mortgage, the other maker is not thereby discharged; so also where a deposit of an under-lease as security is followed by a subsequent deposit of the head-lease to secure further advance (d).

Becomes absolutely entitled.—The word “absolutely” is used in the section to indicate that the interest in which the encumbrance should merge, must be an absolute interest and not a limited one (e). And where there was an outstanding lease (f), it was held that there was no merger. In order that there may be a merger, the two estates which are supposed to coalesce must vest in the same person, in the same right, at the same time (g).

Consent decree.—Purchase by plaintiff under a consent decree, although it amounted to a purchase by a private treaty, did not cause a merger of the mortgagee's interest and the plaintiff as mortgagee was entitled to assert his right against the defendant, as being for his benefit under the section (h).

Necessary implication.—Nothing is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to

(v) *Tyrvhitt v. Tyrvhitt* (1863) 32 Beav. 244, 55 E. R. 96.

(w) *Owen v. Homan* (1851) 20 L. J. Ch. 314, 42 E. R. 307, 318; *Boaler v. Mayor* (1865) 34 L. J. C. P. 230, 144 E. R. 714.

(x) *Lloyd v. Mason* (1845) 14 L. J. Ch. 257, 67 E. R. 590; *Economic Life Assurance Society v. Osborne* (1902) A. C. 147; *Kamshankar v. Gulab Shankar*, A. I. R. (1933) Nag. 241.

(y) *Re. Emery, ex-parte, Harvey* (1839) Mont. & Ch. 261.

(z) *Miln v. Walton* (1843) 7 Jur. 892, 63 E. R. 156.

(a) *Twopenny v. Young* (1824) 3 B. & C. 208, 107 E. R. 711.

(b) *Ansell v. Baker* (1850) 15 Q. B. 20, 117 E. R. 365.

(c) *Sharpe v. Gibbs* (1864) 16 C. B. N. 527, 143 E. R. 1234.

(d) *Re. Dix, ex-parte, Whitbread* (1841) 2 Mont. D. & De. G. 415.

(e) *Sonaula v. Abu Sayad* (1930) 57 Cal. 473.

(f) *Mangullal Bagaria v. Upendra Mohan* (1930) 57 Cal. 82.

(g) *Someshwari Prasad v. Maheshwari Prasad* (1931) 10 Pat. 630; *Maharaja Bahadur Kesho Prasad Singh v. Madho Prasad Singh* (1924) 3 Pat. 880.

(h) *Mangullal Bagaria v. Upendra Mohan* (1930) 57 Cal. 82.

S. 101

pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit, is simply a question of intention. You may find intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot. If there is a reasonable inference from the tenor of the document by which the transactions are carried out and the only inference, consistent with the circumstances attending their execution, then in such circumstances intention must prevail unless it is defeated by some rule which prevents effect being given to it. So where the owner of an equity of redemption by purchase from the trustee in bankruptcy of the mortgagor, paid off a transferee of the first mortgagee and took an assignment to himself which he subsequently transferred to another and the documents and the circumstances shewed an intention to keep alive the security, it was held that the charge was not extinguished but enured for the benefit of the owner of the equity of redemption (i). The same principle is again laid down in a later case (j). In the case of *Adams v. Angell* (k) and *Thorne v. Cann* (l), the equity of redemption had been purchased from the trustee in a bankruptcy and Jesseel, M.R. said, "I am of opinion an intention was clearly shewn not to let in a subsequent mortgagee except on the terms of his paying Adam his principal, interest and costs." Lord Cranworth in *Morley v. Morley* (m) states the principle very clearly thus: "I take the principle to be this, that when an encumbrance is paid off by the person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to shew a contrary intention, the presumption is, that he meant to do that which in law and in equity he might have done, namely, to keep it alive for his own interest." The same rule applies to advances to the judgment debtor to set aside a sale under O.21, r.89 of the Code of Civil Procedure (n), and the provisions of Order 34, rule 5 ought not to be construed so as to render the application of such a principle, to cases where an order absolute has been passed, impossible (o). In England the rule that where an owner has an absolute interest in the estate and charge, the charge is annihilated, is subject to exceptions in the case of infants (p) and lunatics (q), and when payment is made under an order of the Court (r), and in India when there is an impediment to his becoming absolutely entitled to the property (s). When a mortgagee becomes entitled in fee to the estate on which his mortgage is charged, the presumption in the first instance and in the absence of evidence, is that the mortgage has merged in the estate (t).

The intention must be unequivocally manifested at the time when the debt is paid off and the presumption of extinguishment cannot be rebutted by subsequent acts. An act of doubtful and equivocal import cannot rebut the legal presumption. Even a contemporaneous transfer of the charge to a trustee is not conclusive evidence against the presumption. The intention to keep alive must, in the language

- (i) *Thorne v. Cann* (1895) A. C. 11.
- (j) *The Liquidation Estates Purchase Co., Ltd. v. Willoughby* (1898) A. C. 321; *Pitt v. Pitt* (1856) 22 Beav. 298, 52 E. R. 1123.
- (k) (1877) 5 Ch. D. 634.
- (l) (1895) A. C. 11.
- (m) (1855) 5 D. M. & G. 610, 43 E. R. 1007; *Seetharama v. Venkatakrishna* (1893) 16 Mad. 94.
- (n) *Vanmikalunga Mudali v. Chidambara Chetty* (1906) 29 Mad. 37; *Gokuldas Gopaldas v. Puranmal Premeekhdas* (1883) 10 Cal. 1035 P.C.
- (o) *Vanmikalunga Mudali v. Chidambara Chetty* (1906) 29 Mad. 37; *Dinobundu Shaw Chodry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9.

- (p) *Donisthorpe v. Porter* (1762) 2 Eden 162, 27 E. R. 390; *Alsop v. Bell* (1857) 24 Beav. 451, 53 E. R. 431.
- (q) *Compton (Lord) v. Oxenden* (1793) 2 Ves. 261, 30 E. R. 624; *Re. French Brewster's Settlements, Walters v. French Brewsters* (1904) 1 Ch. 713; *Re. Hole, Davies v. Witts* (1906) 1 Ch. 673; *Re. Wilson, Wilson v. Clark* (1916) 1 Ch. 220.
- (r) *Ware v. Polhill* (1805) 11 Ves. 257, 32 E. R. 1087; *Alsop v. Bell* (1857) 24 Beav. 451, 53 E. R. 431.
- (s) *Sonaula v. Abu Sayad* (1930) 57 Cal. 473; *Mangullal Bagaria v. Upendra Mohan* (1930) 57 Cal. 82.
- (t) *Hatch v. Skelton* (1835) 20 Beav. 453, 52 E. R. 679.

of Lord Langdale, not be "left as matter of implication and inference, but must be clearly and unequivocally expressed" (u). In case where the mortgage debt is assigned or transferred to the new lender, whose moneys are utilized in paying the old debt, no difficulty arises (v). A similar right is possessed by a purchaser of mortgaged property in execution of a decree of a subsequent mortgagee, who has paid off a first mortgage as against a second mortgagee suing for sale and as upon his discharge of the prior mortgages the mortgage deeds were handed over to him, this was evidence of his intention to keep the mortgages alive (w). The intention may be found from the deed or the circumstances of the transaction (x). The circumstances of a compromise arrived at in a suit and discharge by the mortgagee who was a party thereto of a mortgage prior in date as well as subsequent to his own mortgage, is evidence of intention to keep the mortgage debts alive and not to extinguish them (y). The question of intention is one of fact. Certain acts are, while certain acts are not, sufficient to rebut the presumption, but when we consider the intention of the person doing an act, that act in one set of circumstances may shew a certain intention whereas the same act under a different set of circumstances may shew a different intention, so that the inference in all cases has to be drawn from the circumstances of the case themselves (z). An attachment was levied on a property over which there were two prior mortgages. The mortgagor raised a loan for a third mortgage and discharged the earlier mortgage. The contention of the auction purchaser at a sale held at the instance of the attaching creditor that the third mortgagee was not entitled to the priority due to the first two mortgages was not upheld (a). Both in England and in this country under the old section while *Toulmin v. Steere* (b) stands, intention governs the case.

Interest of the owner that the charge should continue.—The rule established by long series of authorities is that where the owner of an estate in fee simple becomes entitled to a charge on that estate, *prima facie* the charge, in equity at least, merges in the inheritance, unless the owner of the estate does some act to keep the charge alive, or unless in the circumstances of the case, it would be for his interest that the charge should continue to be a subsisting charge on the estate (c). The question is as to intention and the person in whom the interests are united. When it is perfectly indifferent to the owner of the estate whether the charge should merge or not, there the charge sinks (d). This rule will yield to the intention whether it is expressed or whether it is to be presumed (e). Every one is presumed to intend what is manifestly for his benefit (f). If there is no indication to the contrary, the presumption

(u) *Hood v. Phillips* (1841) 3 Beav. 513, 519, 52 E. R. 205.

(v) *Dinobundu Shaw Chodry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9; *Gokaldas Gopaldas v. Puranmal Premasukdas* (1883) 10 Cal. 1035, 11 I. A. 126; *Mohesh Lal v. Bawan Das* (1882) 9 Cal. 961, 10 I. A. 62.

(w) *Mati-ullah Khan v. Banwari Lal* (1910) 32 All. 138; *Baldeo Prasad v. Uman Shankar* (1910) 32 All. 1; *Mamraj v. Ramji Lal* (1910) 7 A. L. J. 15.

(x) *Ram Das Saw v. Ramnandan Prasad Singh*, A. I. R. (1928) Pat. 195.

(y) *Gujuluva Nagayya v. Thudukuchi Govindayyar*, A. I. R. (1923) Mad. 349.

(z) *Tiruvengadam Pillai v. Sabapathi Pillai*, A. I. R. (1925) Mad. 1217.

(a) *Dinobundu Shaw Chowdry v. Jogmaya Dasi*

(1902) 29 Cal. 154, 29 I. A. 9; *Mahdo Singh v. Pancham Singh* (1927) 49 All. 235.

(b) (1817) 3 Mer. 210, 36 E. R. 81.

(c) *Swinfen v. Swinfen* (1860) 29 Beav. 199, 54 E. R. 603; *Clarendon v. Barham* (1842) 1 Y. & C. Ch. Ca. 688, 62 E. R. 1073; *Davis v. Barrett* (1851) 14 Beav. 542, 51 E. R. 394; *Horton v. Smith* (1858) 4 K. & J. 624, 70 E. R. 259; *Ram Dass Saw v. Ramnandan Prasad Singh*, A. I. R. (1928) Pat. 195.

(d) *Forbes v. Moffatt* (1811) 18 Ves. 384, 34 E. R. 362.

(e) *Grice v. Shaw* (1852) 10 Hare. 76, 68 E. R. 845; *Tyrwhitt v. Tyrwhitt* (1863) 32 Beav. 244, 55 E. R. 96.

(f) *Gauri Shankar v. Bahdur Singh* A. I. R. (1925) Pat. 605; *Abdul Majid v. Arunachala* (1933) 61 M. L. J. 857.

S. 101 is that the owner had intended to have kept alive the previous charge if it would be for his benefit (g).

Where no intention is expressed, or the party is incapable of expressing any, the Court considers what is most advantageous to the party (h). Presumption against merger arises if a stranger pays off a mortgage and it is immaterial that he has not been requested to do so by the mortgagor and that he took an equitable mortgage instead of a legal mortgage intended; nor is the presumption rebutted by the fact that the mortgage taken by the stranger was to be only a part of the property originally mortgaged (i). Nor is the presumption rebutted by reason of obtaining a reconveyance freed and absolutely discharged from the mortgage. A mortgage of a reversionary interest was followed, subject to the mortgage, by a trust for mortgagor's wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mortgage. The solicitors who prepared the reconveyance were ignorant of the existence of the settlement. Held, charge was alive if paid off by a tenant for life (j). On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne encumbrances, if there are any. So also it is admitted that if without going through the ceremony of the assignment of an equitable charge, an assignment which really passes nothing, a declaration is inserted in the deed that the charge shall be treated as remaining on foot that would keep it alive. The intention, therefore, if expressed, governs the case, but if no intention is expressed, the Court considers what is most in the interest of the party discharging the encumbrance. These various positions were considered by Jessel, M.R., in the case below (k). In a case where the mortgaged property was sold in execution of a money decree against the mortgagor and the judgment debtor purchased the equity of redemption, subsequent to which sale, the mortgagor executed a mortgage for a sum which went to pay off the first mortgage, it was held that no intention to keep the former mortgage alive could be gathered (l). Where a purchaser pays off the mortgage decree, the mortgage is kept alive (m), and so also where a mortgagee purchases in execution of his own decree (n). A purchaser from a Hindu widow discharging mortgage debts binding on the estate pursuant to his undertaking, is entitled to keep the original mortgage alive, it being for his benefit (o). In all cases where a subsequent purchaser claims priority over

- (g) *Malireddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140; *Gokaldas Gopaldas v. Puranmal Premeekhdas* (1883) 10 Cal. 1035, 11 I. A. 126; *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9; *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (1912) 39 Cal. 527, 39 I. A. 68; *Hanwant Ram v. Ram Harakh*, A. I. R. (1927) Oudh 341; *Ramashanker v. Gulabshanker*, A. I. R. (1933) Nag. 241; *Mangutlal v. Upendra Mohan* (1930) 57 Cal. 82; *Daso Polai v. Narayana Patro* (1934) 57 Mad. 195.
- (h) *Goculdas Gopaldas v. Puranmal* (1883) 10 Cal. 1035, 11 I. A. 126; *Forbes v. Moffatt* (1811) 18 Ves. 384, 34 E. R. 362; *Gopal Chander Sreemany v. Herembo Chunder Holder* (1889) 16 Cal. 523; *Phillips v. Gutteridge* (1859) 3 De. G. & H. 531, 45 E. R. 206; *Adams v. Angell* (1877) 5 Ch. D. 634; *Goluck Nath Misser v. Lalla Prem*

- Lal* (1876) 3 Cal. 307; *Alangaran Chetty v. Lakshman Chetty* (1897) 20 Mad. 274; *Rupabai v. Audimulam* (1888) 11 Mad. 345.
- (i) *Butler v. Rice* (1910) 2 Ch. 277; *D ne Bundhu Shaw Chowdhry v. Nistarani Dasi* (1899) 3 C. W. N. 153; *Amar Chandra Kundu v. Roy Goloke Chandra Chowdry* (1900) 4 C. W. N. 769.
- (j) *Gifford (Lord) v. Fitz-Hardinge (Lord)* (1899) 2 Ch. 32.
- (k) *Adams v. Angell* (1877) 5 Ch. D. 634.
- (l) *Lomba Gomaji v. Vishwanath Amrith Tilvanekar* (1893) 18 Bom. 86.
- (m) *Hla Bau U v. Ramanathan*, A. I. R. (1925) Rang. 89.
- (n) *Maharaj Bahadur Singh v. A. H. Forbes*, A. I. R. (1926) Pat. 478.
- (o) *Suppu Sokkayya Bhattar v. Suppy Bhattar* (1918) M. W. N. 41

a puisne mortgagee by reason of his having discharged a prior mortgage, in the absence of evidence to the contrary he is presumed to act in accordance with his interests (p), and this is the rule even where the sale is set aside under section 53 as fraudulent (q). A mortgagee purchaser cannot be credited with the intention of altogether extinguishing his mortgage, merely because in the deed of purchase, a part of the purchase-money is treated as going to the discharge of his mortgage (r). It is to the benefit of a purchaser of the equity of redemption discharging a prior mortgage, to keep it alive (s). Similarly, where moneys advanced by the plaintiff were applied to discharge a mortgage of 1877 which was effected to pay off a prior encumbrancer of 1876, he was held entitled to priority over the defendant's mortgage which was intermediate between the above two mortgages, to the extent to which his loan had gone to discharge the encumbrance of 1876 (t). In such a case it must be shewn that the first mortgage was discharged; otherwise the result would be that a number of persons would be entitled to rank as first encumbrancers with reference to different sums of money advanced by them (u). And when the mortgagee purchases the mortgaged property with other properties and jointly with other persons in undivided shares, it is for his benefit to preserve his lien which is not extinguished (v). A puisne encumbrancer, who pays off a prior charge is entitled to be placed in the position of the prior encumbrancer, if it be manifestly for his benefit to keep the charge alive (w). Where a third mortgagee in ignorance of a second mortgage, paid off the first mortgage, an intention to keep the first mortgage alive was presumed (x). So also where a mortgagee takes a renewal of his former mortgage deed (y), or purchases the mortgaged property and sets-off the moneys due to him against the purchase price pending an attachment, he would be entitled to fall back on his lien because the conveyance pending attachment would be void (z). If a subsequent encumbrancer advances money and it is a part of his contract that he shall have an assignment of the prior encumbrance, then he is entitled to stand in the place of that encumbrancer whose debt is paid off by the money which he advances and whose encumbrance he possesses, to be assigned to himself (a). An assignment, however, is not necessary and the earlier mortgage is deemed to have been kept alive if it is for the benefit of the subsequent mortgagee

(p) *Goculdas Gopaldas v. Puranmal Premsukhdas* (1883) 10 Cal. 1035; 11 I. A. 126.

(q) *Appala Raju v. Krishnamurthy*, A. I. R. (1932) Mad. 182.

(r) *Thiruvadi Ayyangar v. P. Janakai*, A. I. R. (1924) Mad. 103; *Madho Singh v. Pancham Singh* (1927) 49 All. 233 (sale of one of two items); *Syed Ibrahim v. Arungathayee* (1915) 38 Mad. 18 (sale to prior mortgagee after creation of subsequent mortgage); *Kalimuddin Shaik v. Baidyanath Saha*, A. I. R. (1930) Cal. 572 (mortgagee purchasing the equity of redemption kept by fraud from knowledge of subsequent mortgage); *Upendra Nath v. Saroda Prasad*, A. I. R. (1932) Cal. 772 (purchase of part of the equity of redemption); *Makhan Mal v. Gokal Chand*, A. I. R. (1932) Lah. 237 (purchase by mortgagee of part of houses mortgaged); *Malireddi Ayyareddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140 (composite security); *Mehl Singh v. Amar Nath*, A. I. R. (1926) Lah. 430; *Abdul Majid v. Arunachala*, A. I. R. (1932) Mad. 84 (purchase of one of two items in ignorance of subsequent mortgage); *Phul Chand v. Mt. Surji*, A. I. R. (1923) All. 457 (purchase by prior mortgagee); *Mohanlal v. Mohomad Sujat*, A. I. R. (1933) Nag. 155 (third mortgagee discharges first mortgage); *Bapu v. Venkata-*

chalapathi Auuar (1934) 64 M. L. J. 606 (discharge of one of two mortgages).

(s) *A. Rama Rao v. Mandachalugal* (1918) 35 M. L. J. 467; *Baldeo Singh v. Deputy Commissioner, Kheri*, A. I. R. (1924) Oudh 1.

(t) *Seetharama v. Venkata Krishna* (1893) 16 Mad. 94; *Ram Bilas v. Lakshminarain*, A. I. R. (1931) Oudh 295.

(u) *Hanumanthaiyan v. Meenatchi Naidu* (1912) 35 Mad. 183; *Gurdeo Singh v. Chandrika Singh and Chandrika Singh v. Rashbehari Singh* (1907) 5 C. L. J. 611.

(v) *Gunindra Prasad v. Baijnath Singh* (1904) 31 Cal. 370.

(w) *Raushan Ali Khan Chowdry v. Kali Mohan Moitra* (1906) 4 C. L. J. 79; *Puranmal Chund v. Venkata Subbarayalu* (1897) 20 Mad. 486, *Bhiku v. Shujat Ali* (1902) 29 Cal. 25.

(x) *Gangadhara v. Sivarama* (1885) 8 Mad. 246.

(y) *Alangaran Chetti v. Lakshmanan Chetti* (1897) 20 Mad. 274; *Mahalakshammammal v. Sriman* (1912) 35 Mad. 642; *Punjab & Sind Bank, Ltd. v. Kishen Singh*, A. I. R. (1935) Lah. 350; *Gopal Chandra v. Heramba* (1889) 16 Cal. 523.

(z) *Gopal Sahoo v. Gunga Pershad* (1881) 8 Cal. 530.

(a) *Mackenzie v. Gordon* (1839) 6 Cl. & Fi. 875 7 E. R. 927.

S. 101 to do so (b). A prior mortgagee purchasing the equity of redemption is entitled to keep his mortgage alive, it being for his benefit to do so, even if such purchase be at a sale in execution of a money decree against the mortgagor (c). The question of benefit must be decided in view of circumstances existing at the time of the transaction (d).

Presumption strengthened.—The law does not, of course, prevent the party entitled to both the estate and the charge from keeping alive the charge; and the rule, therefore, yields to the intention, whether it is expressed or to be presumed. A purchase by a mortgagor at a sale by the mortgagee in exercise of his power of sale cannot defeat the title of the second mortgagee (e). If the estate had been sold to a stranger and he by an independent transaction had sold to the mortgagor, the case would have given rise to very difficult questions. In 1824 A purchased an estate. He mortgaged it to raise part of the purchase-money. In February 1840 the mortgage was paid off and transferred to B who in April 1840 executed a declaration of trust in favour of A. A died in 1840. Held, that the charge had merged (f). There is no merger on a charge which is paid off by a person having only a partial interest in the estate (g). The ordinary presumption was rebutted by procuring a transfer to a trustee and not to himself, especially by the declaration of trust for him, his heirs, executors, administrators and assigns (h). But there is no merger if the owner of the estate does some act to keep the charge alive or if from the circumstances of the case it would be for his interest that it should continue to be a subsisting charge (i). The general rule, indeed, is clear, that when the party has an estate in fee or in tail, and at the same time a charge upon the estate, the charge will merge (j), the presumption being that when the owner of an estate pays off a charge he does it for the relief of the estate and, therefore, the charge is deemed to have been extinguished. But the contemporaneous transfer of a charge to a trustee, though not decisive, must be considered as one of the grounds upon which the presumption may be rebutted (k).

Rebuttable nature of the presumption.—Although the rule of intention has been abrogated by the amended section, the cases bearing on the subject do not lose their importance, so long as the Courts in India differ whether the principle enunciated in the present section is or is not retrospective. The question is upon the intention, actual or presumed, and the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and where this is the case, it will be held to sink, unless something shall have been done by him to keep it on foot (Grant, M.R.).

(b) *Narayan v. Syed Hufiz*, A. I. R. (1925) Nag. 21.

(c) *Ram Sarup v. Ram Lal* (1922) 44 All. 658.

(d) *Swinfen v. Swinfen* (1860) 29 Beav. 199, 54 E. R. 603; *Tyrehill v. Tyrehill* (1863) 32 Beav. 244, 55 E. R. 96; *Wilkes v. Collier* (1869) L. R. 8 Eq. 338; *Bai Rewa v. Vali Mahomed* (1922) 46 Bom. 1009; *Jugal Kishore v. Ram Narain* (1912) 34 All. 268; *Darshan Singh v. Arjun Singh*, A. I. R. (1926) Oudh 606; see *Sonaulla v. Abu Sayad* (1930) 57 Cal. 473.

(e) *Otter v. Lord Vaux* (1856) 6 De. G. M. & G. 638, 43 E. R. 1381; *Platt v. Mendel* (1884) 27 Ch. D. 246.

(f) *Pitt v. Pitt* (1856) 22 Beav. 294, 52 E. R. 1121; *Tyler v. Lake* (1831) 4 Sim. 358;

58 E. R. 131; *Ke. Gibbon, Moore v. Gibbon* (1909) 1 Ch. 367.

(g) *Pitt v. Pitt* (1856) 22 Beav. 294, 52 E. R. 1121.

(h) *Donisthorpe v. Porter* (1762) 2 Eden 162, 27 E. R. 390; *Forbes v. Moffatt* (1811) 18 Ves. 384, 34 E. R. 362; *Trevor v. Trevor* (1719) 2 Myl. & K. 675, 2 E. R. 574, H. L. 186; *Buckingham (Earl of) v. Hobart* (1818) 3 Swan. 36 E. R. 824.

(i) *Swinfen v. Swinfen* (1856) 29 Beav. 199, 54 E. R. 603.

(j) *Donisthorpe v. Porter* (1762) 2 Eden 162, 27 E. R. 390.

(k) *Hood v. Phillips* (1841) 3 Beav. 513, 49 E. R. 202.

Where no intention is expressed, or the party is incapable of expressing any, the Court considers what is most advantageous to him (Grant, M.R.) (*l*). The intention of preventing merger should be unequivocal. Slight evidence suffices to keep on foot a prior security (*m*). Where on the construction of the deed, the transaction did not amount to payment of the old debt, but was in reality a further advance upon fresh security, being given for both the old debt and the fresh advance and upon different terms as to interest, but the old security for the old debt remained untouched and there was nothing to shew a contrary intention, the creditor was presumed to have intended to keep his security alive for his own protection (*n*). Even if this were not so and the old debt was paid by the new transaction, the security would not necessarily be destroyed (*o*). So a mortgagee, taking a renewal of his mortgage which provided for payment of moneys due under the former mortgage, does not lose his security as to allow an encumbrance subsequent to the former mortgage to claim priority (*p*). So a mortgage is kept alive on a conveyance of the equity of redemption by the assignee in bankruptcy of the mortgagor to a trustee for the mortgagee (*q*). Certain lands were mortgaged on three successive occasions, the moneys borrowed on the third mortgage having been applied in discharge of the decree on the first mortgage, at a sale held at the instance of the third mortgagee. The purchaser borrowed part of the purchase-money from the plaintiff to whom he mortgaged the lands on the day of the sale. The second mortgagee thereafter obtained against the purchaser and the mortgagor's widow a decree on his mortgage, which comprised a declaration that the aforesaid sale was subject to his lien and bought the property at the sale and became the purchaser in execution. In a suit by the mortgagee of the purchaser at the third mortgagee's sale, he was declared entitled to priority over the second mortgagee to the extent to which the loan secured by his mortgage had gone to discharge the first mortgage (*r*). The rule applies in favour of a person who after the sale of the properties in execution of a decree on the anterior mortgage, advances money to the judgment debtor on the security thereof, to enable him to set aside the sale under Order 21, rule 89 of the Code of Civil Procedure (*s*), and the provisions of Order 34, rule 5 ought not to be so construed as to render the application of such a principle to cases where an order absolute has been passed, impossible (*t*). In case where the mortgage debt is assigned or transferred to the new lender whose moneys are utilized in paying the old debt, no difficulty arises (*u*).

Presumption was negatived in the following cases; where a third mortgagee, in ignorance of a second mortgage, paid off the first mortgage (*v*); but the charge

- (*l*) *Forbes v. Moffatt*, *Moffatt v. Hammond* (1811) 18 Ves. 384, 34 E. R. 362; *Clarendon v. Barham* (1842) 1 Y. & C. Ch. Cas. 688, 62 E. R. 1073; *Davis v. Barrett* (1851) 14 Beav. 542, 51 E. R. 394; *Grice v. Shaw* (1852) 10 Hare. 76, 68 E. R. 845; *Horton v. Smith* (1858) 4 K. & J. 624, 70 E. R. 259; *Hanwant Ram v. Ram Harakh*, A. I. R. (1927) Oudh 341.
- (*m*) *Vanmikalinga Mudali v. Chidambaram Chetty* (1906) 29 Mad. 37; *Gauri Shankar v. Bahadur Singh*, A. I. R. (1925) Pat. 605.
- (*n*) *Gopal Chander Sreemany v. Herambo Chunder Holdar* (1889) 16 Cal. 523.
- (*o*) *Phillips v. Gutteridge* (1859) 3 De. G. & J. 531, 45 E. R. 206; *Adams v. Angell* (1875) 5 Ch. D. 634; *Gokuldas Gopaldas v. Puranmal Premeukhdas* (1883) 10 Cal. 1035, 11 I. A. 126; *Golek Nath Misser v. Lalla Prem Lal* (1876) 3 Cal. 307.
- (*p*) *Alangaran Chetti v. Lakshmanan Chetti* (1897) 20 Mad. 274; *Rupabai v. Audimulam* (1888) 11 Mad. 345; *Mahalakshammammal v.*

- Sriman* (1912) 35 Mad. 642; *Punjab & Sind Bank, Ltd. v. Kishen Singh*, A. I. R. (1935) Lah. 350; *Gopal Chandra v. Herambo* (1889) 16 Cal. 523.
- (*q*) *Bailey v. Richardson* (1852) 9 Hare. 734, 68 E. R. 711.
- (*r*) *Seetharama v. Venkatakrishna* (1893) 16 Mad. 94.
- (*s*) *Vanmikalinga Mudali v. Chidambaram Chetty* (1906) 29 Mad. 37, following *Gokuldas Gopaldas v. Puranmal Premeukhdas* (1883) 10 Cal. 1035, 11 I. A. 126.
- (*t*) *Vanmikalinga Mudali v. Chidambaram Chetty* (1906) 29 Mad. 37, following *Dinobundu Shaw Chowdry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9.
- (*u*) *Dinobundu Shaw Chowdry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9; *Gokuldas Gopaldas v. Puranmal Premeukhdas* (1883) 10 Cal. 1035, 11 I. A. 126; *Mohesh Lal v. Bawan Das* (1882) 9 Cal. 961, 10 I. A. 62.
- (*v*) *Gangadhara v. Sivarama* (1885) 8 Mad. 246.

S. 101

was kept alive to the extent to which the loan secured to a third mortgagee went to discharge a prior encumbrancer (*w*), even though all such mortgages were usufructuary. Nor will it make any difference if the first and second mortgages comprise properties other than those mentioned in the second mortgage (*x*). On an avoidance of a conveyance, pending attachment, to a mortgagee of the mortgaged property and his setting off the purchase price against his mortgage amount, the lien is not destroyed (*y*). And a second mortgagee does not gain priority in consequence of the purchase by the first mortgagee of the equity of redemption (*z*). But if a subsequent encumbrancer advances money on condition of his obtaining an assignment of the prior encumbrance, he is entitled to stand in the place of the encumbrancer whose encumbrance he procures to be assigned to himself (*a*). In case, however, of a prior mortgagee, even apart from any express provision, his mortgage does not perish, whether the purchase be by private treaty or in execution of sale (*b*). So too if the purchaser of the equity of redemption discharges a prior mortgage (*c*).

On assignment of the equity of redemption prior to the union of mortgages, the same principle would apply, so that a puisne mortgagee of two properties subject to consolidation, may prevent such consolidation by taking a transfer of a mesne encumbrance not subject to consolidation; and by keeping such mesne encumbrance alive, may acquire the right to redeem one mortgage without redeeming the other (*d*). And where there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, that is, may keep the encumbrance alive for his benefit and thus come in before a later mortgagee (*e*). Nor will such a purchase affect the equitable charge of one, to whom a lease was agreed to be granted by the bankrupt subsequent to the mortgage (*f*). And where one of the properties mortgaged was sold by the mortgagor who satisfied the decree of the first mortgagee, the purchaser was held entitled to set-off the first mortgage as a shield against the claim of the puisne encumbrancer where the deed of sale expressly stated that the mortgagor was paying off the first mortgage and that the purchaser was to have the property free from all encumbrances (*g*). A purchaser from a mortgagor and the first mortgagee can always, if he chooses, keep the first mortgage alive and so protect himself against subsequent encumbrances, whether he had notice of them or not (*h*). And if in such a case deeds are framed as not to express the true intention of the parties, owing to a common mistake induced by the misconduct of the mortgagor, a subsequent mortgagee who claims through the mortgagor will not be allowed to take advantage (*i*). But a purchaser from the mortgagor selling the fee simple of the mortgaged estate free from encumbrances is entitled, with the concurrence of the mortgagee, on procuring the mortgagor's discharge from all liability in respect of the mortgage debt, to require a conveyance of the equity of redemption

(*w*) *Seetharama v. Venkatakrishna* (1893) 16 Mad. 94.

(*x*) *Gokal Prasad v. Sukru*, A. I. R. (1924) Oudh 374.

(*y*) *Gopal Sahoo v. Gunga Pershad Sahoo* (1881) 8 Cal. 530.

(*z*) *Hayden v. Kirkpatrick* (1865) 34 Beav. 645, 55 E. R. 784.

(*a*) *Mackenzie v. Gordon* (1839) 6 Cl. & Fi. 875, 7 E. R. 927.

(*b*) *Ram Sarup v. Ram Lal* (1922) 44 All. 859.

(*c*) *A. Rama Rao v. Mandachalugal* (1918) 35 M. L. J. 467.

(*d*) *Minter v. Carr* (1894) 3 Ch. 498.

(*e*) *Ayyareddi v. Gopalakrishnayya* (1924) 47 Mad. 190, 51 I. A. 140; *Gokaldas Gopaldas v. Puranmal Premsukhdas* (1883) 10 Cal.

1035, 11 I. A. 126; *Dinobundhu Shaw Chowdry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9; *Mahomed Ibrahim Hoosain Khan v. Ambika Prasad Singh* (1912) 39 Cal. 527, 39 I. A. 68.

(*f*) *Adams v. Angell* (1875) 5 Ch. D. 634.

(*g*) *Smith v. Phillips* (1837) 1 Keen 694, 48 E. R. 474; *Mahdo Singh v. Pancham Singh* (1927) 49 All. 233; *Dinobundu Shaw Chowdry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9.

(*h*) *Stevens v. Mid-Hants Roy Co.* (1873) 8 Ch. 1064; *Adams v. Angell* (1877) 5 Ch. D. 64; *Thome v. Cawn* (1895) A. C. 11; *A. Rama Rao v. Mandachalugai* (1918) 35 M. L. J. 467.

(*i*) *Whiteley v. Delaney* (1914) A. C. 133.

so as to keep the mortgage on foot (*j*). Whether the purchase is, statedly, of the whole property, for a price made up of the price of the equity of redemption and of the mortgage amount or whether it is, statedly, of the equity of redemption only, the transaction is substantially the same; it is for the benefit of the person making the payment to keep the first mortgage alive (*k*). And a discharge by a mortgagee of a mortgage prior as well as subsequent to his own in pursuance of a compromise decree, is evidence of an intention to keep the mortgage debt alive (*l*). And where a purchaser does not undertake to discharge all the encumbrances on the property purchased by him, the presumption is that he intended to keep them alive (*m*). A mortgagee who purchases at an auction sale under his decree property, which was sold by a Hindu widow to a purchaser who had mortgaged it to pay off debts binding on the estate in pursuance of an arrangement with her, is entitled to keep the mortgage alive (*n*). Similarly, a purchaser discharging a mortgage decree is entitled to assert that the mortgage is kept alive when the property is brought to sale in execution of an attachment levied before the sale under the mortgage decree (*o*). Production by lender of a receipt of the prior mortgagee in favour of the mortgagor, is sufficient evidence of intention to keep the prior mortgage alive. It makes no difference that the subsequent mortgagee had no interest at the time of the advance (*p*) or that it took the form of a decree (*q*). So, too, where one of three items mortgaged was sold and the mortgagee paid in full out of the purchase-money, it was held that it was for the benefit of the purchaser to keep the charge alive (*r*). A subsequent mortgagee has on discharging a prior mortgage to maintain it for his protection, it being obviously for his benefit to do so (*s*). And this doctrine has been extended to outsiders and strangers (*t*).

Conduct controlling the deed.—The rule of law is that where a person is seised in fee of an estate, and is also entitled to a charge on it, if he does no act which will have the effect of keeping the charge on foot, it must be considered as perishing in the inheritance (*u*). But there are cases in which, though no intention to keep a charge alive is expressed, the conduct of a party making payment has been allowed to control the form which the transaction has taken (*v*).

Difference between the rights of a puisne mortgagee purchasing the first mortgagee's rights and one purchasing the mortgagor's rights.—The shield of a subsequent mortgagee who acquires the right of a prior mortgagee is essentially different in character from the shield of a mortgagee who acquires the right of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by

(*j*) *Cooper v. Cartright* (1860) John 679, 70 E. R. 592.

(*k*) *Thiruvadi Ayyangar v. P. Janaki*, A. I. R. (1924) Mad. 103.

(*l*) *Gujuluva Nagayya v. Theedukuchi Govindayya*, A. I. R. (1923) Mad. 349.

(*m*) *Magusud Ali Khan v. Abdullah Khan* (1928) 50 All. 218; *Muhammad Sidiq v. Ghans Muhammad* (1911) 33 All. 101; *Makkan Lal v. Natthi* (1923) 21 A. L. J. 382.

(*n*) *Suppu Sakkayrga Bhattar v. Suppu Bhattar* (1918) M. W. N. 41.

(*o*) *Hia Ban U & U Kyaw San v. A. V. P. L. Ramanathan Chettiar*, 3 Bur. L. J. 287.

(*p*) *Narayan v. Syed Hafiz*, A. I. R. (1925) Nag. 21.

(*q*) *Purnamal Chund v. Venkata Subbarayalu* (1897) 20 Mad. 486.

(*r*) *Tiruvengatam Pillai v. Sabapathi Pillai* (1925)

49 M. L. J. 861.

(*s*) *Bhiku v. Shrijal* (1902) 29 Cal. 25.

(*t*) *Gokaldas Gopaldas v. Puranmal Premeekhdas* (1883) 10 Cal. 1035, 11 I. A. 126; *Dinobundu Shaw Chowdhury v. Nistarani Dasi* (1898) 3 C. W. N. 153; *Amar Chandra Kundu v. Roy Goloka Chandra Chowdhury* (1900) 4 C. W. N. 769.

(*u*) *Tyler v. Lake* (1831) 4 Sim. 358, 58 E. R. 131.

(*v*) *Giffard v. Fitz Hardinge* (1899) 2 Ch. 32; *Phillips v. Gutteridge* (1859) 4 De. G. & J. 531, 45 E. R. 206; *Locking v. Parker* (1872) 8 Ch. 30; *Liquidation Estates Purchase Co. v. Willoughby* (1898) A. C. 321; *Irby v. Orby* (No. 3) (1855) 25 Beav. 632; 53 E. R. 778; *Adams v. Angel* (1875) 5 Ch. D. 634; *Thorne v. Cann* (1895) A. C. 11; *Whitley v. Belaney* (1914) A. C. 132.

S. 101

any question of limitation, for, as pointed out in *Laxman Ganesh v. Mathurabai* (w), he cannot be required to sue for the recovery of the money due on his mortgage from his own property. Indeed, being both the mortgagee and the mortgagor, he cannot have any cause of action against himself. It makes no difference how the rights of the mortgagor are acquired by the mortgagee. In *Baldeo Prasad v. Uman Shankar* (x), a mortgagee who had in the exercise of a right of pre-emption purchased the property mortgaged to him, was held to have a right to be repaid the money due in respect of his mortgage, before a subsequent mortgagee could bring such property to sale in execution of a decree on a mortgage held by the latter (y). A subsequent mortgagee has a right to keep the prior encumbrance alive on his advancing money for the purpose of discharging it, if it be for his benefit. It cannot be said that he has any the less a right to keep the encumbrance alive, because it has taken the form of a decree (z). A subsequent mortgagee in paying off prior mortgages, must be presumed to have acted in accordance with what is best for his own interests (a). And this doctrine has been extended to outsiders and strangers (b). A purchase of the mortgaged property along with other properties by the mortgagee jointly with others in undivided shares, does not destroy his lien, it being evidently for his benefit that the lien should subsist (c).

Discharged bankrupt mortgagor.—A mortgagor of lands who has sold his equity of redemption therein and has also been discharged by process of bankruptcy from all personal liability under the mortgage affecting the lands, if he purchases a first mortgage on the lands, will be regarded as a stranger to the estate, and the equities in favour of puisne encumbrancers, which might otherwise have existed against him as such mortgagor, will not be revived by a subsequent re-purchase of the lands (d).

Intervening encumbrance.—It is well established that merger is presumed when between the date of the original security and the assignment of the proprietary rights, there is no intervening encumbrance (e). A purchase of the equity of redemption by the son, the mortgagee being the father, has been held to be a merger of the two estates. In one case (f) the father and son were members of a joint undivided Hindu family and the mortgage, in the name of the father, was to the benefit of the family. In the other case the son was the *benamidar* for the father (g). Where a son succeeded to the usufructuary mortgage taken by the father and the equity of redemption purchased by the mother, the presumption was against merger. Such a right to keep the mortgage alive is not a mere personal right incapable of transfer to a purchaser (h).

Pre-emption.—Where a prior mortgagee in exercise of his right of pre-emption had purchased the equity of redemption, he has a right to be repaid the amount of

(w) (1914) 38 Bom. 369.

(x) (1910) 32 All. 138.

(y) *Ram Sarup v. Ram Lal* (1922) 44 All. 659.(z) *Purnamal Chund v. Venkata Subbarayalu* (1897) 20 Mad. 486.(a) *Bhiku v. Shujat Ali* (1902) 29 Cal. 25.(b) *Dino Bundhu Shaw Chowdry v. Nistarani Dasi* (1898) 3 C. W. N. 153; *Amar Chandra Kundee v. Roy Goloke Chandra Chowdry* (1900) 4 C. W. N. 269.(c) *Gunindra Prasad v. Baijnath Singh* (1904) 31 Cal. 370; *Sribadh Rai v. Raghunath Prasad* (1885) 7 All. 568; *Janki Prasad v. Sri Matra* (1885) 7 All. 577.(d) *In re Howards Estate* (1892) 29 L. R. Ir. 266.(e) *Mohesh Lal v. Mohand Bawan Das* (1883) 9 Cal. 981, 10 L. A. 62; *Bhawani Kumar v. Mathhura Prasad* (1913) 40 Cal. 89;*Arumuga Sundare v. Narasimha* (1915) 29 M. L. J. 583; *Rajah of Kalahasti v. Prayag* (1916) 30 M. L. J. 391; *Gobind Sarup v. Kuldip Singh*, A. I. R. (1924) Lah. 377; *Bai Rewa v. Vali Mahomed* (1922) 46 Bom. 1009; *Lomba Gomaji v. Vishvanath* (1893) 18 Bom. 86; *Fakiraya v. Gadigaya* (1901) 26 Bom. 88; *S. Akwar Chetty v. K. Jagannatha Ayyar* (1928) 54 M. L. J. 109; *Lakshmi Chand v. Partap Singh*, A. I. R. (1930) Lah. 620.(f) *Lakshmichand v. Pratap Singh*, A. I. R. (1930) Lah. 620.(g) *Gobind Sarup v. Kuldip Singh*, A. I. R. (1924) Lah. 377.(h) *Mst. Chandi Bibi v. Mohanram* (1934) 13 Pat. 200.

his mortgage, before a subsequent mortgagee could bring such property to sale in execution of his mortgage decree (i). The continuation or extinction of an encumbrance is an advantage which runs with the land and is not personal to the vendor. A pre-emptor can invoke the doctrine (j).

Presumption on payment by limited owner.—A tenant for life, in general, paying off a charge, without taking an assignment, is a creditor for the sum so paid and is presumed to have kept the charge alive against the inheritance for his own benefit. This is merely a general rule of presumption or primary inference and is capable of being rebutted by any evidence to the contrary. The smallest demonstration that he meant to pay it off, will prevent his representative from coming for the money. Payment of interest much beyond what the profits of the estate would have discharged, is a demonstration, *prima facie*, that though tenant for life, he meant to discharge the estate (k). So also the presumption would be rebutted by calling for an assignment or by a declaration (l). The intention, in the absence of any circumstances, is to be gathered from what it was his interest to do. It is to the interest of a tenant for life to keep the money on foot as a substantive charge, because if he paid off this charge, he would be benefiting those entitled to the inheritance (m). So also where the mortgage is discharged by a remainderman (n). A simple payment of the charge without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration or to do any act demonstrating his intention. The burden of proof is on those who allege, that in paying off the charge, he intended to exonerate the estate (o). The legal presumption, that a tenant for life who pays off a mortgage on the inheritance intends to keep the charge alive for his own benefit, is not rebutted by the existence of the relationship of parent and child between the tenant for life and remainderman if there is anything else to rebut it (p). But when looking on all the *res gestæ* it appeared that payment by the son of the mortgage debt of his father, was not for the benefit of the son but was in settlement of pecuniary transaction between father and son, it did not entitle him to keep alive the charge (q). A charge is, however, not extinguished if a limited owner erroneously supposing that he was an absolute owner, satisfies it with the intention of extinguishing it (r).

Mortgagor keeping alive paid-off mortgage against subsequent encumbrancers.—The presumption is different where a party paying off the encumbrance is entitled to the inheritance where he is absolutely entitled to the fee simple. The presumption is in favour of extinguishment (s). So a purchaser of mortgaged property who undertook to discharge out of the purchase-money two subsisting mortgages, cannot

(i) *Baldeo Prasad v. Uman Shankar* (1910) 32 All. 1.

(j) *Darsham Singh v. Arjun Singh*, A. I. R. (1926) Oudh 606.

(k) *Jones v. Morgan* (1783) 1 Bro. C. C. 206, 28 E. R. 1086; *Morley v. Morley* (1855) 5 De. M. & G. 610, 43 E. R. 1007; *Gifford v. Fitzhardinge* (1899) 2 Ch. 32; *Manks v. Whiteley* (1912) 1 Ch. 735.

(l) *Buckinghamshire (Earl of) v. Hobart* (1818) 3 Swans. 186, 36 E. R. 824.

(m) *Pitt v. Pitt* (1866) 22 Beav. 294, 52 E. R. 1121; *Whittingham v. Chesters* (1935) 1 Ch. 77.

(n) *Whittingham v. Chesters* (1935) 1 Ch. 77.

(o) *Burrell v. Egremont (Earl)* (1844) 7 Beav. 205, 49 E. R. 1043.

(p) *In re Harvey, Harvey v. Horday* (1896) 1 Ch. 137; *Burrell v. Egremont (Earl)* (1844)

7 Beav. 205, 49 E. R. 1043; *Morley v. Morley* (1855) 5 D. M. & G. 610, 43 E. R. 1007.

(q) *Crow v. Pettingall* (1869) 20 L. T. 342.

(r) *Buckinghamshire (Earl of) v. Hobart* (1818) 3 Swans. 186, 36 E. R. 824.

(s) *Dalip Rai v. Birnaik Rai* (1909) 6 A. L. J. 549; *Govindasami Thevan v. T. M. Doraisami Pillai* (1911) 20 M. L. J. 380; *Chelamcherla v. Mummareddi* (1911) 21 M. L. J. 180; *Otter v. Lord Vaux* (1856) 6 De. G. M. & G. 638, 43 E. R. 1381; *In re W. Tasker & Sons, Ltd., Hoare v. W. Tasker & Sons, Ltd.* (1905) 2 Ch. 587; *Watts v. Symes* (1851) 21 L. J. Ch. 713, 42 E. R. 544; *Parry v. Wright* (1828) 5 Russ. 142, 38 E. R. 981; *Brown v. Stead* (1832) 5 Sim. 535, 58 E. R. 439.

S. 101

hold up as a shield the mortgage which he has paid off against the debt which he undertook to pay, but which he did not discharge (*t*). Similarly, on the principle embodied in section 43 of the Transfer of Property Act, the presumption of merger arises when the person so paying or purchasing is the mortgagor himself (*u*). Hence a mortgagor redeeming cannot stand in the mortgagee's place against other encumbrancers (*v*). This, too, was the view of Buckley, J., though possibly his observations may be regarded as dicta (*w*). When a representative of a mortgagor purchases the mortgagee rights, the question whether the mortgage ceases to exist is one of intention of the parties (*x*).

Prior security not extinguished for the benefit of the purchaser.—A property under attachment was at the time subject to two mortgages created by the execution debtor. Two days after attachment the mortgagor executed a mortgage. It was held that the intention was to give to the new mortgagee the first and only charge over the property. It was further held that a purchaser at the Sheriff's sale who bought with notice of the security so effected, was bound thereby. Section 64 of the Civil Procedure Code, 1908, did not, on its true construction, render the mortgage void so as to confer upon the execution creditor a benefit not within the intention of the parties but only so far as it prejudiced his interests (*y*).

Purchase by trustee in bankruptcy of mortgaged estate.—The answer to the question as to the rights of a subsequent mortgagee on a prior mortgagee giving up the security to the trustee in liquidation and proving as an ordinary creditor, under the English Bankruptcy, has been that the trustee is in the same position as the mortgagee and there is no annihilation of the security of the prior mortgagee which can avail to accelerate or advance the securities, change the rights or improve the position of the subsequent mortgagees, but the whole matter remains as it was; except that the trustee stands in the place of the prior mortgagee (*z*). The trustee in bankruptcy does not, by purchasing from the first mortgagee of the bankrupt, extinguish the first mortgage and make the second mortgagee the first encumbrancer on the estate. *But such a purchase does not extinguish the right of the second mortgagee to redeem.* Nothing done or left undone can neutralise the first mortgage (*a*). So a mortgage is kept alive on a conveyance of the equity of redemption by the assignee in bankruptcy of the mortgagor to a trustee for the mortgagee, where the deed contained a recital that the mortgage should remain unmerged (*b*).

The point of time to be regarded.—The expression of intention against merger, in order to have effect, must be made at the time when the two interests become united, for any expression of intention previous to the time of the union of the interests would be of no value, as such intention could be altered at any time upto the time of the merger (*c*). One of the latest English cases in which the rule was considered is that of the *Liquidation Estates Purchase Co. v. Willoughby* (*d*). The decision of the Court of Appeal was reversed by the House of Lords on the facts, but the correctness of the statement of the law contained in the judgment of the Master of the Rolls was not challenged. The Courts in India have adopted the same

(*t*) *Surjiram v. Barhamdeo* (1905) 2 C. L. J. 288; *Muhamad Sadiq v. Ghaus Muhamad* (1911) 33 All. 101.

(*u*) *Manjhappa v. Krishnayya* (1906) 29 Mad. 113.

(*v*) *Platt v. Mendel* (1884) 27 Ch. D. 246.

(*w*) *Hummel v. George Routledge & Sons, Ltd.* (1904) 2 Ch. 474.

(*x*) *Radha Kishan v. Fakharuddin*, A. I. R. (1934) Lah. 143.

(*y*) *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1902) 29 Cal. 154, 29 I. A. 9.

(*z*) *Cracknall v. Janson* (1877) 6 Ch. D. 735.

(*a*) *Bell v. Sunderland Building Society* (1883) 24 Ch. D. 618.

(*b*) *Bailey v. Richardson* (1852) 9 Hare. 734 68, E. R. 711.

(*c*) *Tyrwhitt v. Tyrwhitt* (1863) 32 Beav. 244, 55 E. R. 96; *Wilkes v. Collin* (1869) L. R. 8 Eq. 338; *Pitt v. Pitt* (1856) 22 Beav. 294, 52 E. R. 1121.

(*d*) (1898) A. C. 321.

rule (e), otherwise the nature of the title might be in suspense for an indefinite time. In case of a devise this presumption arises on the death of the person who is entitled both to the estate and to the charge and this intention must be collected from all circumstances which existed at that period. All the acts of the person so entitled prior to his decease down to and at the time of his decease, must also be taken into consideration (f).

Sale decree.—An order made under Order 34, rule 5 of the Code of Civil Procedure, 1908, for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. So where a first mortgagee of property subject to a second mortgage, obtained an order for sale and purchased the property at an auction sale, in a subsequent suit by the second mortgagee it was held that the condition upon which the latter was entitled to a decree for sale was the payment to the decree-holder of the amount due under the decree, not the amount which would have been due under his first mortgage (g).

Punjab.—The section applies to the Punjab (h).

Form of conveyance.—The form commonly adopted by conveyancers under section 101 on a sale of the equity of redemption is to state the date and to make the mortgagor as vendor and the mortgagee as purchaser, parties to the deed. Then follow the usual recitals, including the recital relating to the contract between the parties, that the vendor has agreed to sell the equity of redemption in the hereditaments and premises to the purchaser for a price which by arrangement may be retained upto the mortgage amount and the balance be paid to the mortgagor, if any. Next is the operative part whereby in consideration of the moneys paid and/or retained, the vendor as beneficial owner conveys to the purchaser the premises freed from right of redemption of the vendor but otherwise subject to the mortgage. The purchaser on his part releases the vendor from his covenants, including the covenant for payment of principal and interest, and from all other claims and demands. Then the declaration against merger by the purchaser wherein he declares that the principal sum and the interest due and to accrue due shall not merge in the equity of redemption but shall be kept on foot as a charge so as to protect the purchaser against all subsequent encumbrances (i). The conveyance should be signed both by the vendor and the purchaser.

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent

Service or tender on
or to agent.

- (e) *Jugal Kishore v. Ram Narain* (1912) 34 All. 268; *Darshan Singh v. Arjun Singh*, A. I. R. (1926) Oudh 606; see *Sonaulla v. Abu Sayad* (1930) 57 Cal. 473, 478.
(f) *Swinfen v. Swinfen* (1860) 29 Beav. 199, 54 E. R. 603; *Hood v. Phillips* (1841) 3 Beav. 513, 49 E. R. 202; *In re Lloyd's Estate* (1903) 1 I. R. 144.
(g) *Matru Mal v. Durga Kunwar* (1920) 42 All. 364, 47 I. A. 71; *Het Ram v. Shai Lal* (1916) 40 All. 407, 45 I. A. 130; *Ume Chunder Sarcar v. Zahoor Fatima* (1891) 18 Cal. 164, 17 I. A. 201 (before the Act)

- distinguished; *Sukhi v. Ghulam Safdar Khan* (1921) 43 All. 469, 48 I. A. 465; *Nannu Mal v. Ram Charan* (1930) 52 All. 331.
(h) *Gopal Singh v. Ladha Mal*, A. I. R. (1930) Lah. 1063; *Lakhmi Chand v. Partap Singh*, A. I. R. (1930) Lah. 620; *Ben Singh v. Hazra Singh*, A. I. R. (1927) Lah. 275; *Punjab & Sind Bank, Ltd. v. Kishen Singh*, A. I. R. (1935) Lah. 350.
(i) *Encyclopedia of Forms and Precedents*, 1st Ed., Vol. 12, p. 563.

- S. 102** holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Amendments.—By section 52 of the Amending Act, 20 of 1929, the following amendments were made :—

- (1) In paragraph 2, in place of the words “ where the person or agent on whom such notice shall be served cannot be found in the said district, or is unknown ” are substituted the words “ where no person or agent on whom such notice should be served can be found or is known.”
- (2) Paragraph 2 has been newly added.
- (3) In paragraph 3, for the words, “ where the person or agent to whom such tender should be made cannot be found within the said district or is unknown ” have been substituted the words “ where no person or agent to whom such tender should be made could not be found or is known ” and instead of the words “ in such Court as last aforesaid ” the words “ in any Court in which a suit might be brought for redemption of mortgaged property ” have been substituted.

Sufficiency of service or tender.—The service or tender must be made on or to the person to whom it should be made in the district where the mortgaged property or part is situate, otherwise to an agent holding a general power-of-attorney from such person, or otherwise duly authorized in that behalf.

Scope of the section.—The section is restricted in its operation to Chapter IV dealing with the subject of mortgages.

Notice.—Under Chapter IV, notice may either be to a mortgagor or mortgagee. Notice to mortgagee is required under section 60 while notice to a mortgagor is required under section 69. In the latter case it is usually stipulated in the mortgage-deed how the notice is to be served and on whom. It is, however, a question whether

such a provision is valid if opposed to the provisions of this section. Section 84 also provides for notice before cessation of interest either under section 84 or section 83.

Ss. 102-
103

Tender.—In Chapter IV this subject is dealt with in section 60.

Forum.—The Court to give directions how and on whom notice is to be served or tender made must be the one having jurisdiction to entertain a redemption suit.

Proviso.—Tender and deposit are again mixed up here. This has been provided already in section 83. Section 102 does not deal with deposit in Court.

Deposit.—In Chapter IV this subject is dealt with in sections 83 and 84.

Power-of-attorney.—May be special or general, the latter need not contain any special reference to accept service or tender.

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served *on or by*, or tender or deposit made, accepted, or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of *Order XXXII in the First Schedule to the Code of Civil Procedure, 1908*, shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Notice, etc., to or by
person incompetent to
contract.

Amendment.—By section 53 of the Amending Act, 20 of 1929, the words "or by" have been added to correct a clerical error. And the words "Chapter XXXI of the Code of Civil Procedure" have been substituted by the words "Order XXXII in the First Schedule to the Code of Civil Procedure, 1908."

Dispute as to the minority of the mortgagee.—Such a question must be decided by the Court and a guardian *ad-litem* appointed if necessary (j).

Service on person incompetent to contract.—In order to be discharged from liability to pay interest under section 84 where the mortgagee concerned is a minor, it is necessary that the notice must be served on or tender made or deposit taken by the curator of the minor's property and if there be none such, the mortgagor should apply and obtain the appointment of a guardian *ad litem* for the purpose of serving

(j) *Ganeshi Lal v. Rohni* (1928) 50 All. 655.

**Ss. 103-
104**

or receiving service of such notice, or for the purpose of making or accepting such tender, or making or taking out of Court such deposit made in Court and for the performance of consequential acts which could or ought to be done by such person if competent to contract. The application would lie in the Court in which a suit for redemption would be brought. The same rule applies when one of the mortgagees is a minor (*k*). Where notice intended for a minor mortgagee was affixed to the door of the house of the minor R.L. under the guardianship of his father M.D., it was held that the service was bad (*l*). The rule is, however, relaxed when the transaction is entered into by the joint family of which the minor is a member (*m*).

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.

Power to make rules.

Power to make rules.—Power is here given to the High Court to frame rules for carrying out in itself and in Courts subordinate to it the provisions of Chapter IV (*n*). The power is principally intended to regulate the procedure to be adopted for carrying out the provisions of the chapter. A rule which went beyond the powers conferred by section 104 would be *ultra vires* and so would it be also if it were inconsistent with some general provisions of the Code of Civil Procedure (*o*).

Original side rules.—Rules dealing with sales by the Commissioner are specially framed under the Act to deal with cases on the Original Side (*p*). Where those rules are inconsistent, they should prevail over the very general terms of rule 72A of Order 21 of the Civil Procedure Code which would apply to the mofussil, and which regulates the proceedings in the mofussil apart from the proceedings on the Original Side (*q*). For other rules see (*r*).

(*k*) *Gokal Kalwar v. Chandar Sekhar* (1926) 48 All. 611; *Kannu Mal v. Indarpal Singh* (1922) 45 All. 273; *Pandurang v. Moreswar* (1903) 27 Bom. 23.

(*l*) *Sheo Saran v. Ram Lagan* (1922) 44 All. 64.

(*m*) *Sheo Saran v. Ram Lagan* (1922) 44 All. 64.

(*n*) *Mallikarjunadu v. Lingamurti* (1902) 25 Mad. 244.

(*o*) *Mallikarjunadu v. Lingamurti* (1902) 25 Mad. 244, 254.

(*p*) Rule 598 of the Bombay High Court.

(*q*) *Vrajlal v. Venkataswami* (1928) 52 Bom. 459; see *Mallikarjunadu v. Lingamurti* (1902) 25 Mad. 244, 254.

(*r*) Rules 585—599 of the Bombay High Court.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered, periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.

S. 105

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Lease.—Used in reference to immoveable property a lease is a transfer of the right to use, occupy or enjoy such property for a definite time, expressed or implied, and may be perpetual. Such right of use, occupation or enjoyment is granted by the transferor (called the lessor), to the transferee (called the lessee) for a consideration known either as premium or rent or both. There can be no lease without a reversion. In case the consideration is a fixed price it is known as premium, and where it is money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions, it is called rent. As distinguished from a conveyance of immoveable property the one is a transfer of ownership absolutely and the other is a restricted transfer of a right to enjoy (s). Both must be supported by consideration or price paid or promised. In the case of a conveyance the price is usually paid once for all, whilst in the case of a lease it is paid once for all or periodically. A conveyance is an unconditional transfer of ownership and a lease is a transfer of a right to enjoy subject to conditions. Unlike a conveyance a lease is resumable. It may be of corporeal or incorporeal hereditaments such as a right of way, tolls, pasturage, fisheries, ferries and sporting rights. A coal mine can (t), but the transfer of the duties and obligations of a *Yajman Vriti* cannot, (u), be the subject of a lease. A lessee who agrees to sell the lease and allows the prospective buyer, pending consent of the lessor, to work upon the property does not create a sub-lease (v). All leases are governed by the Act unless exempted (w). In construing a lease effect must be given to the real transaction regardless of the name by which the instrument is described (x). Although the

(s) See *Shyam Sundar Lal v. Din Shah* (1937) All. 312.
 (t) *Fala Krista v. Jagannath Marwari* (1932) 59 Cal. 1314.
 (u) *Kodulal v. Beharilal*, A. I. R. (1932) Sind 60.
 (v) *Kuchwar Lime or Stone Co., Ltd. v. Secretary*

of State for India (1936) 15 Pat. 460.
 (w) *Abdul Majid v. Nageshwar Dal*, A. I. R. (1927) All. 78.
 (x) *Sabdi Prasad v. Sheikh Budhai*, A. I. R. (1925) Cal. 370.

S. 105

Act is founded on English decisions they should not be resorted to without ascertaining the Indian Law on the subject (y). The Act does not apply to leases granted prior thereto (z).

Component parts of a lease.—According to custom the lessor's attorney prepares the lease and the lessee pays the expenses thereof (a).

Section 107 of the Transfer of Property Act requires a lease to be in writing where it is from year to year, or for any term exceeding one year, or reserving a yearly rent. They should also be registered. All other leases may be made either by registered instrument or by oral agreement accompanied by delivery of possession. The lease begins with the date though such date is not conclusive as to the time of execution or the commencement thereof. Next follow the names of the parties. The name and description of the lessor is first mentioned and then that of the lessee. Unlike other instruments, leases are conspicuous by the absence of recitals. Then comes the operative part of the lease, that the lessor "demises" to the lessee or "agrees to let" or "lets" followed by the parcels. Then comes the *habendum*, wherein, the commencement and duration of the term are enumerated. Next is the *reddendum* which deals with rent, the manner of its payment and whether it includes the landlord's property tax and other payments or excludes the same. These are the principal parts of an indenture of lease. After these come the covenants wherein first the lessee's covenants are mentioned and then the lessor's. If there be no stipulation as to what covenants are to be given the landlord is only entitled to the usual covenants with which we have dealt elsewhere. But where there is a stipulation between the parties, the lessee covenants generally as regards :

- (1) Payment of rent.
- (2) To keep the interior and exterior of the building in good and tenantable repair and to paint the same at the end of a particular number of years.
- (3) Not to make any alterations without the lessor's consent.
- (4) Not to cause annoyance or nuisance to the neighbouring owners.
- (5) To permit the lessor and his agent at all times to enter upon and view the premises.
- (6) Not to do anything whereby the insurance may be rendered void or voidable or whereby the premium may be enhanced.
- (7) To indemnify the lessor against any increased or additional premium caused by any act or default of the tenant.
- (8) Not to assign, sub-let or part with the possession or any part thereof without the previous written consent of the lessor, such consent not to be unreasonably withheld, on proof being furnished as to respectability of the proposed assignee or sub-tenant.
- (9) On the determination of the tenancy to yield up the premises in good tenantable repair.
- (10) The lessor covenants with the lessee to pay the rates and taxes including water-rate but exclusive of charges for electricity consumed in the premises.
- (11) During the term to keep the roof and outside walls, drainage and water-pipe and sanitary apparatus in good repair.

(y) *Hunsraj v. Bejoy Lal* (1930) 57 Cal. 1176,
57 I. A. 110.
(z) *Shahjahan Begam v. Munna*, A. I. R. (1927)

All. 342, 34 Mad. 161.
(a) *Grissell v. Robinson* (1836) 3 Bing. N. C. 10,
132 E. R. 312.

- (12) To keep the premises insured against loss or damage by fire and to forthwith rebuild or reinstate the demised premises.
- (13) The lessee paying the rent and performing the conditions and observing the covenants shall quietly enjoy the demised premises during the term without interruption by the lessor or any person claiming under him or in trust for him.

Then follows the proviso dealing with suspension of rent in case of fire and the power of re-entry for non-payment of rent or breach of any of the tenant's covenants, or in case the lessee shall become bankrupt (b). The lease must be executed by both the lessor and the lessee. It must be stamped and, where necessary, registered. The transaction may be evidenced by a single instrument or it may be executed in duplicate or the parties may have an original and counterpart, the former is executed by the lessor and the latter by the lessee. The lessee is entitled to the custody of the original and the lessor to the counterpart.

Two kinds of leases.—The Transfer of Property Act recognizes only two kinds of leases, (1) a transfer of the right to enjoy property for a certain time, expressed or implied, and (2) a transfer of such right in perpetuity (c). The parties, in order to create a valid lease, must stipulate by express contract the duration of the lease, or it must be such as could be inferred by aid of section 106 of this Act. Hence any transfer of a right to enjoy immoveable property which is neither for a certain time nor in perpetuity, is void as creating an interest repugnant to law (d). Proof of the purpose of the original grant determines the real nature of the tenancy (e). Mere long possession, even at unvarying rent, does not establish a lease in perpetuity unless it appears that such tenancy may be acquired by long usage (f). There is, however, a presumption of permanency where the commencement or duration is lost in antiquity (g) but not where the origin is known (h). The fact that the commencement of the tenancy cannot be determined coupled with the presumption of the continuance of the tenancy and coupled also with the fact that a permanent building has been erected on the land as far back as 80 years ago, raises a strong presumption that the tenancy is permanent (i). Where the holding is of an unknown origin, the mere fact that the rent has not been increased is no evidence of the fact that the rent has been fixed in perpetuity (j). A lease is not permanent where from the rent note the term was to be so long as the *Kesari* and *Mahratta* institutions existed (k).

In the referring judgment of the Calcutta High Court, on a review of the cases there cited, it was stated that in the case of *Dunne v. Nobo Krishna* (l) alone it was

(b) Encyclopædia of Forms and Precedents, 2nd Ed., Vol. 8, pages 198 to 203.

(c) *Ma Gyi v. Maung Tat*, A. I. R. (1934) Rang. 291.

(d) *Municipal Corporation v. Secretary of State* (1905) 29 Bom. 580; *Cheshire Lines Committee v. Lewis & Co.* (1880) 50 L. J. Q. B. 121.

(e) *Jagabandhu v. Magnamoyi* (1917) 44 Cal. 555; *Promoda Nath v. Asiruddin Mandal* (1911) 15 C. W. N. 896.

(f) *Kedar Nath v. Madu Sudan*, A. I. R. (1923) Cal. 682; *Makhan Lal v. Arun Bala*, A. I. R. (1924) Cal. 465; *Narayanbhat v.*

Davlati (1891) 15 Bom. 647.

(g) *Ramchandra v. Anant* (1894) 18 Bom. 433; *Pramatha Nath v. Rajah Bejoy*, A. I. R. (1927) Cal. 234.

(h) *Gopal Chandra v. Satya Bhanu*, A. I. R. (1926) Cal. 634, *Tekait v. Darshan Deo*, A. I. R. (1924) Pat. 560; *Narayan v. Pandurang* (1923) 47 Bom. 4.

(i) *Rukmini v. Rayaji* (1924) 48 Bom. 541.

(j) *Jagabandhu v. Magnamoyi* (1917) 44 Cal. 555.

(k) *Ramchandra v. Narasimha* (1931) 33 Bom. L. R. 590.

(l) (1890) 17 Cal. 144.

S. 105

held that mere long possession of homestead land was sufficient to justify a presumption of a permanent grant, whilst in the cases mentioned below (m) the contrary view was taken, that long possession of itself was not sufficient to raise such a presumption, and before such an inference could be made, it was necessary that there should be something more, viz., either (1) the fact of the land having been for the erection of *pucca* buildings, or (2) the fact of the tenant, to the knowledge of the landlord and without objection on his part, having erected *pucca* buildings or having spent large sums on improvements of a substantial character. The Full Bench to which the above reference was made having held it irregular for a single Judge to make a reference to a Full Bench, on remand the referring Judge adhered to his view above expressed in the reference, with the observation that it should not be treated as a hard and fast rule (n). As regards the second of the above-mentioned rules it has been laid down by the Privy Council that a lessor is not to be restrained from evicting his tenant whose term has expired merely by reason of the latter having erected permanent buildings within the knowledge of the lessor, and there not having been any interference on his part. To raise an equitable estoppel against the lessor, the tenant must shew facts to justify the legal inference that the lessor had by plain implication contracted that the right of tenancy should be altered into a permanent tenancy (o). The same tribunal held that the tenant had discharged the onus which lay on him and proved his tenancy as of a permanent nature in a suit for ejectment in which the tenant claimed a permanent tenure, founding his title upon a series of transmissions of it by sale and mortgage, which went so far back as 1826, each transmission purporting to be of a permanent inheritable right, and upon the continuous possession of his predecessors in title, the receipts proving an uninterrupted payment of an unchanged rent (p). So also where the parties contemplated the erection of a permanent building notwithstanding the lease was from year to year, the presumption of permanency was inferred (q). And also where the tenure was in existence for over 80 years the rent never having been changed and the tenancy transferred over and over again as an absolute interest (r). But where land is let out for building purposes and there is no fixed period, the presumption of a permanent tenancy arises (s). The onus of proving a permanent tenancy is on the tenant once the relationship of landlord and tenant is admitted (t). The onus is discharged where it has been established by evidence that the tenants had been immemorially in possession of the land paying a uniform rent, that the lands were reclaimed and brought under cultivation by them, that they had made great improvements and carried on the cultivation of dry or garden crops of their own choice, without any interference, and had for a very long time been making alienations of wells and lands (u). A permanent tenancy may be pleaded where the following words occur in a lease,

- (m) *Prosunno Coomaree v. Rutton Bepary* (1876) 3 Cal. 696; *Taruk Podo Ghosal v. Shyama Churn Napat* (1881) 8 C. L. R. 50; *Prosunnon Coomar v. Jagun Nath* (1881) 10 C. L. R. 25; *Narayan v. Davlata* (1891) 15 Bom. 647; *Gungadhar v. Ajimuddin* (1881) 8 Cal. 960; *Rakhal Das v. Dino Moyi* (1889) 16 Cal. 652.
- (n) *Naba v. Cholim* (1901) 25 Cal. 896.
- (o) *Beni Ram v. Kundan Lal* (1899) 21 All. 496, 28 I. A. 59; *Ismail Khan v. Broughton* (1901) 5 C. W. N. 846.
- (p) *Upendra Krishna v. Ismail Khan* (1905) 32 Cal. 41, 31 I. A. 144; *Nilratna Mandal v. Ismail Khan* (1905) 32 Cal. 51, 32 I. A.

- 149; *Ismail Khan v. Srimutty* (1903) 8 C. W. N. 301.
- (q) *Promoda v. Srigobind* (1905) 32 Cal. 648.
- (r) *Naba Kumari v. Behari Lal* (1907) 34 Cal. 902, 34 I. A. 160; *Janaki Nath v. Kali Narain* (1910) 37 Cal. 662.
- (s) *Navalram v. Javerilal* (1905) 7 Bom. L. R. 401.
- (t) *Jabeda Khatun v. Mohommad Mozaffar A. I. R.* (1926) Cal. 322; *Nainapillai v. Ramanathan* (1924) 47 Mad. 337, 51 I. A. 83.
- (u) *Seturatnam v. Venkatachela* (1919) 43 Mad. 567, 47 I. A. 76.

viz., *putni* (v) *mulgeni* (w) *kattugudi* (x) *mukarar* (y) *maurasi-mokrari* (z) *mourasi* (a) *saswatom* and *kayam* (b), *kayam saswathampatta* (c), *sanba sani kalmi asat iotedari* (d), *raluka pottah* (e), *benami* (f), *chand-suraj* in Bombay, *patta dawani* in the United Provinces. The expression *istemrari mokarari* does not *per se* convey, either lexicographically or by way of custom, an estate of inheritance; but an *istemrari mokarari patta*, notwithstanding the absence of words indicative of heritability such as *farzandan*, *naslan bad naslan* or *al-aulad*, may indicate a perpetual grant, if the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, shew such an intention with sufficient certainty. The Calcutta High Court laid down the following rules on the point:—

1. Clauses in a lease which impose a restraint on transfer or cutting down of fruit bearing or income-yielding trees by the lessee are not consistent with the theory of a perpetual lease.
2. Clauses which throw the cost of improvement on the lessee indicate some measure of continuity, but not necessarily perpetuity.
3. A lease in favour of two persons points to the conclusion that, though some measure of continuity was desired, perpetuity was not intended.
4. A substantial premium for a lease is one of the surest indications of a permanent grant (g). A lease notwithstanding that it is permanent is liable to forfeiture under the provisions of the Transfer of Property Act (h) and the inclusion of a forfeiture clause does not destroy the permanent character of the lease (i). The presumption of perpetuity is only a crystallized mode of proof and, like any other proof, capable of rebuttal.

Agreement to lease amounting to a lease.—The Transfer of Property Act does not define an agreement to lease but by the Registration Act, lease includes “an agreement to lease” (j). The phrase “agreement to lease” in section 2 (7) of the Registration Act, XVI of 1908, relates to some document that creates a present and immediate interest in the land (k). In England, prior to the Judicature Acts, a distinction prevailed between a lease and an agreement for lease. But since the Judicature Acts there is no distinction because equity looks upon that as done which ought to be done (l). Whether an agreement for lease operates as a demise or an agreement only, depends upon the intention of the parties (m). It is often difficult to determine whether a particular instrument amounts to an agreement for lease or an actual demise. The question depends upon the intention of the parties, collected from circumstances enumerated in the instrument (n) and from the nature and condition of the subject-matter, without reference to extrinsic circumstances or subsequent acts (o). In order that an agreement for lease should

- (v) *Modhu Sudan v. Roche* (1898) 25 Cal. 24 I. A. 164.
- (w) *Unhamma Devi v. Vaikunta* (1894) 17 Mad. 218.
- (x) *Subba v. Nagappa* (1889) 12 Mad. 353.
- (y) *Megh Lal v. Rajkumar* (1907) 34 Cal. 358.
- (z) *Sreemutty v. Kalidas* (1897) 2 C. W. N. 292.
- (a) *Port Canning Land Improvement Corporation v. Kalyani* (1920) 47 Cal. 280.
- (b) *Venkatachariar v. Narasimha* (1918) 35 M. L. J. 647.
- (c) *Rama Aiyangar v. Anga Gurusami* (1918) 35 M. L. J. 129.
- (d) *Ershaque v. Dulah Miah*, A. I. R. (1931) Cal. 87.
- (e) *Upendra Lal v. Jogesh Chandra* (1917) 22 C. W. N. 275.
- (f) *Kangali v. Surja Narain*, A. I. R. (1922) Pat. 161.

- (g) *Ram Narain Singh v. Chota Nagpur Banking Association*, (1916) 43 Cal. 332.
- (h) *Kally Dass v. Mon Mohini* (1897) 24 Cal. 440.
- (i) *Megh Lal v. Rajkumar Thakur* (1907) 34 Cal. 358; *Venkatachariar v. Narasimha* (1918) 35 M. L. J. 647.
- (j) Sec. 2 (7) of Registration Act, XVI of 1908 (1923) 47 Cal. 485.
- (k) *Hemanta v. Midnapore Zamindari Co.* 46 I. A. 240; *Chandulal v. Keshavlal* (1936) 38 Bom. L. R. 486.
- (l) *Gray v. Spyer* (1922) 2 Ch. 122.
- (m) *Sidebotham v. Holland* (1895) 1 Q. B. 378; *B. Mofurappa v. K. Ramasami* (1934) 57 Mad. 760.
- (n) *Curling v. Mills* (1843) 6 Man. and G. 173, 134 E. R. 853.
- (o) *Doe d Morgan v. Powell* (1844) and Man. and G. 980, 135 E. R. 397.

S. 105

be construed as a lease it must amount to a present demise and this would be so even if there be a clause for future lease or leases (*p*). Where words of present demise are used, the question must depend upon the paramount intention of the parties (*q*). An agreement for a lease, with stipulation for the lessee to commence with laying out a considerable sum on the premises (the lease to contain certain specified covenants) "and in the meantime, and until such lease shall be executed to pay rent, and to hold the same premises, subject to the covenants above mentioned" was held to amount to an actual demise. Tindal, C. J., observed:—"The law is well settled, that where there is any doubt as to the operation of the contract, the Court must endeavour to discover the intention of the parties from the contents of the instrument, and if we see a paramount intention that the instrument shall operate as a lease, we must hold it to be such, although it may contain conflicting expressions. We think this instrument must be taken to operate as a lease. It is true, the parties contemplate a formal lease in future, and if that were the only stipulation there might be some difficulty, although it is to be observed, that the term is to begin at once. But when we come to the latter words of the agreement, that until the lease is executed the parties are to stand in the same relation as if it had been executed, there is no longer any room for doubt" (*r*). If an agreement for lease contain words of "present demise" the lessor is bound to give possession of the premises to the tenant (*s*). Agreement to lease containing covenants which come into effect immediately (*t*), or followed by entry (*u*), or where the tenant was to be put into immediate possession or stamped as a lease (*v*), or providing all that would be included in a lease including payment by lessee of expenses for a lease (*w*) amount to a present demise. But antecedent possession, not in pursuance of an agreement to lease but in pursuance of a memorandum relating to a previous and completed transaction by which the tenure holders had obtained possession of the lands, is not a present demise (*x*). The relation created by words of present demise is, however, liable to be defeated if there be a stipulation that a lease shall be granted if a stipulated sum be paid (*y*); or that there should be no entry until a lease is executed (*z*); or the terms are uncertain and insufficient (*a*). The following have been authoritatively regarded as words of present demise: "agree to let" (*b*), "agreed to take" (*c*), "doth demise" (*d*), "I agree to give you a

- (*p*) *Poole v. Bentley* (1810) 12 East 168, 104 E. R. 66; *Hemanta Kumari v. Midnapore Zemindar Co.* (1920) 47 Cal. 485, 46 I. A. 240; *Panchanan Bose v. Chandi Charan Misra* (1910) 37 Cal. 808; *Doe d Phillip v. Benjamin* (1839) 9 Ad. and El. 644, 112 E. R. 1356; *Sanjib Chandra v. Santosh Kumar* (1922) 49 Cal. 507; *Purmanandas v. Dharsey* (1886) 10 Bom. 104.
- (*q*) *Jones v. Reynolds* (1841) 1 Q. B. 506, 113 E. R. 1226; *Chapman v. Towner* (1840) 6 M. and W. 100, 151 E. R. 338.
- (*r*) *Pinero v. Judson* (1829) 6 Bing. 206, 130 E. R. 1259.
- (*s*) *Jinks v. Edwards* (1856) 11 Exch. 775, 156 E. R. 1045.
- (*t*) *Wright v. Trevezant* (1828) 3 C. & P. 441; *Copley v. Hepworth* (1690) 3 Salk. 108, 1 E. R. 721; *Poole v. Bentley* (1810) 12 East 168, 104 E. R. 66; *Port Canning Land Improvement Corporation v. Katyani* (1920) 47 Cal. 280, 46 I. A. 279; *Doe d Walker v. Groves* (1812) 15 East 244, 104 E. R. 837; *Doe d Pearson v. Ries* (1832) 8 Bing. 178, 131 E. R. 369.
- (*u*) *Hancock v. Caffyn* (1832) 8 Bing. 358, 131 E. R. 432.

- (*v*) *Doe d Green Colcombe v. Fidler* (1795) Peak Ad. Cas. 33 N. P.; *Alderman v. Neate* (1830) 4 M. & W. 704, 150 E. R. 1604.
- (*w*) *Warman v. Faithful* (1834) 5 B. & Ad. 1042, 110 E. R. 1078.
- (*x*) *Port Canning Land Improvement Corporation v. Katyani* (1920) 47 Cal. 280, 46 I. A. 279.
- (*y*) *Hancock v. Caffyn* (1832) 8 Bing. 358, 131 E. R. 432.
- (*z*) *Doe d Walker v. Groves* (1812) 15 East 244, 104 E. R. 837.
- (*a*) *Jones v. Reynolds* (1841) 1 Q. B. 506, 113 E. R. 1226.
- (*b*) *Doe d Phillip v. Benjamin* (1839) 9 Ad. & El. 644; 112 E. R. 1356; *Doe d Walker v. Groves* (1812) 15 East 244, 104 E. R. 837; *Poole v. Bentley* (1810) 12 East 168, 104 E. R. 66; *Staniforth v. Fox* (1831) 7 Bing. 590, 131 E. R. 228; *Wilson v. Chisolm* (1831) 4 C. & P. 474.
- (*c*) *Doe d Pearson v. Ries* (1832) 8 Bing. 178, 131 E. R. 369; *Alderman v. Neate* (1830) 4 M. & W. 704, 150 E. R. 1604; *Ramjoo v. Haridas* (1925) 52 Cal. 695.
- (*d*) *Barry v. Nugent* (1782) 3 Doug. 179, 99 E. R. 601.

contract for my property " (e), " promise and agree that I am renting " (f), but not " shall let " (g), or " agreed to let of " (h). An actual demise may be created even by correspondence between the parties or the terms may be included in more than one document (i).

Agreement for lease.—Where no present interest passes the agreement is only executory and does not operate as a lease (j), although there be words of present demise (k). So also where the lessor has no present power to demise (l); or it is unknown when the holding was to commence (m), or the document states that on the fulfilment of its terms a lease would be granted (n). Similarly, intention of the parties, the terms and the collateral circumstances, such as property being in the course of construction, and demise to be from a future date, negative a present demise (o). And a document creating a right to obtain a lease on the performance of certain conditions, excludes a present demise (p). In such a case the contract is only for a future lease and the lessor is not entitled to distrain (q). The rule which is laid down in all these cases is that you must look at the whole of the instrument to judge of the intention of the parties as declared by the words of it, for the purpose of seeing whether it is an agreement or a lease (r). The following instances may be enumerated as shewing when an agreement to lease amounts to a lease. It will be observed, however, that in all these cases, which depend on their own facts and circumstances and in which it was held that a present or immediate demise took place, there was either an actual present demise, immediate possession given, or something to shew that possession and the relation of landlord and tenant were to commence before a lease was executed (s). However desirable it may be to find some certain criterion for ascertaining the intention of parties upon such occasions, the difference between instruments is so great, that none such has yet been discovered.

Particular Instances.

(a) Agreement which was dated the 8th October, 1882, provided that the lease was to commence from the 1st of October—a date already passed and that the rent was to commence from that day. Held, immediate demise.

Purmanandas v. Dharsey (1886) 10 Bom. 104.

(b) A by deed, " in consideration of the rents, covenants and agreements hereinafter reserved and contained " on the part of B, covenants to grant to B, at his request, a lease of a house for twentyone years from a day past, " but determinable as hereinafter mentioned." B covenants to lay out a certain sum on the premises and it is agreed that the lease shall contain a covenant for payment of rent and other usual covenants. Held, a present demise.

(e) *Purmanandas v. Dharsey* (1886) 10 Bom. 101.
(f) *Sanjib Chandra v. Santosh Kumari* (1922) 49 Cal. 507.

(g) *Mahomed Yusuf v. Secretary of State for India* (1921) 45 Bom. 8.

(h) *Hemanta Kumari v. Midnapore Zemindary Co.* (1920) 47 Cal. 485, 46 I. A. 240.

(i) *Chapman v. Bhick* (1838) 4 Bing. N. C. 187, 132 E. R. 760; *Ramjoo v. Haridas* (1925) 52 Cal. 695; *Boyd v. Kreig* (1890) 17 Cal. 548; *Chuni Lal v. Gopiram* (1927) 45 C. L. J. 32; *Morgan v. Fernandez* (1916) 30 M. L. J. 519; *Mir Muhammad v. Natwar Lal* (1923) 45 All. 220; *Mahomed Yusuf v. Secretary of State for India* (1921) 45 Bom. 8.

(j) *Phillips v. Hartley* (1827) 3 C. & P. 121; *Macnaghten v. Rameshwar Singh* (1903) 30 Cal. 831; *Beni v. Puran Das* (1905) 27 All. 190.

(k) *Browne v. Warner* (1807) 14 Ves. 156, 33 E. R. 480.

(l) *Hayward v. Harwell* (1837) 6 Ad. & El. 265, 112 E. R. 101.

(m) *Doe d Wood v. Clarke* (1845) 7 L. B. 211, 115 E. R. 468.

(n) *In re Maneklal Manilal* (1929) 53 Bom. 1; *Syrian Land Co., Ltd., v. J. D. Rodrigues* A. I. R. (1933) Rang. 220.

(o) *Mahomed Yusuf v. Secretary of State* (1921) 45 Bom. 8.

(p) *Harinath v. Promotho Nath* (1921) 25 C. W. N. 550.

(q) *Dunk v. Hunter* (1822) 5 B. & Ald. 322, 106 E. R. 1209.

(r) *Gore v. Lloyd* (1844) 12 M. & W. 463, 152 E. R. 1279.

(s) *Jones v. Reynolds* (1842) 1 Q. B. 506, 3 E. R. 1228.

S. 105

Curling v. Mills (1843) 6 Man. and G. 173, 134 E. R. 853.

(c) The plaintiff wrote: "I do hereby agree to take by our personal settlement your house and premises No. 7; Bowbazar Street, on a lease for 21 years"—and then the terms followed. The defendant replied: "I do confirm your letter dated 19th November 1921. All terms will be settled on the agreement." The plaintiff was in possession both before and after the date of the two letters. Held, a present demise.

Ramjoo Mahomed v. Haridas Mullick (1925) 52 Cal. 695.

(d) A agrees to "let" to B "on lease" for a certain term at a certain rent, "subject to the stipulations and covenants in the original lease, under which he holds." Lease to be prepared by A's solicitor at B's expense; held, a lease.

Wilson v. Chisholm (1831) 4 C. & P. 474.

(e) On October 28th, 1843, plaintiff, defendant (lessor), and M. (lessee) entered into an agreement whereby M. who was tenant to defendant of his house agreed to let to plaintiff and defendant agreed to accept plaintiff as tenant. Immediately after the execution of this agreement M. let plaintiff into possession of the premises. Held, the instrument amounted to a lease by defendant to plaintiff.

Tarte v. Darby (1846) 15 M. & W. 601, 153 E. R. 989.

(f) A agrees to let and B agrees to take land for 61 years at a certain rent. A agreed when five houses were covered to grant a lease or leases and this agreement was to be considered binding till one fully prepared could be produced. Held, a present demise.

Poole v. Bentley (1810) 12 East 168, 104 E. R. 66.

(g) By a written instrument, stamped with a lease stamp, A agreed to demise and let a house and premises to B as a poor house for the use of the parish for a term of 99 years at a rent of £27. The agreement provided for a lease and counterpart, with covenants, agreements and general clauses as are usually contained in leases. No lease was ever executed but the premises from the date of the written instrument were used as a poor-house for the parish. Held, present demise.

Alderman v. Neate (1839) 4 M. & W. 704, 150 E. R. 1604.

(h) "G. F. does this day agree to let to J. S. three cottages for ten years; he further agrees to build a brewhouse and to make a cellar at the rent of £35; he agrees to pay the ground rent and has this day received £4 from J. S. in earnest." Held, executed demise.

Staniforth v. Fox (1831) 7 Bing. 590, 131 E. R. 228.

(i) An agreement for a lease contained covenants on the part of the lessee to lay out a considerable sum on the premises, to pay all taxes, to repair and to paint once in three years; and also a covenant that until the lease was executed, the lessees were "to pay rent, and to hold the premises, subject to the covenants above mentioned." Held, absolute demise.

Pinero v. Judson (1829) 6 Bing. 206, 130 E. R. 1259.

(j) K. agreed to let and P. to take an unfinished house for the term of sixty years, being the whole term that K. had leased the same to him, at the rent of £525 payable quarterly, to insure the premises and to have the benefit of an insurance

lately paid ; a lease and counterpart to be prepared at the expense of P. and to contain all the clauses, covenants and agreements of K.'s ; held, actual demise.

S. 105

Doe d. Pearson v. Ries (1832) 8 Bing. 178, 131 E. R. 369.

(k) In 1895 the appellant instituted two suits (72) against Government and (73) against W & Co. to obtain possession of different plots which had reappeared after diluvion. Suit (73) was compromised on the terms, amongst others, that W & Co. were to retain the land the subject of that suit, recognize the appellant as owner and that if the appellant succeeded in obtaining a decree against Government she would grant a *jote* settlement of the land in suit (72) to W & Co., on the same conditions as those agreed to with regard to the lands in their possession. A decree in terms of the compromise was drawn up. The appellant succeeded in the suit (72) but refused to grant the land. W & Co., sued for specific performance of the agreement. Held, that the compromise was not a present demise.

Hemanta Kumari v. Midnapore Zemindari Co. (1920) 47 Cal. 485, 46 I. A. 240.

Registration.—The importance of the distinction whether an agreement to lease amounts to a present demise or not, arises from the viewpoint of registration of the instrument (*t*). The former is an instrument compulsorily registrable (*u*) while the latter is not (*v*). Whether the transaction is contained in more than one document or is embodied in correspondence (*w*) between the parties there is now no distinction as to admissibility in evidence (*x*). Prior to the decision of the Privy Council (*y*) the Madras High Court held that an agreement to lease was compulsorily registrable whether creating a present demise or not (*z*). A later decision of the same High Court took an altered view (*a*).

Stamp on leases.—*Ad valorem* duty on a lease including underlease or sub-lease and agreement to let or sub-let is prescribed by article 35 of the Indian Stamp Act, 1899. To the article is added a proviso that in case an agreement to lease is stamped with *ad valorem* stamp required for a lease and a lease in pursuance of such agreement is subsequently executed, the duty on such a lease shall not exceed annas twelve. An agreement to lease operating as a present demise is not admissible in evidence for want of registration. So when it is not duly stamped as a lease it would be liable to duty and penalty as provided in section 35 of the Stamp Act. The duty, as will be seen from the said article, is calculated on rents which include Government assessment agreed by the lessee to be paid (*b*). When an agreement for lease has been lost, there is a presumption that it was duly stamped and the onus is on the party objecting, to shew that the lost document was unstamped. Where a lease is shewn to have been unstamped, secondary evidence of its contents cannot be received (*c*). If plaintiffs put in the original lease duly stamped signed

(t) Registration Act, XVI of 1908, sec. 2 (7) and sec. 17 (d).

(u) *Purmanandas v. Dharsey* (1886) 10 Bom. 104; *Sanjib Chandra v. Santosh Kumar* (1922) 49 Cal. 507.

(v) *Hemanta Kumari v. Midnapore Zemindari Co.* (1920) 47 Cal. 485, 46 I. A. 249; *Port Canning Land Improvement Corporation v. Kalyani Debi* (1920) 47 Cal. 280, 46 I. A. 279; *Macnaghten v. Rameshwar Singh* (1903) 30 Cal. 831; *Beni v. Puran Das* (1905) 27 All. 190.

(w) *Boyd v. Kreig* (1890) 17 Cal. 548; *Chunilal v. Gopiram* (1927) 45 C. L. J. 32; *Morgan v. Fernandez* (1916) 30 M. L. J. 519; *Nur Mahomed v. Nalicar Lal* (1923) 45 All. 220; *Mahomed Yusuf v. Secretary of State for India* (1921) 45 Bom. 8; *Ramjoo v.*

Haridas (1925) 52 Cal. 695.

(x) Proviso to sec. 49, Registration Act, XVI of 1908.

(y) *Hemanta Kumari v. Midnapore Zemindari Co.* (1920) 47 Cal. 485, 46 I. A. 240.

(z) *Narayanan v. Muthia Servay* (1912) 35 Mad. 63.

(a) *Swaminatha v. Ramaswami* (1921) 44 Mad. 399.

(b) Reference under the Stamp Act (1884) 7 Mad. 155 F. B. in *re Gangaram Narayandas Teli* (1915) 39 Bom. 434 *contra*.

(c) *Smith v. Henley* 13 L. J. Ch. 221, 41 E. R. 680; *Raja of Bobbili v. Inugaute* (1900) 23 Mad. 49, 26 I. A. 262; *Kallu v. Halki* (1896) 18 All. 295; *Hiralal v. Shanker* (1921) 45 Bom. 1170.

S. 105 by defendant only, the defendant may put in the counterpart although unstamped (*d*). There is no definition in section 2 (16) of the Stamp Act, 1899, of a lease, as it merely states what a lease of immoveable property includes, so that one has to turn to the definition of lease given in section 105 of the Transfer of Property Act. According to the Stamp Act a lease means a lease of immoveable property and includes also :

- (a) a *patta* ;
- (b) a *kabuliyat* or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for immoveable property ;
- (c) any instrument by which tolls of any description are let ;
- (d) any writing, on an application for a lease, intended to signify that the application is granted.

Lease for three years with option to renew.—Such a lease with an option to renew for another one or two years from the expiration of the original term is not an instrument relating to several distinct matters within the meaning of section 59 of the Stamp Act, 1899. It is one contract, namely, a demise. The option to renew is ancillary to and forms part of the consideration for entering into the lease (*e*).

Concurrent leases.—Where a lease is made to one before the expiration of the former lease, the latter demise would take effect after the determination of the former. The second lease is a grant of the reversionary interest and if the first lease is surrendered before the term expires, the second lease cannot commence immediately, for the lessor had no power to contract for the period of the first lease. The lessor made a lease to W. R. for twenty years and about a year afterwards he made another lease to W. W. for twenty years. Now, if there was an attornment to this second lease, then it amounts to a grant of the reversion of the lessor ; but if no attornment, then it is a lease by estoppel ; so where a man makes a lease to B. for twenty years, and about a year afterwards makes another lease to C. for twenty years, this is a lease by estoppel, and the rent is payable for the whole term ; but if he enters upon the first lease, and then makes a lease to C. who is turned out by B., it is no lease by estoppel, but only a future interest for the last year (*f*).

Future leases.—This the law recognizes as creating an interest in the future coupled with the right to complete that interest by possession. It is a right *in rem* and alienable (*g*). It is not an interest in the land but an absolute proprietary right to take possession, on the arrival of the stipulated time. It does not offend the rule against perpetuities (*h*). Such leases come into operation on the expiration of the first term. So, a lease for ten years, is followed the next year by another for twenty years, the latter is a good lease for the last ten years of it. If, however, the prior lessee surrenders or the prior lease is void or misrecited, the second lease would commence at once.

Reversionary lease.—As a reversionary lease merely creates an *inter esse termini* until entry thereunder, it does not enlarge the term of the original lease (*i*).

(*d*) *Turner v. Hardy* (1842) Car. & M. 449 N. P.
 (*e*) Reference under Stamp Act, sec. 57 (1902) 25 Mad. 3 ; see *Secretary to the Commissioner of Salt etc.*, (1920) 43 Mad. 385 (as to the meaning of distinct matters).
 (*f*) *Holman v. Hore* (1892) 3 Salk. 153, 91 E. R. 747.
 (*g*) *Gillard v. Cheshire Lines Committee* (1884)

32 W. R. 943.
 (*h*) *Mann, Crossman and Paulin, Ltd., Land Registry (Registrar)* (1918) 1 Ch. 202.
 (*i*) *Lewis v. Baker* (1905) 1 Ch. 46 ; *Smith v. Day* (1837) 2 M. & W. 684, 150 E. R. 931 ; *Hyde v. Warden* (1877) 3 Ex. D. 72 ; *Joyner v. Weeks* (1891) 2 Q. B. 31.

Invalid leases.—Under English Law, an instrument which is void as a lease by reason of the provision in the Real Property Act may nevertheless enure as an agreement (*j*). So if a tenant for life under a limited power of leasing, grants a lease exceeding his power, the lease is void, and not capable of confirmation by the remainderman. But if the latter accepts rent as rent, after the death of the tenant for life, it is an admission of the relationship of landlord and tenant (*k*). And so where a defendant having for several years as an assignee under a void lease, paid the rent reserved, he was held liable to repair to the end of the term according to the covenant in the lease (*l*).

Assignment of a lease : and under-lease.—According to English Law, one is an assurance of the whole of the remaining interest the lessee has, while an under-lease is for a period less than the whole term or the residue. A lease for a period exceeding the termor's interest operates as an assignment. Hence an under-lease of the whole term amounts to an assignment (*m*). Under the Transfer of Property Act, having regard to sections 105 and section 108 (*j*), an under-lease for the entire residue of the under-lessor's term operates in the absence of a contract to the contrary, as an under-lease and does not, as ordinarily under the English Law, constitute an assignment of the lease (*n*).

Under-lease exceeding original term.—If a lessee with an original lease and a reversionary lease or an agreement therefor under-lets the premises for a term exceeding the original lease, he cannot distrain for rent during the original lease for want of reversion (*o*).

"Kabuliyat" whether sufficient to create a lease.—The Allahabad High Court held that a registered *kabuliyat* did not bestow title on the occupier as it was not a lease as defined by section 105 of the Transfer of Property Act (*p*). The same view was taken by the Court of the Central Provinces (*q*) and Rangoon (*r*) while the High Courts of Calcutta (*s*) and Madras (*t*) took the opposite view. The Bombay High Court rested its decision on the fact of possession (*u*). This conflict has now been set at rest by the amendment to section 107 of the Transfer of Property Act whereby a registered lease is required to be executed by both lessor and lessee (*v*).

Test to distinguish lease from licence.—Both have several elements in common but the difference between lease and licence is that in the former there is a transfer of interest in immoveable property, while in the latter there is none. Ordinarily a lease of immoveable property is a transfer of the right to enjoy such a property for a limited time expressed or implied or in perpetuity for a consideration termed

- (*j*) *Tidey v. Mollett* (1864) 33 L. J. C. P. 235, 143 E. R. 1143.
 (*k*) *Doe d. Martin v. Watta* (1797) 7 T. R. 83, O., E. R. 866.
 (*l*) *Beale v. Sanders* (1837) 3 Bing. N. C. 850, 132 E. R. 638.
 (*m*) *Beardman v. Wilson* (1868) 38 L. J. C. P. 91.
 (*n*) *Hunsraj v. Bejoy Lal Seal* (1930) 57 Cal. 1176, 57 I. A. 110.
 (*o*) *Lewis v. Baker* (1905) 1 Ch. D. 46; *Parmenter v. Webber* (1818) 8 Taunt. 593, 129 E. R. 515; *Preece v. Corrie* (1828) 5 Bing. 24, 130 E. R. 968; *Beardman v. Wilson* (1868) 19 L. T. 282.
 (*p*) *Kedar Nath v. Dhankar Lal* (1924) 46 All. 303; *Mt. Bhagwati v. Nandu Mal*, A. I. R. (1927) All. 729; *Sikandar v. Bahadur* (1905) 27 All. 462; *Beni v. Puran Das* (1905) 27 All. 190; *Kashi Gir v. Jogendra Nath* (1905) 27 All. 136; *Sheo Karan*

- Singh v. Mahrajah Parbhu Narain Singh* (1909) 31 All. 276; *S. Safdar Ali v. Ambika Prasad*, A. I. R. (1930) All. 678.
 (*q*) *Birdichand v. Popatlal*, A. I. R. (1926) Nag. 391; *Deolia v. Raje Janardhan* A. I. R. (1928) Nag. 153.
 (*r*) *U. Tha Nyo v. Maung Kyaw Tha*, A. I. R. (1925) Rang. 273; *Maung Ba Sein v. Maung Htoon Shwe*, A. I. R. (1927) Rang. 95.
 (*s*) *Raimoni v. Mathura* (1912) 39 Cal. 1016; *Dinanath v. Janaki Nath* (1928) 55 Cal. 392.
 (*t*) *Syed Ajam v. Ananthanarayana* (1912) 35 Mad. 95.
 (*u*) *Ramsing v. Bai Dhanba* (1925) 27 Bom. L. R. 626.
 (*v*) Sec. 55 of Act, XX of 1929, the Transfer of Property Amendment Act.

S. 105 premium or rent (*w*) while a licence is a grant to do upon immoveable property of the grantor something which in the absence of such right would be unlawful. Such right does not amount to an interest in the property. The consideration is not rent but a fee. The test is whether sole and exclusive possession has been granted. If so, it is a lease, otherwise it is a licence (*x*). There can be no lease when the owner retains possession (*y*). Another usual test is that a licensee is not liable to be assessed or rated. In deciding whether a given use of land amounts to a lease or licence, the Court regards the substance. Where the owner has not meant to part with possession or control, it is a licence. So also when the contract is merely for use in a certain way and on certain terms (*z*). If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise (*a*). Thus a licence properly passes no interest nor alters or transfers property in anything, but only makes an action lawful which otherwise would have been unlawful, as a licence to hunt in a man's park and carry away the deer killed for his own use, to cut down a tree in a man's park and carry it away the next day, are licences as to acts of hunting and cutting down the tree (*b*). A licence is not connected with the ownership of any land but creates only a personal right or obligation. Licence rights are not generally transferable and the transferee is not bound to continue the licence granted by the former owner (*c*). Unlike a lease, a licence cannot be transferred by the licensee or exercised by his servants or agents, unless it be for attending a place of public entertainment (*d*). The transferor of a lessor is liable to the lessee if the latter so chooses under section 109 of the Transfer of Property Act but the transferee of the grantor of the licence is not bound by the licence (*e*). A lease is determined in one of the various modes prescribed in section 111 of the Transfer of Property Act whilst a licence may be revoked at any time unless coupled with a transfer of property, and such transfer is in force, or the licensee acting on the licence has executed a work of permanent character, and incurred expenses in the erection (*f*). Again, on revocation a licensee is entitled to a reasonable time to remove materials brought by him on the premises (*g*) while in case of a lease the lessee must remove by the time fixed for determination of the lease or before quitting possession, except in case of growing crops (*h*). Further, a licensee has no right to sue in his own name (*i*). A right conferred by a licence is not exclusive unless so stated (*j*).

A familiar example of the distinction between lease and licence is in the case of servants who occupy premises of their masters. A servant, who occupies premises

(*w*) Sec. 5, Transfer of Property Act, IV of 1882.

(*x*) *Board of Revenue v. South Indian Railway Co., Ltd.* (1929) 48 Mad. 368; *Mammukutti v. Puzhakkal* (1906) 29 Mad. 353; *Seeni Chelliar v. Santhanathan* (1897) 20 Mad. 58; *Taylor v. Caldwell* (1863) 32 L. J. Q. B. 164, 122 E. R. 309; *the Secretary of State for India v. Bhupalchandra* (1930) 57 Cal. 655.

(*y*) *Sherif Dadumiaji v. Emperor* (1930) 32 Bom. L. R. 332; *Indal v. Debi*, A. I. R. (1926) Nag. 174; *Secretary, Board of Revenue v. Agent, S. I. Ry., Co., Ltd.* (1925) 48 Mad. 368; *Indian Hotels Co. v. Phiroz Sorabji* (1923) 25 Bom. L. R. 84; *Secretary of State for India v. Bhupal Chandra Ray* (1930) 57 Cal. 655; *Ramswami v. Abdul Kuddus*, A. I. R. (1926) Mad. 978; *Gulab Khan v. Lal Mahomed*, A. I. R. (1926) Oudh 609; see *Burmah Shell Oil Storage and Distributing Co., of India, Ltd. In re* (1933) 55 All. 874.

(*z*) *Wilson v. Taverer* (1901) 1 Ch. 578; *Wells v. Kingston Upon Hull Corporation* (1875) 44 L. J. C. P. 257; *Burmah Shell Oil Storage and Distributing Co., of India Ltd. In re* (1933) 55 All. 874.

(*a*) *Glenwood Lumber Co., Ltd. v. Phillips* (1904) A. C. 405; *the Secretary of State for India v. Bhupalchandra* (1930) 57 Cal. 655; *the Secretary of State for India v. Sati Prasad Ganga* (1928) 55 Cal. 1328.

(*b*) *Thomas v. Sorrell* (1673) Vaugh. 330, 124 E. R. 1098.

(*c*) *Sundrabai v. Jayawant* (1899) 23 Bom. 397.

(*d*) Sec. 56, the Easements Act, V of 1882.

(*e*) Sec. 59, the Easements Act, V of 1882.

(*f*) Sec. 60, the Easements Act, V of 1882.

(*g*) Sec. 63, the Easements Act, V of 1882.

(*h*) Sec. 108 sub-sections (h) and (i), Transfer of Property Act, IV of 1882.

(*i*) *Heap v. Hartley* (1889) 42 Ch. D. 461.

(*j*) *Sutherland (Duke) v. Heathcote* (1892) 1 Ch. 475.

belonging to his master for the convenient performance of his duties, acquires no estate therein (*k*). But if a servant lives in the house of his master at a yearly rent, the house cannot be described as the master's house though it is on the premises where the master's business has been carried on and although the servant has it because of his service (*l*). And where the servant is entitled to compensation for erecting buildings, payment thereof is not a condition precedent to quitting the premises on termination of the service (*m*). Where an occupation by the servant is as remuneration for service wholly or in part, no notice to quit is necessary (*n*).

Licences.—Letting of land for a *mela* or fair (*o*); liberty to fasten a coal hulk to moorings till either party gives a month's notice (*p*), or to erect and place book-stands at railway stations (*q*); letting stall at an exhibition at a weekly rent, the stall to be used for a few hours a day (*r*); letting accommodation for a theatre refreshment room and bar (*s*); grant by a canal company of the exclusive right of putting pleasure boats on their canal (*t*) are illustrations of licences.

Further Illustrations.

(a) A agreed with B to let him have the use of the Surrey Garden and Music Hall for four days at £100 a day for giving concerts. Held, licence.

Taylor v. Caldwell (1863) 3 B. & S. 826, 122 E. R. 309.

(b) A, the owner of lace machines paid 12s. a week to B for permission to place the machines in a room in the latter's factory and for egress and ingress for himself and workmen. Held, licence.

Hancock v. Austin (1863) 14 C. B. S., 143 E. R. 593.

(c) A building was let out in separate tenements. Each floor had two privies and a washing place kept by the landlord under his control as to user and repairs. The rent notes did not expressly give the tenants the right to use them. Held, by Martin, C. J., that the privies and washing places were enjoyed under a revocable licence.

Lakshmichand v. Ratanbai (1927) 51 Bom. 274.

(d) A agreed to deliver to B a certain quantity of *urid* (grain) on the 3rd of March every year for allowing cattle or carts over a strip of land belonging to B. Held, lease.

Indal v. Debi, A. I. R. (1926) Nag. 174.

(e) A gave B permission to build a market-place on a certain plot of land. Before it was finished he was evicted by the owner. Held, licence.

Basdeo Rai v. Dwarka Ram (1916) 38 All. 178.

(f) The plaintiff's premises, known as "Wellington Mews," provided spaces for carriages, stalls for horses and open spaces for cars. The key remained with the supervisor of the mews. The defendant hired accommodation for his carriage, horse and cars. There was no writing to shew what the terms were between the parties. Held, licence.

(*k*) *White v. Bayley* (1861) 30 L. J. Ch. 253, 142 E. R. 438.

(*l*) *R. V. Jarvis and Walker* (1824) 1 Mood C. C. 7.

(*m*) *Pandit Chandrika v. B. B. & C. I. Ry. Co.* (1935) 39 C. W. N. 552 P. C.

(*n*) *Doe D Hughes v. Derry* (1849) C. & P. 494.

(*o*) *Secretary of State for India v. Karuna* (1908) 35 Cal. 82.

(*p*) *Watkins v. Milton next Gravesend Overseers* (1868) 3 Q. B. 350.

(*q*) *Smith v. Lambett Assessment Committee* (1882) 10 Q. B. D. 327.

(*r*) *Rendell v. Roman* (1893) 9 T. L. R. 192.

(*s*) *Edwardes v. Barrington* (1901) 85 L. T. 650.

(*t*) *Hill v. Tupper* (1863) 32 L. J. Ex. 217; 159 E. R. 51.

S. 105

Indian Hotels Co., Ltd. v. Phiroz (1923) 25 Bom. L. R. 84.

(g) Permission granted to A by B for a consideration named, to cut, at his expense for a period of 6 years trees, standing on the land. Held, a licence.

Mammikutti v. Puzhakkal (1907) 29 Mad. 353.

(h) A who was *mirasdar* of a village permitted B to occupy his land on condition that he should do for B the work of a blacksmith. B worked upto 5 years and ceased. Held, licence.

Athakutti v. Govinda (1893) 16 Mad. 97.

Rent generally.—This is usually specified in the lease being the consideration for the transfer by the lessor to the lessee. It is really the outcome of the relationship of landlord and tenant. It may consist of money, a share of crops or it may be rendering of service or any other thing of value. The lease must fix the time of payment which may be periodical or on specified occasions. The usual practice is to make it payable monthly, quarterly, half-yearly or yearly. It may be a fixed sum or may be made to depend upon certain calculations but it must be reduced to a certainty. In building leases it is usual during the time fixed for construction of the building to provide for the payment of a nominal rent as a mere acknowledgment of the lessor's title without any relation to the value of the premises demised (*u*). When reserved in the alternative the lessee has the right of election. A rent cannot issue out upon incorporeal hereditament (*v*). Its acceptance is confirmation of a voidable lease. In case of a mortgage by the lessor, rent is payable to the lessor till notice but thereafter it should be paid to the mortgagee who is entitled to all rents subsequent to his mortgage though accrued due prior to his notice. In the administration of estates (*w*) rent of property occupied by tenant stands on a higher class than ordinary debt. So that the landlord has a preferential claim over the estate of the deceased tenant for rent for one month prior to his death. So also in case of insolvency under the Presidency Towns Insolvency Act (*x*), rent due to a landlord has priority to all other debts provided it does not exceed one month's rent. There is no similar provision in the Provincial Insolvency Act (*y*). Where there is an agreement between a landlord and a tenant that rent is to be calculated on the basis of an area estimated approximately without actual measurement, the landlord has no right, without the consent of the tenants, to substitute a different method of calculation, whether by actual survey or otherwise (*z*). The payment of rent may be by service (*a*) which must not be of a casual or accidental nature. Medical practitioner rendering services as consideration for occupation of the house, to the owner and his family is rent and the agreement amounts to a lease (*b*). The covenant for payment of rent runs with the land (*c*) and it is a usual covenant in a lease. The rent must be certain. If it fluctuates according to the happening of certain events it does not become uncertain. When there is a difference between the time of payment in the *reddendum* and the *habendum*, the former shall prevail (*d*).

(*u*) *Stephens and Bow Educational Foundation (Governors) v. Inland Revenue Commissioners* (1913) 3 K. B. 570.
 (*v*) *Gardiner v. Williamson* (1831) 2 B. and Ad. 336, 109 E. R. 1168.
 (*w*) The Succession Act, XXXIX of 1925, sec. 320.
 (*x*) Sec. 49.
 (*y*) Act V of 1920.
 (*z*) *Vagha Jasing v. Manilal* (1935) 37 Bom. L. R. 249; *Gouri Pattra v. Reily* (1892) 20 Cal. 579; *Manindra Chandra v. Kanlat*

Shaik (1923) 50 Cal. 957.
 (*a*) *Doe d Edney v. Benham* (1845) 7 Q. B. 976 (sweeping Parish Church); *Doe d Edney v. Billett* (1845) 7 Q. B. 976 (ringing church bell).
 (*b*) *Jyotish Chandra v. Ramanath Bhadra* (1905) 32 Cal. 243.
 (*c*) *Kumar Raj Krishna Prasad v. Barabani Coal Concern, Ltd.* (1934) 80 C. L. J. 477.
 (*d*) *Tompkins v. Pincent* (1702) 1 Salk. (141), 91 E. R. 131.

The rent may be paid in kind (*e*), or it may be at the lessor's election in money or kind or both. The rent may be conditional on the execution of certain works to be carried out by the lessor (*f*) or conditional on the lessor furnishing the premises (*g*). Every lease contains a proviso for re-entry on non-payment of rent. Collection charges fixed by lease as payable annually in addition to rent is part of the rent and recoverable as such. It is not an illegal cess (*h*). Notwithstanding assignment the tenant remains liable under section 108, clause (j) of the Transfer of Property Act during the whole period of the tenancy. The rent may be reserved to a stranger, in which case the lessor may bring an action for payment to the stranger (*i*). An agreement to reduce rent does not create a new demise (*j*), but if the tenant fails to pay the reduced rent the landlord is entitled to claim the rent, according to the original term (*k*). Where lessee of a public house covenanted to purchase all beer from the lessors and the lease contained a provision for reduction of rent so long as the lessee purchased beer from the lessor, it was held that the covenant was an absolute one and the lessee had no alternative of dealing with a rival brewer and paying the non-reduced rent (*l*). Similarly, a covenant that the lessee of a hotel would not, during the term, receive or sell upon the premises any wine or spirits except such as was supplied by or through the lessor, his successor or assigns, was held to be a covenant running with the land and binding on the assigns of the lessee though not mentioned. Where such covenant is coupled with a proviso for abatement of the rent so long as the lessee shall well and truly observe the covenant, the assigns of the lessee are entitled to the benefit of the proviso notwithstanding the fact that the business of the lessor and the ownership of the reversion have been severed (*m*). Where rent is payable monthly or yearly the first payment becomes due at the end of the first month or the first year. Rent may be paid in advance by stipulation, but in the absence of such stipulation it would be a voluntary payment, not a fulfilment of the obligation imposed by the covenant to pay rent. It would be only an advance to the landlord with an agreement that when the rent becomes due, such advance will be treated as fulfilment of the obligation to pay the rent. The rent is payable to the lessor or a person entitled to receive rent as being authorized by the lessor or it may be paid to the assignee of the reversion. The rent may be paid to a receiver appointed by the Court or to an executor or administrator of a deceased. In the case of co-owners or tenants in common making a joint demise with a general *reddendum* not saying to whom the rent was payable, it was held that although the words of demise were joint the reversions were several and the rent followed the reversion (*n*).

Under section 109 of the Transfer of Property Act, on assignment of the reversion, the lessor is entitled to the accrued rent and his assignee to the rents accruing after the assignment. So that where after execution of a lease, the lessor mortgaged the property, and the mortgagee allowed the lessor to remain in receipt of the rents, and subsequent to the mortgage, the lessee, unaware of the transaction, paid on application to the lessor, a year's rent in advance, but after payment and

(*e*) *Doe D Tucker v. Morse* (1830) 1 B. & Ad. 365, 109 E. R. 822 (delivery of culm); *Pitcher v. Tovey* (1692) as reported in 4 Mod. Rep. 71, 87 E. R. 268, to pay so many bottles of wine.
 (*f*) *Graham v. Erwood* (1851) 17 L. T. O. S. 65.
 (*g*) *Mechelen v. Wallace* (1836) 7 Ad. & El. 54 n., 112 E. R. 391.
 (*h*) *Radha Charan v. Golak Chandra* (1904) 31 Cal 834; *Mahomed Favez v. Jamoo Gaze* (1881) 8 Cal. 730.

(*i*) *Deering v. Farrington* (1674) 1 Mod. Rep. 113, 86 E. R. 772.
 (*j*) *Crowley v. Vully* (1852) 21 L. J. Ex. 135, 155 E. R. 968.
 (*k*) *Re. Smith and Hartogs, ex-parte Official Receiver* (1895) 73 L. T. 221.
 (*l*) *Hanbury v. Cundy* (1887) 58 L. T. 155.
 (*m*) *White v. Southend Hotel Co.* (1897) 1 Ch. 767.
 (*n*) *Beer v. Beer* (1852) 12 C. B. 60, 138 E. R. 823.

S. 105 before the rent had become due, the mortgagee gave notice to the lessee to pay the rent to him, and on the lessee refusing, distrained, it was held that payment of the rent before it became due was not a good payment as against the mortgagee and the lessee was still liable to pay rent. The receipt of the rent could not be treated as a discharge by the lessor, for by the assignment of the reversion before the rent was received by him, he had deprived himself of the power to give a valid discharge for the rent (*o*). The payment may be made in cash or by bill or by cheque if agreed between the parties. Plaintiff and defendant each kept an account with a bank at M. In October plaintiff desired defendant to pay into his account a sum due to him for rent. Defendant wrote to the plaintiff stating that he would cause the transfer of the amount to his account and the plaintiff sent him a receipt by return of post. The sum, however, was not transferred until December 1. On December 9, notice of transfer was sent to plaintiff by post which did not reach him till December 11. On December 10, the banker stopped payment. Held that the transfer was equivalent to payment (*p*).

A tender without prejudice or under protest is valid. It merely imports that the tenant did not acquiesce in the demand of the landlord but at the same time he did not preclude himself from recovering the money back if he could (*q*). An offer to pay under protest is a good tender (*r*) but a conditional tender is not good (*s*). Mere non-payment of rent does not raise an irrebuttable presumption that the tenant holds the property free from rent (*t*). Mere non-payment of rent for 12 years does not extinguish the landlord's right to recover rent and no question of adverse possession arises therefrom (*u*). Where rent is payable in kind, such as by delivery of paddy or in money, the tenant has a choice either to pay the money or deliver the paddy. It cannot generally be said by the landlord that the tenant is bound to pay the market value of the paddy, if he does not deliver the paddy as rent in kind (*v*). The authority to collect rent does not carry with it the authority to grant receipt (*w*). As to interest on rent in arrears, rent does not include interest. But if a tenant agrees to pay interest, the landlord is entitled to recover it and where the holding is sold, the purchaser is liable to pay interest (*x*), though it cannot be said that interest is an ordinary incident of tenancy (*y*). Section 108 (1) requires the lessee to pay rent at the proper time and place where the rent is to be paid, and presumably it must be on the premises. Further, as the section does not state what is the proper time for payment, the day following the expiration of the month of the tenancy would be the proper time, as it is usually the custom to pay rent monthly. A covenant for payment at the time and in the manner reserved, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a date certain and the ordinary doctrine applies, whereby the covenantor is bound to seek out the covenantee and to render to him the obligation under the covenant by payment or tender of the money. Similarly, in case of payment such as is contemplated by section 108 (h) which the lessee may deduct from the rent, he is bound to satisfy the lessor by reasonable evidence to that effect and the same

(*o*) *De Nicholls v. Saunders* (1870) 39 L. J. C. P. 297; *Ashburton (Lord) v. Nocton* (1915) 1 Ch. 274.
 (*p*) *Eyles v. Ellis* (1827) 4 Bing. 112, 130 E. R. 710.
 (*q*) *Sweny v. Smith* (1869) 38 L. J. Ch. 446; *Manning v. Lunn* (1845) 2 Car. & Kir. 13.
 (*r*) *Scott v. Uxbridge and Rickmansworth Ry. Co.* (1866) 35 L. J. C. P. 293.
 (*s*) *Greenwood v. Sutcliffe* (1892) 1 Ch. 1.
 (*t*) *Kampla Prasad v. Ramsaransingh*, A. I. R. (1929) Nag. 123.

(*u*) *Sheonandan v. Kesho Prasad*, A. I. R. (1928) Pat. 63.
 (*v*) *Saroj Bandhu v. Mati Lal*, A. I. R. (1928) Cal. 112; *Bangshiram v. Prasannamoyi Debi* (1928) 55 Cal. 574.
 (*w*) *Bhome Lal v. W. A. Vincent*, A. I. R. (1922) Pat. 619.
 (*x*) *Bijoy Chand v. Khoka Sinha*, A. I. R. (1924) Cal. 1059.
 (*y*) *Sashi Mohan v. Meajan Haji*, A. I. R. (1926) Cal. 255.

obligation which imposes upon him the duty of going to the landlord for payment and paying him rent, imposes upon him the duty of taking to the landlord that which was equivalent to payment, viz., the receipt which he has received from the person to whom payment had been made (z). Rent is not a "debt" within the meaning of section 17 of the Succession Certificate Act and, therefore, no certificate of succession is necessary (a). Payment recorded in a Wajob-ul-arz as *muhtarifa* is rent and not cess (b). So also *chowkidari* tax payable by patnidar under *putni* settlement (c), but not land revenue as it does not spring from a contractual engagement (d). On eviction or expulsion of the lessee, the entire rent is suspended during the continuance of the eviction or expulsion, but the tenancy is not thereby determined, nor is the tenant discharged from his obligation to perform the covenant under the lease other than the covenant for payment of rent (e). Where eviction is from a part of the premises, the tenant by giving up possession of the residue, is entirely discharged. But if the tenant after eviction continues in possession of the residue, he may be liable upon a *quantum meruit* (f). Where eviction is under a superior title, for example, compulsory acquisition of land, the liability to pay rent is determined on yielding up the premises (g). So also where a stranger claiming under a title paramount evicts the lessee, the rent is suspended. Where plaintiff let furnished apartments to defendant for a year at a certain rent, but before the expiration of the term, the tenant left the premises and the landlord re-let the same to another, who quitted before the expiration of the original term of the former tenant, it was held that the landlord could not recover the balance of the rent due, as by re-letting the apartment to another he had put an end to the original contract (h). There is a suspension of rent if after making a lease, the landlord accepts a demise of part of the premises.

Apportionment of rent.—This takes place when there is a change in the interest of the person receiving rent, such that that interest ceases or is altered and another interest begins. It may take place on a transfer by the lessor to a third person, or where there are joint lessors, by a splitting up of the reversion (i).

How rent recovered.—Rent is recovered either by action or by distress. The latter remedy is under the Small Causes Courts Act.

Assignment of the rent.—Considered as a "debt" (j), rent may be assigned by the lessor, so that the assignee can sue for the recovery of the rent, even though he has no interest in the reversion (k).

Due payment, meaning of.—Usually the covenant for payment of rent requires the lessee to make "due payment." In a lease an option to purchase for a certain specified amount was reserved to the tenant on giving notice of intention to purchase the reversion as prescribed, "provided the lessee shall have duly paid the rent reserved and faithfully performed and observed the terms and conditions contained on the lessee's part to be performed and observed." The plaintiff did not pay the rent due in December 25, 1907, till January 10, 1908, and gave notice of intention to purchase on March 20, 1908. It was held that if "due payment "

(z) *Haldane v. Johnson* (1853) 8 Ex. 689, 155 E. R. 1529; *North London and General Property Co., Ltd., v. Moy, Ltd.* (1917) 2 K. B. 617.

(a) *Nagendar v. Satadal* (1899) 26 Cal. 536.

(b) *Muhammad v. Nathu* (1905) 27 All. 183.

(c) *Assanulla v. Tirthabashini* (1895) 22 Cal. 680.

(d) *Sheikh Gulam v. Kashinath* (1901) 25 Bom. 244.

(e) *Morrison v. Chadwick* (1849) 7 C. B. 266, 137 E. R. 107.

(f) *Stokes v. Cooper* (1814) 3 Camp. 514n; *Smith v. Raleigh* (1814) 3 Camp. 513 N. P.

(g) *Wainwright v. Ramsden* (1839) 5 M. & W. 602, 151 E. R. 255.

(h) *Walls v. Atcheson* (1826) 3 Bing. 462, 130 E. R. 591.

(i) See secs. 36 and 37 of the Act.

(j) *Knill v. Prowse* (1884) 33 W. R. 163.

(k) *Allan v. Bryan* (1826) 5 B. & C. 512, 108 E. R. 191.

S. 105

meant punctual payment, the lessee certainly could not say so, because one payment of rent had been allowed to fall for a few days into arrear, but that "duly" need not necessarily mean punctual and the lessee could say that since the commencement of the tenancy he had duly paid the rent reserved and that all the conditions precedent to the exercise of the option had in fact been performed (*l*). "Due performance" means performance in the popular sense rather than in the legal sense of the expression (*m*).

Limitation.—The limit of time for action is three years from the date the arrears of rent become due, the article of the Limitation Act of 1908 being 110; but where the claim is for compensation for wrongful use, the article is 115.

Different varieties of rent.—In popular language rent is consideration paid by a lessee to the lessor of immoveable property on the latter transferring the right to enjoy such property to the lessee. Besides this there are different varieties of rent known to English Law as rent service, rent charge, rent sick, rack rent, quit rent, gas rent, tithe rent-charge and rent having no money value.

Abatement of rent.—A tenant is not entitled to abatement of rent where the lease contains a clause precluding the tenant from claiming remission on any ground and the lessor from demanding anything in excess of the fixed rent (*n*). Nor is he entitled to abatement of the rent because the tenant has lost the property by inundation (*o*), nor for mere deterioration of the productive powers of the land unless there is a total loss by submergence (*p*). To succeed in obtaining an abatement of the rent on the ground of eviction by title paramount, the lessee must make out that he had to leave a part of the land demised, not only against his will but at the instance of the person who had a right to interfere with his possession, his title being superior to that of his lessor (*q*). Partial dispossession by landlord entitles the tenant to abatement and not suspension of the rent (*r*). But no claim to abatement is sustainable in respect of part of the land which at the date of the purchase was in possession of a trespasser, who afterwards was allowed to remain in possession, and thus acquired an absolute title against the purchaser of a perpetual tenancy. It is the duty of a tenant under a perpetual tenancy to protect himself against illegal encroachment (*s*). There would be an abatement of rent where the tenant had knowledge before he entered on the land, that a portion of it was in the possession of another (*t*). When a tenant claims variation of the amount of the rent, the onus is on him to prove why there has been a variation (*u*). Where a tenant has never been put in possession of the whole area but only of a portion thereof, the Court will fix a rate of rent for the area taken possession of. But where under circumstances over which the landlord had no control, the tenant had not been given possession of the whole area, then the rent will be in proportion to the area of the land of which the tenant obtained possession. But the landlord is not entitled, after dispossessing the tenant from a portion of the demised area, to sue for rent in respect of the whole or any portion thereof (*v*). Where rent is fixed not with reference to the actual measurement, but approximately for land within certain boundaries as defined, the tenant cannot claim reduction of rent, due

(*l*) *Starkey v. Barton* (1909) 1 Ch. 284.
 (*m*) *Bastin v. Bidwell* (1881) 18 Ch. D. 238.
 (*n*) *Dwijendra Nath Biswas v. Jitendra Nath Roy*, A. I. R. (1928) Cal. 419.
 (*o*) *Mahammad Ismail v. Suresh Chandra*, A. I. R. (1926) Cal. 946.
 (*p*) *Vishwanath v. Ramkrishna* (1926) 50 Bom. 94.
 (*q*) *Indu Bhusan v. Moazam Ali*, A. I. R. (1929) Cal. 272.
 (*r*) *Dwarkanath v. Srigobinda*, A. I. R. (1929)

Cal. 130.
 (*s*) *Katyayani v. Udoy Kumar* (1925) 52 Cal. 417, 52 I. A. 160; *Womesh Chunder v. Raj Narain Roy* (1868) 10 W. R. 15.
 (*t*) *Joyram Chandra v. Bisnu Charan*, A. I. R. (1925) Cal. 805.
 (*u*) *Nrisinha v. Batasi*, A. I. R. (1926) Cal. 106.
 (*v*) *Suresh Chandra v. Mathura Nath*, A. I. R. (1925) Cal. 1187.

to the area being found less than what is mentioned (*w*). In respect of excess land, the landlord is entitled to recover rent, in other words, an inquiry as to the exact area in the tenant's occupation and the rent recoverable in respect thereof for the years in suit will be made (*x*). Where no rent is fixed, it is an implied contract to pay reasonable rent (*y*). Rent is suspended when there is dispossession by the act of the landlord (*z*). A tenant is entitled to a proportionate abatement of rent, when dispossessed of a part of the property but he is liable to forfeit his claim by acquiescence and laches (*a*). When a reduction for rent is claimed by a tenant, he may insist on a measurement and an order must be made if a justifying case is made out (*b*).

Suspension of rent.—Technicalities of English Common Law as to the rule of suspension of rent should not be imported into this country, particularly in the mofussil, irrespective of a consideration whether the application of the rule would meet the ends of justice. The rule is to be applied in India as a rule of equity, justice and good conscience (*c*). Suspension of rent would be when a tenant is dispossessed of a part of the premises or has not obtained occupation of the whole (*d*). The basis of the doctrine is that the rent due is an entire sum (*e*), while the essential elements are, eviction in fact to which the lessor was a party and eviction with the object of depriving the tenant of peaceful enjoyment of any portion of the demised premises (*f*). The doctrine of suspension is applicable where the rent is fixed in lump for the whole land treated as an indivisible subject, and where the rent is fixed according to the area in the tenant's possession (*g*). The doctrine is not applicable where the eviction is accidental (*h*), nor because of a mistake of the landlord (*i*), as where through a *bona fide* mistake, he has omitted to put the tenant in possession of the entire land which being largely jungle, was little known (*j*); nor is it applicable where a trespasser is in possession of the land at the time of the demise (*k*).

Agreement to deliver agricultural produce over cash rent.—Under a registered *kabulat*, the tenants agreed to deliver certain agricultural produce and to supply the landlord with a cart and bullocks when necessary, in addition to money rent. It was stipulated that in default, the landlord might claim cash value for the said dues along with the rent. In a suit by the landlord to recover the cash equivalent of such dues, it was held that the covenant was unenforceable and that the various articles agreed to be supplied were not the produce of the fields, so that it could not be suggested that the contract was to pay a portion of the rent in cash and another portion in kind (*l*).

Premium.—This is the price paid or promised by the lessee as consideration for the transfer by the lessor. It differs from rent in that it is paid in one lump sum and is not periodical, like rent. It is known in Bombay as *pagdi*, which may be from lessee to the lessor or sub-lessee to the lessee. It is a payment in addition

- (*w*) *Abdul Mannap v. Sheikh Muslim*, A. I. R. (1925) Cal. 426.
 (*x*) *Manmatha Pal v. Surendra Nath*, A. I. R. (1925) Cal. 463.
 (*y*) *Ram Gobind v. Shahshi Sekhar*, A. I. R. (1925) Pat. 517.
 (*z*) *Joyram Chandra v. Bisnu Charan*, A. I. R. (1925) Cal. 805.
 (*a*) *Midnapore Zemindari Co., Ltd. v. Shib Narayan*, A. I. R. (1928) Cal. 137.
 (*b*) *Sivadas v. Birendra*, A. I. R. (1926) Cal. 672.
 (*c*) *Susil Kumar v. Rajani Kanta*, A. I. R. (1927) Cal. 737.
 (*d*) *Mahim Chandra v. Karmali*, A. I. R. (1921) Cal. 516; *Sajjad Ahmad v. Trailakhya*

- (1928) 55 Cal. 464.
 (*e*) *Abhaya Charan v. Hem Chandra*, A. I. R. (1929) Cal. 568.
 (*f*) *Tarap Sheikh v. Kunja Behari*, A. I. R. (1926) Cal. 1226.
 (*g*) *Tarap Sheikh v. Kunja Behari* (1925) 52 Cal. 417, 52 I. A. 160.
 (*h*) *Manik Chandra v. Hari Mustri*, A. I. R. (1926) Cal. 1148.
 (*i*) *Hiseswar Sarkar v. Kali Charan*, A. I. R. (1926) Cal. 908.
 (*j*) *Kalyani Debi v. Uday Kumar* (1922) 49 Cal. 257.
 (*k*) *Narendra v. Manindra* (1922) 49 Cal. 1019.
 (*l*) *Sis Ram v. Ashgar Ali* (1913) 35 All. 19.

S. 105

to the rent, by a trader to his landlord to prevent him from setting up a rival business or by a brewer agreeing to pay on obtaining a licence or by a lessee on obtaining a lease from the lessor, or by a sub-lessee from the lessee. A covenant by a lessee to discharge the lessor's liability in addition to payment of rent is not liable to stamp duty as a premium (*m*).

Covenants and their varieties.—Covenants are either express or implied. Express covenants which are sometimes described as covenants in deed, are covenants which are expressly created by words between the parties in a deed, declaratory of their intention. No precise or technical language is required, nor is the formal word "covenant" necessary (*n*). An express covenant may also be created by words which at the first view might appear to operate rather as conditions, qualifications or defeasances of covenants (*o*). Implied covenants which are known as covenants in law depend for their existence on the intentment and construction of the law. They are as effectually binding on the parties as if expressed in the most unequivocal terms. In construction, express covenants are regarded with greater strictness than those that are implied (*p*). Implied covenants do not extend to a thing not *in esse* at the time of the demise. Therefore, if A in consideration that B will build a mill upon the land and a water-course through the land, demises the land to B and afterwards stops the water-course, B for the above reason cannot maintain covenant against A (*q*). There are covenants which are conditional and dependent, in which the performance of one depends upon the prior performance of the other, so that till the prior condition be performed, the other party is not liable in an action on his covenant (*r*). Where there are mutual conditions to be performed at the same time, they are termed concurrent covenants. Another variety of covenants, known as mutual or independent, is where either party may recover damages from the other for the injury he may have received by a breach of the covenant in his favour and where there is no ground for the defendant to allege a breach of the covenant on the part of the plaintiff (*s*). The dependence or independence of covenants is to be collected from the evidence, sense and meaning of the parties and however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance (*t*). To discover the intention of the parties concerned is, therefore, the chief object. From the authorities the following four rules have been deduced. The first two relate to dependent and the other two to independent covenants.

(1) Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other (*u*).

(2) Where a day certain is appointed for payment, if the said day is to occur after the time in which the consideration ought to be performed for which the money is made payable, the performance of the consideration is a condition precedent to the payment of the money, and ought to be averred in an action brought for the money (*v*).

(3) Where mutual covenants go to a part only of the consideration on both sides, and where a breach may be paid for in damages, the defendant has a remedy on his covenant and shall not plead it as a condition precedent (*w*).

(*m*) *United Provinces Electric Supply Co., Ltd.*
In re (1934) 61 Cal. 556.
(*n*) Platt on Covenants, pp. 25 to 28.
(*o*) Platt on Covenants, p. 36.
(*p*) Platt on Covenants, p. 40.
(*q*) Platt on Covenants, p. 45.

(*r*) *Kingston v. Preston* (1781) 2 Dougl. 689.
(*s*) Platt on Covenants, pp. 70-71.
(*t*) Platt on Covenants, p. 79.
(*u*) Platt on Covenants, p. 80.
(*v*) Platt on Covenants, p. 83.
(*w*) Platt on Covenants, p. 90.

(4) If a day be appointed for payment of money and the day comes before the thing for which the money is to be paid can be done, then though the agreement be to pay the money for the doing of the thing, yet an action may be brought for the money before the thing is done, because the agreement is positive that the money shall be paid at the appointed time (x).

A covenant, when it relates to an act already done, is said to be executed. It is executory when the performance is future. Covenants may be framed in the alternative, giving the covenantor the choice of doing or the covenantee the choice of having performed one of two or more things at election. The rule in such cases is that the party for whose benefit the alternative arises, must do the first act by determining his election. Again, covenants are either affirmative, that something is already performed or shall be performed in the future, or in the negative, that the party has not performed or will not perform a certain act. A negative covenant cannot be said to be performed until it becomes impossible to break it. On this ground the Courts are unwilling to construe a negative covenant as a condition precedent (y).

Lease for an immoral object.—A lease of immovable property in which the consideration or object is unlawful is void (z). Hence where property is knowingly let to a prostitute for her business, the landlord cannot recover rent (a), unless accrued due before knowledge (b); nor can the landlord sue on breaches of covenants (c) nor the tenant insist upon the statutory notice to quit (d).

Restrictive user of premises.—Not seldom covenants are discovered in leases which restrain the lessee from permitting the premises to be put to particular uses or trades or restraining him from doing certain acts which he would otherwise have a right to do. They are generally to be met with in cases of public houses or in connection with a trade or business requiring a licence or adjoining houses or building leases. Such covenants are not usual (e) and when they have found their way in leases, they are known to run with the land though "assigns" be not named (f). They are of a continuing nature, being a new breach from day to day during the time the premises are used contrary to the covenant (g). Restrictive covenants restrict the enjoyment of land. When a person in possession of land binds himself to maintain a building or part thereof in a certain condition, he enters into an obligation restrictive of his full enjoyment of the land. It is not necessary that there should be an express negative covenant; a negative covenant may be implied (h). In the construction of such covenants due regard must be had to the business carried on at the time of the demise and the situation of the premises (i). Where a lease contained a covenant not to use the premises for the business of a butcher, baker, tobacco or sugar-merchant or for any offensive trade without licence of the lessor, it was held that it was no breach of the covenant to convert the premises into a private lunatic asylum (j). But the carrying on of a school for young ladies is a breach of the covenant not to carry on any "trade, business or

(x) Platt on Covenants, p. 95.

(y) Platt on Covenants, pp. 19-21.

(z) Sec. 23, the Indian Contract Act, IX of 1872.

(a) *Appleton v. Campbell* (1826) 2 C. & P. 347, N. P.; *Bani Mancharam v. Regina Stanger* (1908) 32 Bom. 581; *Choga Lal v. Piyari* (1909) 31 All. 58.

(b) *Crosse v. Murray* (1850) 15 L. T. O. S. 206.

(c) *Smith v. White* (1866) 35 L. J. Ch. 454.

(d) *Rugby School (Governors) v. Tannahill* (1934) 151 L. T. 177.

(e) *Propert v. Parker* (1832) 3 My. & K. 280, 40 E. R. 107.

(f) *Wilkinson v. Rogers* (1864) 9 L. T. 434.

(g) *Doe d Ambler v. Woodbridge* (1829) 9 B. & C. 376, 109 E. R. 140.

(h) *Abbey v. Gutteres* (1911) 55 So. Jo. 364.

(i) *Gutteridge v. Munyard* (1834) as reported in 7 C. P. 129 N. P.

(j) *Doe d Wetherell v. Bird* (1834) 2 Ad. & El. 161, 111 E. R. 63.

S. 105

calling" (*k*). So a hospital, where patients made small payments according to their means, was held to be a "business" (*l*). It is, however, not essential that there should be payment in order to constitute a business; nor does the payment necessarily make that business, which without payment would not be a business (*m*). So it is a breach of a restrictive covenant as to user to let a part of a private dwelling-house for advertisement posters (*n*) or converting residential flats into a hotel (*o*). In construing such covenants a "screen" of open trellis work has been held to be a building (*p*). The taking in of paying-guests to meet rents and outgoings is a breach of the covenant against using premises for the purpose of trade or business and using them otherwise than as a private dwelling-house (*q*).

A covenant against the use of premises for noisome or offensive trades is not broken by depositing large quantities of lucifer matches (*r*). But the carrying on of a tannery business (*s*) or a hospital (*t*) are breaches of covenant against carrying on noxious trades. In the case of hospitals and homes for invalids, in order to enforce such a covenant, it is not necessary to shew damage or pecuniary loss. It is sufficient, without proving actual risk of infection, that sensible people feel a reasonable apprehension of risk and interference with the pleasurable enjoyment of their house for ordinary purposes, as distinguished from a more fanciful feeling of taste entertained by sensitive persons. Amongst the usual restrictive covenants, is a covenant not to build and to keep open to the sky unbuilt upon and unobstructed, a stipulated strip of land; such a covenant is deemed to have been broken by the erection of a boundary wall or wooden boards for advertisement purposes (*u*). Such covenants are mainly entered into for the purpose that the lessee's elevation shall correspond with the adjoining houses and equity will enforce such a covenant (*v*). A covenant not to let premises as "a motor garage and office" is not broken by temporary storage of motor cars (*w*). The lessee of a person bound by restrictive covenants can be sued whether assigns are mentioned in the covenant or not (*x*). Again, structural alterations enhancing the risk of insurance would be a breach of a covenant restraining alteration (*y*). Often restrictive covenants are met with for the protection of adjoining premises. The word "adjoining" has been construed to mean not only premises in physical proximity but has also been applied to a range of buildings belonging to the same owner and forming a block. But if there be an intermediate building belonging to another owner, such a building is destructive of the phrase "adjoining buildings" (*z*). A restrictive covenant as to letting or user of property, will be construed strictly and not so as to create a wider obligation than is imported by actual words (*a*). A covenant restrained the lessee from doing anything which might become a nuisance to adjoining tenants and also from using the premises for propagandist purposes; the lease gave a power

(*k*) *Kemp v. Sober* (1852) 19 L. T. O. S. 308;
Wickenden v. Webster (1856) 25 L. J. Q. B.
 264, 119 E. R. 909.
 (*l*) *Bramwell v. Lacy* (1879) 10 Ch. D. 691.
 (*m*) *Rolls v. Miller* (1884) 27 Ch. D. 71.
 (*n*) *Rubbs v. Esser* (1909) 26 T. L. R. 145;
Pocock v. Gilham (1863) C. & E. 104.
 (*o*) *Alexander v. Mansions Proprietary, Ltd.*
 (1900) 16 T. L. R. 431.
 (*p*) *Wood v. Cooper* (1894) 3 Ch. 671.
 (*q*) *Thorn v. Madden* (1925) Ch. 1847.
 (*r*) *Hickman v. Isaacs* (1861) 4 L. T. 285.
 (*s*) *Reeves v. Greenwich Tanning Co., Ltd.* (1864)
 2 Hem. & M. 54, 71 E. R. 380.
 (*t*) *Bramwell v. Lacy* (1879) 10 Ch. D. 691;
Heatly v. Benham (1888) 40 Ch. D. 80.
 (*u*) *Pocock v. Gilham* (1883) 1 Cab. & E. 104.
 (*v*) *Frankly v. Tuton* (1821) 5 Mad. 469, 56

E. R. 975.
 (*w*) *Derby Motorcab Co. v. Crompton and Evans*
Union Co., Ltd., and Guest (1915) 31 T. L. R.
 185.
 (*x*) *Holloway Brother, Ltd. v. Hill* (1902) 2 Ch.
 612, *Brigg v. Thornton* (1904) 1 Ch. 386.
 (*y*) *British Emporium Mutual Life Insurance*
Co. v. Cooper (1888) 4 T. L. R. 362.
 (*z*) *Buckell v. King and Koral* (1895) 40 So. Jo.
 50; *Cave v. Horsell* (1912) 3 K. B. 533;
Vale and Sons v. Moorgate Street and
Broad Street Building, Ltd., Baker (Albert)
& Co., Ltd. (1899) 80 L. T. 487; *Derby*
Motor Car Co. v. Crompton and Evans
Union Bank (1913) 29 T. L. R. 673.
 (*a*) *Briggs v. Thornton* (1904) 1 Ch. 386; *Spicer*
v. Martin (1888) 14 A. C. 12; *Spencer v.*
Bailey (1893) 69 L. T. 179.

of re-entry for non-payment of rent only. The plaintiff committed a breach of his covenant and also sent to British trade unions a circular inciting revolution, and thereupon the defendant re-entered and locked him out. In an action for injunction to restrain defendants from interfering with plaintiffs' (lessees') occupation of the premises, it was held that in the circumstances, the plaintiff was not entitled to equitable relief and the action must be dismissed (b). Like any other covenant a restrictive covenant may be waived expressly or impliedly or relaxed. The remedy of the lessor for breach would be damages or injunction unless there be a forfeiture clause. Where the lessee who had entered into a restrictive covenant as to user had under-let and the under-lessee with his consent committed a breach, the latter was a necessary party to the suit (c).

Covenants running with the land.—Covenants may be sub-divided into real and personal, the principal difference being that the former may run with the land, while the latter never can. As distinguished from a real covenant, a personal covenant binds the covenantor during life, and on his death his assets. It may also be personal in the sense that it is to be performed personally by the covenantor only (d). Real covenants are again sub-divided into covenants which run with the land and those which run with the reversion. The former class of covenants bind the lessee and his assigns and the latter bind the lessor and his assigns, as they touch the reversion. As to covenants running with the land, these are again divided into two groups, those which touch and concern things *in esse* and thus bind assigns, whether named or not named, and those which extend to things not *in esse* at the time of the demise, in which case assigns are bound if named, unless the thing to be done is merely collateral to the land and does not concern the thing demised (e). A covenant is collateral which does not at all relate to the thing granted, such as to build a house on another man's ground or that the lessor will distrain for rent on land other than that demised. Whenever covenants tend to the support and maintenance of the thing demised, such as that the premises shall be quietly enjoyed or kept in reparation or that the party shall pay rent and shall not cut down timber, trees or do waste, they are said to be inherent and necessarily run with the land (f). So do covenants implied in law (g). No branch of the law of transfer is so complete as this. The safest way is to add "assign" as included in the expression covenantor. The true principle is that no covenant or condition which affects merely the person and which does not affect the nature, quality or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land (h). To make it run with the land there must be privity of estate between the contracting parties (i). A covenant in a lease, that the lessor and his assigns will not erect or permit to be erected any building, in front of the building lying on the land adjoining the demised premises, touches the thing demised and, therefore, runs with the land (j).

The following have been held to be covenants running with the land:—For further assurance (k); covenant to insure containing a stipulation to employ the moneys in rebuilding or repairing (l); not to assign, under-let or otherwise part

- (b) *Litvinoff v. Kent* (1918) 34 T. L. R. 298.
 (c) *Mitchell v. Steward* (1866) 35 L. J. Ch. 393;
Abbey v. Gutteres (1911) 55 So. Jo. 364.
 (d) *Platt on Covenants*, pp. 67, 69.
 (e) *Spencer's Case* (1583) 5 Co. Rep. 16a., 77
 E. R. 72.
 (f) *Platt on Covenants*, p. 66, 69; *Easterly v. Sampson* (1830) 6 Bing. 644, 130 E. R. 1429.
 (g) *Spencer's Case* (1583) 5 Co. Rep. 16a., 77

- E. R. 72.
 (h) *Horsey Estate, Ltd. v. Steiger* (1899) 2 Q. B. 79.
 (i) *Platt on Covenants*, p. 461; *Webb v. Russell* (1789) 3 T. R. 402, 100 E. R. 639.
 (j) *Ricketts v. Enfield (Churchwardens)* (1909) 1 Ch. 544.
 (k) *Middlemore v. Goodhall* (1638) Cro. Cas. 503.
 (l) *Vernon v. Smith* (1821) 5 B. & Ald. 1, 106 E. R. 1094.

S. 105

with possession of the demised premises without the licence of the lessor (*m*); covenants for title (*n*); for quiet enjoyment (*o*); to erect a house or to build a wall on the demised premises (*p*); or for renewal of the lease (*q*); to repair (*r*); to pay rent (*s*); but not when rent is paid by way of service (*t*); nor where it relates to incorporeal hereditaments (*u*). Covenants to reside upon the demised premises during the demise (*v*), not to carry on certain specified trade (*w*).

General principles relating to covenants.—The following principles are deducible from *Spencer's* case in which a lessee covenanted for himself, his executors and administrators that he, his executors, or assigns would build a brick-wall upon part of the land demised. It was held that if the lessee assigned his term, such a covenant did not bind the assignee and the following rules were laid down:—

- (1) Where a covenant extends to a thing *in esse*, parcel of the demise, it shall go with the land and bind the assignee although he be not bound by express words.
- (2) Where the covenant extends to a thing which is not in being at the time of the demise, it cannot be appurtenant to the thing and shall bind the covenantor, his executor and administrators and not the assignee.
- (3) If the lessee covenanted for himself and assigns to make a new wall or the thing demised, the assignee would be bound, for although the covenant extends to a thing to be newly made, yet it is to be made upon the thing demised and the assignee to take the benefit of it.
- (4) But if a covenant by the lessee and his assigns relates to a thing merely collateral to the land and does not touch or concern the thing demised, the assignee shall not be charged, for example, the lessee covenanting for himself and assigns to build a house upon the land of the lessor which is not parcel of the demise, the covenant shall not bind the assignee.
- (5) If a man leases personal goods and the lessee covenants for himself and his assigns at the end of the time to deliver the same in as good right, etc., such covenant is but a personal contract and does not bind the assignees.
- (6) If a lessee for years covenants to repair the house during the term, it runs with the land and binds all others in whose hands the term shall come.
- (7) The assignee of the assignee has an action on the covenant; so the executor of the assignee of the assignee; so also the assignee of the executor or administrator of every assignee (*x*).

Covenant for renewal.—This is an option granted by the lessor to the lessee for a further term. The lessee has upon the expiration of the term under such a covenant, a right to demand a lease for a further term, subject to the stipulation arrived at between the parties, including or excepting the clause for renewal according to stipulation. It must express whether the right is optional or compulsory.

- (*m*) *Williams v. Earl* (1868) 3 Q. B. 739; *McEacharn v. Colton* (1902) A. C. 104; *Goldstein v. Sanders* (1915) 1 Ch. 549.
 (*n*) *Middlemore v. Goodhall* (1638) Cro. Cas. 503.
 (*o*) *Campbell v. Lewis* (1820) 3 B. & Ald. 392, 106 E. R. 706; *Manchester Sheffield Lincolnshire Rly. Co. v. Anderson* (1898) 2 Ch. 394.
 (*p*) *Spencer's Case* (1583) 5 Co. Rep. 16a., 77 E. R. 72.
 (*q*) *Roe d. Bamford v. Hayley* (1810) 12 East. 464, 104 E. R. 181.
 (*r*) *Martyb v. Clue* (1852) 18 Q. B. 661; *Spencer's*

- Case* (1583) 5 Co. Rep. 16a., 77 E. R. 72.
 (*s*) *Parker v. Webb* (1693) 3 Salk. 5, 90 E. R. 939.
 (*t*) *Keppell v. Bailey* (1834) 2 My. & K. 517, 39 E. R. 1042.
 (*u*) *Windsor (Dean and Chapter) v. Gover* (1671) 2 Saund. 302; 85 E. R. 1096.
 (*v*) *Tatem v. Chaplin* (1793) 2 Hy. Bl. 133, 126 E. R. 470.
 (*w*) *Hodson v. Coppard* (1860) 29 Beav. 4, 54 E. R. 525; *Collins v. Plum* (1810) 16 Ves. 454, 33 E. R. 1057.
 (*x*) *Spencer's Case* (1583) 5 Co. Rep. 16a., 77 E. R. 72.

A covenant for renewal runs with the land (y). It is not a usual covenant. It also runs with the reversion (z). In the absence of express stipulation by whom it is exercisable and the terms on which it is to be granted, the right rests with the lessee to obtain a renewal on the same terms as the original lease, excepting the covenant for renewal (a). The Courts construe the covenant strictly against the lessee (b). A clause in a lease that at the end of the term the lessor shall at the request of the lessee, grant a new lease on the like terms with all covenants and conditions as in the present lease, would not include a covenant for renewal, so as to make the lease perpetual, it being established that the words "under the same rents and covenants" or "in the same form" are not sufficient to include a covenant for renewal (c). Although a covenant by which a lessee has an option to purchase is void, when unlimited as to time as being repugnant to the rule against perpetuities, the option of renewal is outside the rule even though the terms of the new lease are not the same (d). The option for renewal is assignable in equity, though no mention is made of executors, administrators or assigns (e). Persons having a qualified interest renew only for the benefit of those who are entitled to the lease—a trustee holds for the benefit of his *cestui que trust*, an executor for the estate and even a stranger interfering in an estate would be likewise liable. Where a mortgagee obtains a renewal, the mortgagor on redemption is entitled to the benefit of it (f), and in case of renewal by a mortgagor, the new lease would be for the benefit of the mortgagee as being a graft on the old one (g). Similarly, in cases of partners and those having a joint interest, the individual renewing is a trustee for the others (h). The assignee of the lessee is entitled to enforce it (i). Should the assignee of the reversion refuse to renew, the lessee may sue the original lessor or his assignee at his option or both at the same time (j) unless the lessee has released or discharged the original lessor from liability. Not only therefore, an assignee (k), but even the representative of a lessee is entitled to the benefit of it (l); but an assignee of an undivided share may not maintain an action for a breach in respect of that share, for the renewal covenant cannot be broken up (m). The contrary view based on *Simpson v. Clayton* (n) is erroneous. It is doubtful, where a reversion becomes vested in two individuals and the lessee on a refusal by them to renew, accepts from one a fresh lease of a moiety, whether such conduct would amount to abandonment of his right to demand a renewal of the other moiety (o). A mortgagee cannot claim a renewal where the renewal clause is not assigned to him (p). A covenant for renewal by a minor is void (q). On bankruptcy it passes from the assignee to the purchaser (r). It is usual to stipulate for what term the renewal shall be granted. It may be a perpetual renewal, yet if it is not expressed so, nor are there any general words such as "from time to time" from which such

- (y) *Roe d Bamford v. Hayley* (1810) 12 East 464, 104 E. R. 181.
 (z) *Muller v. Trafford* (1901) 1 Ch. 54.
 (a) *Secretary of State for India v. Forbes* (1912) 16 C. L. J. 217.
 (b) *Baynham v. Guy's Hospital* (1796) 3 Ves. 295, 30 E. R. 1019; *Eaton v. Lyon* (1798) 3 Ves. 690, 30 E. R. 1223.
 (c) *Iggulden v. May* (1804) 2 New. Rep. 452, 127 E. R. 703.
 (d) *Rider v. Ford* (1923) 1 Ch. 541.
 (e) *Tolhurst v. Associated Portland Cement Manufacturers and Imperial Portland Cement Co.* (1903) A. C. 414.
 (f) Sec. 64, Transfer of Property Act, IV of 1882.
 (g) Sec. 71, Transfer of Property Act, IV of 1882.
 (h) *Platt on Leases*, Vol. 1, pp. 762 to 764.
 (i) *Nava Kishore Das v. Madan Mohan Das*,

- A. I. R. (1924) Cal. 346; *Onkar Prasad v. Badri Das* (1925) 23 Nag. L. R. 26.
 (j) *Platt on Leases*, Vol. 1, p. 732.
 (k) *Nava Kishore v. Madan Mohan*, A. I. R. (1924) Cal. 346.
 (l) *Hyde v. Skinner* (1723) 2 P. Wms. 196, 24 E. R. 697.
 (m) *Secretary of State for India v. Volkart Bros.* (1928) 51 Mad. 885, 55 I. A. 423; *Jogesh Chandra Roy v. Ananda Chandra Chaudhury* (1926) 53 Cal. 590.
 (n) (1838) 4 Bing. N. C. 758; 132 E. R. 981.
 (o) *Platt on Leases*, Vol. 1, p. 760.
 (p) *Benoy Krishna v. Fanindra Nath Roy*, A. I. R. (1927) Cal. 100.
 (q) *Indian Cotton Co. v. Ragunath* (1931) 33 Bom. L. R. 111.
 (r) *Buckland v. Papillon* (1866) 2 Ch. App. 67.

S. 105

an intention can be collected, a perpetual renewal cannot be decreed (*s*). The fact of repeated renewals is not a guide that a perpetual renewal was intended (*t*). The Court leans against a perpetual renewal (*u*). A perpetual right of renewal is repugnant to a strict tenancy from year to year unless the contract shews otherwise (*v*). There is no legal presumption against a right of perpetual renewal but the burden of proof is on the one claiming such a right, which will not be inferred by equivocal expressions, fairly capable of another construction (*w*). The following phrases in a lease have been construed to confer a perpetual right of renewal:—“at any time when requested” (*x*); covenant “to renew at the end of every 11 years” (*y*); “including the present covenant” (*z*); but not the phrase “from time to time renew” (*a*); nor an agreement to pay a sum upon renewal (*b*); where the option is of a “lease” (*c*); where the renewal clause mentions the stipulations on which the new lease is to be granted except the clause for renewal, the lessee is entitled to only one renewal. On breach of covenant for renewal, the lessee is entitled to specific performance unless the covenant is vague (*d*).

A lease dated 12th June 1912, for 21 years contained a proviso to determine the tenancy at the end of the first 7 years or 14 years by either party giving to the other six months' previous notice in writing, expiring at the end of 7 or 14 years, with a proviso for renewal if the lessee should give six months' notice to the lessor prior to the expiration of the term of 21 years for a term of 7 years commencing on March 25, 1931. In 1922 the freehold reversion became vested in the plaintiff. By a notice on 20th August, 1923, defendant gave notice to take a further lease. The plaintiff declined and gave notice to determine the tenancy as from 25th March 1924. Held, that there was a blunder in the drafting of the two last clauses, for the lessee by giving a notice requiring a grant of a further lease, could not prevent the lessor or himself from determining the lease at the end of the first 7 or 14 years and that the tenancy had determined (*e*). It is usual to provide in the renewal clause that the lessee shall be entitled to the further term, if he has performed the several stipulations contained and on his part to be observed upto the termination of the tenancy, so that if he has committed any breaches of covenant, he forfeits his right to exercise the option (*f*), but not if there be no subsisting breach at the time of renewal, though there may have been breaches during the term (*g*).

A covenant for renewal is not capable of being broken up.—In 1914 the respondents in whom the lease was vested, having sold a portion of 1.10 acres out of a total acreage of 4.34, the Privy Council held that upon a true construction of the covenant, respondents were not entitled to a renewal of the portion left with them (*h*). In the Courts below reliance was placed on *Simpson v. Clayton* (*i*) which, however, proceeded on a different ground. In a Calcutta case the Collector representing the Court of Wards granted a six years' lease to one M. with a proviso for renewal.

- (*s*) Platt on Covenants, p. 236; *Secretary of State for India v. Forbes* (1912) 16 C. L. J. 217.
 (*t*) Platt on Covenants, p. 241; *Cooke v. Booth* (1778) 2 Cowp. 819, 98 E. R. 1380; *A. G. v. St. John's Hospital, Bath* (1865) 1 Ch. App. 92.
 (*u*) *Baynham v. Guy's Hospital* (1796) 3 Ves. 295; 30 E. R. 101.
 (*v*) *Gray v. Spyer* (1922) 2 Ch. 22.
 (*w*) *Swinburne v. Milburn* (1884) 9 A. C. 844.
 (*x*) *Cooper Mining Co. v. Beach* (1823) 13 Beav. 478, 51 E. R. 184.
 (*y*) *Wynn v. Convoy Corporation* (1914) 2 Ch. 705.
 (*z*) *Hare v. Burges* (1857) 27 L. J. Ch. 86, 70 E. R. 19.

- (*a*) *Browne v. Tighe* (1834) 2 Cl. & Fin. 396, 5 E. R. 944.
 (*b*) *Smyth v. Nangle* (1840) 7 Cl. & Fin. 405, 7 E. R. 1124.
 (*c*) *Hyde v. Skinner* (1723) 2 P. Wms. 196, 24 E. R. 687.
 (*d*) *Nava Kishore v. Madan Mohan*, A. I. R. (1924) Cal. 346.
 (*e*) *Stewart v. Massett* (1924) 69 So. Jo. 72.
 (*f*) *Greville v. Parker* (1910) A. C. 335; *Bastin v. Bidwell* (1881) 18 Ch. D. 238.
 (*g*) *Onkar Prasad v. Badri Das* (1925) 23 Nag. L. R. 26.
 (*h*) *Secretary of State for India v. Volkart Bros.* (1928) 51 Mad. 885.
 (*i*) (1838) 4 Bing. N. C. 758, 132 E. R. 981, 55 I. A. 423.

The lease on the expiry of six years was not renewed and it was held that the heirs of the original lessee who continued to be in possession were not entitled to a renewal (j).

Notice of intention to renew.—The option is usually exercised by notice in writing given to the lessee by the lessor. The time within which application for renewal must be made is of the essence of the contract, so that if the lessee is guilty of laches, he will not be entitled to renewal (k). Even an informal notice is sufficient (l). It is usually provided that notice of intention to renew must be given before the end of the term. Gross laches will not be relieved in equity and so also in cases of wilful ignorance or avoidable accident (m). Is it necessary to demand a renewal and obtain a fresh lease or does further continuance in possession by the lessee entitle him to claim a new lease? The question came up before the Patna High Court where it was held, that the lessee being in possession, no fresh lease was necessary, and he could enforce specific performance of the agreement to execute a fresh lease, the position of the lessee who was already in possession, being as if a fresh document had been executed (n). It is, however, respectfully submitted that the lessee should apply for a renewal unless prevented by fraud, surprise or ignorance not wilful, for if the lessee could have relief, it would amount to this, that the lessee is let loose and the lessor continues to be bound, for if the contract were to continue executory, the lessor will not have the benefit of that in consideration of which, he stipulated to grant a renewal (o). If a tenant has been guilty of gross laches in demanding a renewal or tendering a lease for the lessor's execution, equity will not aid such lessee (p).

Form of covenant for renewal.—"If the tenant shall be desirous of continuing the tenancy hereby created for a further term of years at the expiration of the term hereby granted and shall on or before the day of give to the landlord or leave at or post to his usual or last known address in a notice in writing of such his desire and shall pay the rent hereby reserved and perform the several stipulations herein contained and on his part to be observed up to the termination of the tenancy hereby created then the landlord will let the said premises to the tenant for the further term of years from the day of at the same rent as is herein reserved (or at the increased rent of Rs. and subject in all (other) respects to the same stipulations as are herein contained (except or including as the case may be) this clause for renewal" (q).

Usual covenants.—Parties entering into a lease usually stipulate the terms to be embodied in the more formal lease in the agreement for lease. Or, if desirous of avoiding delay, they stipulate that the lease shall contain usual covenants. The draftsman has no difficulty when the terms are previously settled, but when the terms are not settled, it gives rise to disputes and consequent litigation, for it often becomes the subject of controversy between the parties and their legal advisers as to what covenants could be included in the phrase "usual covenants." Usual covenants do not mean covenants generally inserted but such as may be insisted upon independently of stipulations such as are incidental to the nature of the contract and presumably, therefore, in the contemplation of both the parties

(j) *Jogesh Chandra Roy v. Annada Charan* (1926) 53 Cal. 590.

(k) *Jogesh Chandra Roy v. Annada Charan*, (1926) 53 Cal. 590.

(l) *Nicholson v. Smith* (1882) 22 Ch. D. 640.

(m) *Harries v. Bryant* (1827) 4 Russ. 89, 38 E. R. 738.

(n) *Mohit Narayan v. Kamal Nath*, A. I. R. (1923) Patna 236.

(o) *Platt on Leases*, Vol. 1 p. 758.

(p) *Eaton v. Lyon* (1798) 3 Ves. 690, 30 E. R. 1223; *Platt on Covenants*, p. 258.

(q) *Encyclopædia of Forms*, 2nd Ed. Vol. 8, p. 191.

S. 105 to that contract ; and such as are calculated to secure the full effect of the contract (*r*). It is also expressed as “ none but fair and usual covenants ” or “ with all usual and reasonable covenants commonly inserted in leases of the same nature ” (*s*). The phrase “ usual covenants ” in an agreement touching a lease, may be explained by reference to the nature of the premises (*t*) and the general practice with conveyances. It was observed by Jesseel, M. R., that usual covenants may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind. What is well known at one time may not be well known at another time, so that you cannot say that usual covenants never change (*u*). Cases on the subject commence with *Church v. Brown* (*v*). It must not be supposed that most of the clauses appearing in a lease are usual within the legal acceptance of the term “ usual covenants.” Only those covenants are usual which find their way into every lease and which by common consent are essential to perfect the contract. The result of the authorities appears to be that where the agreement is silent and provides merely for the lease containing usual covenants or is an open agreement, without any reference to covenants and there are no special circumstances justifying the introduction of other covenants, the following are the only clauses which either party can insist upon, viz. :—

Covenant by the lessee.—To pay rent (*w*), to pay taxes except such as are expressly payable by the landlord (*x*), to keep and deliver up the premises in repair (*y*), to allow the lessor to enter and view the state of repairs, clause for re-entry in default of payment of rent (*z*), and the usual qualified covenant by the lessor for quiet enjoyment by the lessee (*a*).

The following are usual covenants.—To insure ; not to carry on a particular trade without the licence of the lessor (*b*) ; in restraint of trade in a trading locality (*c*) or against particular trades (*d*). If the premises be blown down or burnt by fire, the lessor shall repair and rebuild and in default the lessee shall be at liberty to quit the premises and be forthwith discharged from the payment of rent (*e*). Against assignment without licence of lessor is not a usual covenant (*f*), even though the subject-matter of the lease be a public house (*g*). To reside on the premises and personally conduct the business (*h*), for re-entry otherwise than on payment of rent (*i*). The power of re-entry if the lessee or his assigns become bankrupt or make composition with his creditors (*j*) are not usual. To pay rates and taxes is usual only if they have occurred in previous cases (*k*). An affirmative covenant to carry on a particular business is not usual (*l*). An agreement to let, with liberty to build erections necessary for carrying on the business of a glass

(*r*) *Wilkins v. Fry* (1816) 1 Mer. 263, 35 E. R. 665; *Jones v. Jones* (1803) 12 Ves. 186, 33 E. R. 71.

(*s*) Platt on Covenants, pp. 430, 432.

(*t*) *Bennet v. Womack* (1828) 7 B. & C. 627, 108 E. R. 856.

(*u*) *Hampshire v. Wickens* (1878) 7 Ch. D. 555.

(*v*) (1808) 15 Ves. 258, 33 E. R. 752.

(*w*) *Taylor v. Horde* (1756) 1 Burr. 60.

(*x*) *Doe d Dymoke v. Withers* (1831) 2 B. & Ad. 896, 109 E. R. 1375.

(*y*) *Blakesley v. Whieldon* (1841) 1 Hare. 176, 66 E. R. 996.

(*z*) Davidson Precedents in Conveyancing 3rd Ed., Vol. 5, Part 1, pp. 51-53.

(*a*) *Hall v. City of London Brewery Co.* (1862) 31 L. J. Q. B. 257.

(*b*) *Propert v. Parker* (1832) 3 My. & K. 280, 40 E. R. 107.

(*c*) *Wilbraham v. Livesey* 18 Beav. 206, 52 E. R. 81.

(*d*) *Propert v. Parker* (1832) 3 My. & K. 280, 40 E. R. 107.

(*e*) *Doe d Ellis and Medwin v. Sandham* (1787) 1 T. R. 705, 99 E. R. 1332.

(*f*) *Hampshire v. Wickens* (1878) 7 Ch. D. 555; *Bishop v. Taylor & Co.* (1891) 60 L. J. Q. B. 556; *De Soysa v. De Pless Pol* (1912) A. C. 194; *Church v. Brown* (1808) 15 Ves. 258, 33 E. R. 752.

(*g*) *In re Lander and Bagley's Contract* (1892) 3 Ch. 41.

(*h*) *In re Lander and Bagley's Contract* (1892) 3 Ch. 41.

(*i*) *In re Lander and Bagley's Contract* (1892) 3 Ch. 41; *Hodgkinson v. Crow* (1875) 10 Ch. 622 (case of a mining lease).

(*j*) *Hyde v. Warden* (1877) 3 Ex. D. 372.

(*k*) *Canadian Pacific Railway Co. v. Toronto Corporation* (1905) A. C. 33.

(*l*) *Doe d. Bale (Marquis) v. Guest* (1846) 15 M. & W. 160, 153 E. R. 804.

manufactory, did not warrant that the lessee could carry on the business of a glass Ss. 105-106 manufactory during the term.

Usual covenants in an under-lease.—The tenant is entitled to an under-lease containing the usual covenants only and is not bound to accept an under-lease subject to unusual covenants which may be contained in the head-lease (*m*).

Attornment.—This is an act of a tenant whereby he puts one person in the place of another as his landlord. The tenant who has attorned, continues to hold upon the same terms as he held of his former landlord (*n*). The application for a new lease, payment of rent are acts of attornment. An attornment of a tenant to a receiver appointed to collect rents and payment of rent to him, creates a tenancy by estoppel between the tenant and the receiver but not so as to enable the person entitled to the land to treat the tenant as his tenant and to distrain for rent (*o*).

Specific performance of contract to lease.—See section 27A of the Specific Relief Act, 1877. This section applies to contract to lease executed after the 1st day of April 1930.

Distress.—The remedy by distress is open to a lessor for recovery of rent but there can be no distress in case of incorporeal hereditaments, as no rent issues out of it (*p*) though a demise of incorporeal hereditaments can be made. The remedy by distress is under the Presidency Small Causes Courts Act (*q*).

Statement in a will of the nature of tenancy.—The nature of tenancy mentioned in a will may be regarded as a statement made in course of a transaction by which a certain property was bequeathed to a legatee under the will and consequently the statement made in the will may be taken as evidence under section 13 of the Indian Evidence Act (*r*).

Costs.—In English Law, in the absence of a contract to the contrary, the lessee bears the costs of the lessor and the same rule applies to us, so that a lessor should not be content with stamp duty as provided in section 29 of the Stamp Act.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Duration of certain leases in absence of written contract or local usage.

(*m*) *Melzak v. Lilienfeld* (1926) 1 Ch. 480; *Reeve v. Berridge* (1888) 20 Q. B. D. 523; *Hyde v. Warden* (1878) 3 Ex. D. 72.
(*n*) *Cornish v. Searell* (1828) 8 B. & C. 471, 108 E. R. 1118.
(*o*) *Evans v. Mathias* (1857) 26 L. J. Q. B. 309,

119 E. R. 1364.
(*p*) *Gardiner v. Williamson* (1831) 2 B. & Ad. 336, 109 E. R. 1108.
(*q*) XV of 1882, Ch. 8.
(*r*) *Pramatha Nath v. Chanpa Dasi* (1929) 58 Cal. 275.

S. 106

Every notice under this section must be in writing signed by or on behalf of the person giving it, and *either be sent by post to the party* who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Changes in the section.—By section 54 of the Amending Act (s), service by post of a notice to quit has been made effective, so as to bind the party to whom it is addressed. The English Law is followed here (t).

Agricultural leases.—Leases for agricultural purposes have by section 117 been exempted from the operation of the provisions of this chapter, so that the presumption in cases of leases for agricultural purposes would not apply merely on the ground that such presumption has found a place in the statute (u).

Contract to the contrary.—It is open to the parties to contract themselves out of the provisions of this section and to make a valid contract between themselves as regards duration of their lease and the manner of terminating the same. Even the length of notice or the calendar according to which the same is to be computed, may be the subject-matter of contract between the parties. The calendar may be the Gregorian or any other which the parties may choose to adopt and the date of commencement of the letting need not be the first day of a month. The letting may be by express contract or by implication arising from conduct or dealing. The parties may stipulate for surrender of the premises on demand. When the term is fixed, the section *does not apply* on its determination (v); nor to a tenancy which commenced before the Act (w).

Local custom or usage to the contrary.—The usage in many of the provinces in India is to give a month's notice expiring at the end of a month of the tenancy (x).

Recognition of tenancy.—Receipt of rents constitutes tenancy requiring to be determined by notice or otherwise, before such parties can be treated as trespassers (y). A tenancy can be proved by documentary or oral evidence (z). Where on payment of *nazarana* the lessee is allowed to build, the lease would be regarded as a building lease of a permanent tenure (z¹).

The rule in section 106.—The rule in this section prescribes how a tenancy is to be determined. There are two varieties recognized, the monthly and the yearly. The rule was strictly enforced where a landlord gave a month's notice to a tenant, holding over under a manufacturing lease in spite of his admission that he was a monthly tenant. There was no estoppel as the facts affecting the tenancy were known to both parties (a). Where the Bengali calendar is used, the six months' notice required should expire with the end of the Bengali year (b). Where no period

(s) Transfer of Property Amendment Act, XX of 1929.
 (t) See also *Harihar v. Ramshashi Roy* (1919) 46 Cal. 458.
 (u) *Cheekati Zamindar v. Ranasooru* (1900) 23 Mad. 318.
 (v) *Bishen Sarup v. Abdul Samad*, A. I. R. (1931) All. 649.
 (w) *Debendra Nath v. Pashupati* (1931) 35 C. W. N. 1047.
 (x) *Bhijabhai v. Hayem* (1898) 22 Bom. 754.
 (y) *Sonet Koer v. Himmot Bahadoor* (1874) 1

Cal. 391, 2 I. A. 92.
 (z) *Sundar Ali v. Nur Mamud* (1934) 60 C. L. J. 225.
 (z¹) *Gur Din v. Badri* (1937) 12 Luck. 516.
 (a) *Jack & Co. v. Joosab Mahomed* (1924) 48 Bom. 38.
 (b) *Jamiruddin Saodagar v. Hazi Mal Gani* (1935) 62 C. L. J. 201; *Rajendronath v. Bassider Ruhman* (1876) 2 Cal. 146 (F. B.); *Debendra v. Syama Prosanna* (1906) 11 C. W. N. 1124; *Gopi Nath Chongdar v. Shaik Abdul Gafur* (1905) 22 C. L. J. 190

is specified, the inference is that the tenancy is from month to month (c). The presumption is in favour of monthly tenancies by section 106 of the Act. It is equally a widespread practice to make the monthly letting coincide with the calendar month, though an entry takes place in the middle of a calendar month (d). The fact that the rent is reserved at so much a year does not conclusively shew that the tenancy is from year to year (e). The tenancy is regarded as monthly and terminable on 15 days' notice (f). But where rent is an annual one, the presumption ought to be drawn that the tenancy was to be annual (g). Again, where a lease of land was granted for a term of years for purposes which were neither agricultural nor manufacturing, it was held that on the expiration of the term, the lessee was a monthly tenant (h).

Month and year.—Month and year shall mean a month and year reckoned according to the British calendar (i).

Notice to determine a tenancy.—Such notice may be given by the lessor or the lessee and it may be signed by or on behalf of the person giving it. It is not necessary that the person signing on behalf of the person giving it, should be empowered by a duly executed power-of attorney. A power-of attorney to sue in ejectment implies an authority to issue notice to quit (j). The person entitled to the reversion is the proper person to give notice (k). Notice addressed to a tenant not as a tenant but as a trespasser giving six months' time to quit, is valid (l). If a part of the land of a tenancy is excluded from the notice to quit and from the suit, and of such part the defendants are in possession as tenants under the plaintiff, the plaintiff cannot obtain a decree in the ejectment suit (m). Where distinct tenancies are created of different parts of the same premises, a notice to quit treating the tenancies as one would be bad.

Dissolution of tenancy without notice.—In the following cases no notice to quit is necessary under the section i.e, where the tenant is at sufferance, that is to say, holds over after the expiration of the notice to quit, nor where the lease expires by effluxion of time (n), or by any of the other modes prescribed by section 111 of this Act except forfeiture. In case where the tenancy is at will it may be determined by delivery of possession by the tenant or the landlord demanding possession. A sub-lessee is not entitled to notice. No notice is necessary where landlord accepts a new tenant nor when parties have by express agreement contracted themselves out of the provisions of this section. So also where under section 108 (e) the lessee elects to avoid the lease. Nor is notice to quit necessary when the object or purpose of the lease is immoral (o).

Length of notice.—The notice, whether of one or six months, must not determine the lease in the middle of the month of the tenancy or in the middle of the year of the tenancy. It must expire at the end of the month or at the end of the year, as the case be, of the tenancy. This must be strictly complied with; for example, in the case of monthly tenancy, it is not open to the lessor or lessee to give even two

- (c) *Mohini Chandra v. Anil Bandhu* (1908) 13 C. W. N. 513.
 (d) *Arunachella Chettiar v. Ramiah Naidu* (1907) 30 Mad. 109.
 (e) *Sarat Chandra v. Jadab Chandra* (1917) 44 Cal. 214.
 (f) *Debendra Nath v. Syama Prosanna* (1907) 11 C. W. N. 1124.
 (g) *Sheikh Akloo v. Sheikh Emaman* (1917) 44 Cal. 403.
 (h) *Troilokya v. Sarat Chandra* (1905) 32 Cal. 123.
 (i) General Clauses Act, X of 1897, sec. 3, clauses

- 33 and 59.
 (j) *Bodordoja v. Ajijuddin* (1930) 57 Cal. 10.
 (k) *Manikkam Pillai v. Rettnasami Nadar* (1917) 33 M. L. J. 684.
 (l) *Ram Charan v. Hari Charan Guha* (1908) 7 C. L. J. 107.
 (m) *Bodordoja v. Ajijuddin Sarkar* (1920) 57 Cal. 10.
 (n) *Kundan Lal v. Deepchand*, A. I. R. (1933) All. 756; *Mahomed Fazluzzaman v. Anwar Husain*, A. I. R. (1932) All. 314.
 (o) *Rugby School (Governors) v. Tannahill* (1934) 151 L. T. 177.

S. 106

months' notice expiring in the middle of the month of the tenancy. Where rent is payable monthly and no date of commencement is fixed, 15 days' notice is sufficient and a notice given on the 24th of June to vacate on the 31st of July was held valid (*p*). The word "by" has been held to include the day named (*q*). A tenancy is deemed to have commenced on the first of a month when a tenant enters into occupation in the middle of a month and pays for the number of days he occupied (*r*). In case of a monthly tenancy where the tenancy expires at the end of a month, a notice served on the first of the month is invalid as there must be a clear one month's notice. So that the last date for service would be 12 p.m. of the last day of the month previous to the month on which the lessee is required to quit. If a tenancy begins not on the first of a month but, say, the 3rd or 14th, the month of the tenancy would expire on the 3rd or 14th of the following month. Such cases are usually determined by the mode of payment of rent. A month means a period of one month reckoned with reference to the commencement of the lease. Section 110 prescribes the mode of computation. Where a lease commenced on the 1st of April a notice to quit prescribing the 31st day of October would be bad (*s*). A lease for four years commenced on June 1st, 1921. The tenant gave notice on February 1st, 1928, stating that possession would be given on March 1st. The landlord's contention that the tenancy expired on February 29th was not upheld. Further, a term of the lease to pay rent on the 7th of each succeeding month was held not to be "an express agreement to the contrary" within the meaning of the section (*t*).

Tendered or delivered.—The notice to quit must be tendered or delivered personally to the party to be bound by it or to one of his family or servants, but in the latter case, it should be delivered or tendered at his residence. It is not necessary that the notice should be tendered or delivered personally by the lessor or his agent. In a Bombay case the notice was delivered to the tenant's solicitors and the service was held to be sufficient. The presumption arose that they had authority to receive the notice and the question whether they actually sent it in time to the defendant, did not arise (*u*). In this case notice was dated 28th December and the tenant was asked to vacate on or before the 1st of February following. When notice is served through the post there is a presumption that it was received by the person to whom it was addressed. The presumption is stronger when the letter is registered (*v*). It is not rebutted but strengthened by the fact that a receipt for it is produced, signed on behalf of the addressee by some person other than the addressee himself (*w*). Section 106 recognizes service by post but does not state that the postal letter should be delivered or tendered personally to the party bound by it. It is sufficient that it is posted to such party. In the case of joint tenants service on one is *prima facie* evidence that it has reached the other joint tenant (*x*). To give rise to this presumption, it must be addressed to all the joint tenants. Where a notice, addressed to all the joint tenants, was sent by registered post and an acknowledgment signed by one of the joint tenants was received back through the post office, was produced and proved in Court, it was held, applying the dictum of the Judicial Committee, that the

(*p*) *A. P. Bagchi v. F. Morgan*, A. I. R. (1937) All. 36.

(*q*) *Sheikh Nuroo v. Seth Meghraj* (1937) Nag. 214.

(*r*) *Ramji Lal v. Secretary of State*, A. I. R. (1936) Oudh 306.

(*s*) *Susit Chunder v. Birendrajit* (1934) 38 C. W. N. 782.

(*t*) *Binoykrishna Das v. Salsicconi* (1933) 60 Cal. 389, 59 I. A. 414.

(*u*) *Bhojabhai v. Hayem* (1898) 22 Bom. 754; *Prior v. Ongley* (1850) 10 C. B. 25; *Tanham*

v. Nicholson (1872) 5 H. L. 661; see *Gardner v. Ingram* (1889) 61 L. T. 729.

(*v*) *Gresham House Estate Co. v. Rossa Grande Gold Mining Co.*, (1870) W. N. 119; Indian Evidence Act, I of 1872; sec. 114; General Clauses Act, X of 1897, sec. 27.

(*w*) *Harihar Banerji v. Ram Shaksi Roy* (1919) 46 Cal. 458, 45 I. A. 222; *Bodordoja v. Ajijuddin* (1929) 57 Cal. 10.

(*x*) *Harihar Banerji v. Ram Shaksi Roy*, (1919) 46 Cal. 458, 45 I. A. 222; *Bodordoja v. Ajijuddin* (1929) 57 Cal. 10.

other joint tenants had been served with notice (y). A mere advertisement in a local newspaper cannot take the place of a notice delivered to the tenant (z). Registered notice to quit, returned marked "refused" by an officer of the post office, is sufficient service (a).

Principles to be observed in construing notices to quit.—In *Harihar Banerji v. Ram Shashi*, the Judicial Committee of the Privy Council observed that the principles laid down by the English authorities in construing notices to quit containing errors honestly but mistakenly or inadvertently made, apply equally in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to relate, but what they would mean to the tenants presumably conversant with all those facts and circumstances; and further, they are to be construed not with a desire to find fault in them, which would render them defective but in accordance with the maxim "*Ut res magis valeat quam pereat*." Where inaccuracies are deliberately inserted in notices for fraudulent purposes, these principles are inapplicable (b).

Clear days.—15 days' notice required by the section means 15 clear days. Where plaintiff served a notice on the 16th Fagan requiring the defendant to quit on the 30th of the same month so that the defendant had only 14 days' clear notice, the notice to quit was held bad (c). When a date is fixed, the tenant has time till the hour of midnight to vacate (d). In Calcutta 15 days' notice is enough to terminate a monthly tenancy (e). In the mofussil of the Bombay Presidency as also in the Punjab (f) 15 days' rule is applicable. Notice is not bad because it gives two months instead of 15 days (g).

Sufficiency of notice before a Court of Appeal.—It is not right for an Appeal Court to go into the question of validity and sufficiency of notice, where this objection was not taken in the written statement and the question did not form the subject-matter of discussion in the trial Court and was not even mentioned in the grounds of appeal (h).

What notice a tenant holding an annual tenancy is entitled to.—Where the rent is annual and there is nothing to rebut the inference of annual tenancy, a presumption to that effect should be drawn, and if there be no registered instrument as required by section 107 of the Transfer of Property Act, the case would fall within section 106 of that Act. And the lease not being for agricultural or manufacturing purposes, must be deemed to be from month to month, terminable on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy (i).

Expiration of notice.—The section requires in all leases that the notice must expire at the end of the period of the tenancy even though there be a clause for payment of proportionate part of rent reserved for any time, less than the stipulated period

(y) *Bodordoja v. Ajijuddin Sarkar* (1929) 57 Cal. 10; *Rajoni Bibi v. Hajison Nissa* (1899) 4 C. W. N. 572; *Bejoy Chand v. Kali Prasanna*, A. I. R. (1925) Cal. 752.
(x) *Chand Mal v. Bachraj* (1883) 7 Bom. 474.
(a) *Jogendra v. Dwarka Nath* (1888) 15 Cal. 681.
(b) *Harihar v. Ram Shashi* (1919) 46 Cal. 458, 45 I. A. 222.
(c) *Subadini v. Durga Charan* (1901) 28 Cal. 115; *Susil Chander v. Birendrajit* (1934) 38 C. W. N. 782.

(d) *Shankar Lal v. Babu Ram* (1921) 43 All. 330.
(e) *Profulla Chandra v. Nanda Lal* (1935) 39 C. W. N. 1069.
(f) *Rattan Sen v. Krishna Kuar*, A. I. R. (1933) Lah. 134.
(g) *Secretary of State for India v. Madhu Sudan* (1932) 36 C. W. N. 918.
(h) *Bodordoja v. Ajijuddin Sarkar* (1930) 57 Cal. 10.
(i) *Sheikh Akloo v. Sheikh Emaman* (1917) 44 Cal. 403.

S. 106

that the tenant shall occupy (*j*). The Court must in each case determine what date is the end of the tenancy (*k*). In case of a monthly tenancy, it must be a notice expiring at the end of the periodic month from the commencement of the tenancy. On September 5, 1923, the tenant received by post from the landlord a notice dated September 1, 1923, purporting to give him "one month's notice to quit;" it was held that the notice was bad (*l*). In case of a yearly tenancy the date of expiration is the anniversary of the date of commencement (*m*). The rule is, however, subject to exception created by agreement between the parties, so that where tenancy commenced on May 1, 1895, and the rent was payable quarterly "subject to three months' notice on either side at any time to terminate this agreement," three months' notice given on 24th January 1901 to quit on 25th April was held good (*n*).

Nature of notice.—It must be clear and unambiguous. It must not be optional. The addition "or I shall insist on double rent," (*o*) "the annual rental of the premises now held by you from me will be £160 payable quarterly in advance" (*p*), "on failure whereof I shall require you to pay me double former rent" (*q*), does not vitiate the notice. On the other hand, a notice by tenant that he would not be able to stop over unless the rent was reduced is sufficient determination (*r*). An agreement for a yearly tenancy provided for six months' notice to be given on March 1 and September 1 in any year. On December 23, 1913, the tenants wrote to the landlord giving notices to quit the premises "at the earliest possible moment." Held the tenancy was validly determined at the expiration of 6 months from March 1, 1914 (*s*). A notice to quit "on the earliest day your tenancy can legally be determined" is bad as it throws upon the tenant the burden of resolving the questions of law (*t*). So also a notice to quit on or before the date is bad (*u*). And where a lease stipulated that a landlord ejecting a tenant should offer compensation for the lessee's structure a notice to quit without such an offer was held bad (*v*). The rule in India with regard to construction of notices to quit containing additional clauses has not been uniform. The Allahabad Full Bench held that the notice was bad by reason of the claim to enhanced rent (*w*). At a later date similar notice received a different construction (*x*). Where a landlord wrote to his tenant to come to an agreement for increased rent the notice was held good (*y*). Threat to charge a sum in excess of rents for damages was held good (*z*). A notice to quit demanding enhanced rent on failure to comply, renders the lessee liable unless he protests when the lessor's only remedy is ejectment (*a*). A small error as to area of the land does not vitiate the notice (*b*). A notice, "meet us, increase the rent, and give us a legal writing or in default on 31st March 1892, we shall keep present two good men and

- (*j*) *Doe d White v. Okey* (1845) 5 L. T. O. S. 245.
 (*k*) *Sheikh Sona Ullah v. Troylukho* (1897) 2 C. W. N. 383; *Susit Chunder v. Birendrajit* (1934) 38 C. W. N. 782.
 (*l*) *Precious v. Reddie* (1924) 2 K. B. 149; *Bradley v. Atkinson* (1885) 7 All. 596.
 (*m*) *Dixon v. Bradford and District Railway Servants Coal Supply Society* (1904) 1 K.B. 444.
 (*n*) *Soanes v. Nicholson* (1902) 1 Q. B. 157.
 (*o*) *Doe d Mathews v. Jackson* (1779) 1 Doug. K. B. 175, 99 E. R. 115.
 (*p*) *Ahearn v. Bellman, Sedgwick v. Ahearn* (1879) 48 L. J. Q. B. 681; *Bury v. Thompson* (1895) 1 Q. B. 696; *Re. Perrett and Bennett-Standford's Arbitration* (1922) 2 K. B. 592.
 (*q*) *Doe d Lyster v. Goldwin* (1841) 10 L. J. Q. B.

275.
 (*r*) *Bury v. Thompson* (1895) 1 Q. B. 696.
 (*s*) *May v. Borup* (1915) 1 K. B. 830.
 (*t*) *Phipps (P) & Co. (Northampton and Towcester Breweries, Ltd.) Rogers* (1925) 1 K. B. 14.
 (*u*) *Gardner v. Ingram* (1889) 61 L. T. 729.
 (*v*) *Shamber Chandra v. Kanai Lal, A. I. R.* (1936) Cal. 581.
 (*w*) *Bradley v. Atkinson* (1885) 7 All. 596.
 (*x*) *Shanker Lal v. Baburam* (1921) 43 All. 330.
 (*y*) *Gangadas v. Ananda Chandra* (1908) 13 C. W. N. 146.
 (*z*) *Adolphe Strager v. Emma Price* (1907) 12 C. W. N. 1059.
 (*a*) *Mahomed Noor v. Ashiq Beg, A. I. R.* (1933) Oudh 465.
 (*b*) *Shama Churn v. Wooma Churn* (1898) 25 Cal. 36.

take full possession of the said land with all trees, etc., on that day" was held valid (c).

Mode of service of notice.—The notice to quit, given either by lessor or lessee, may be served in any of the following five ways :—

- (1) By post addressed to the party who is intended to be bound by it.
- (2) Tendered or delivered (a) personally to such party or (b) one of his family at his residence or (c) to one of his servants at his residence, or
- (3) If such tender or delivery as in (2) be not practicable by affixing it to a conspicuous part of the property. The first of the above-mentioned ways would include service by registered post (d).

Sunday.—Notice given or served on Sunday is good (e).

Business premises.—Service of notice on business premises upon person in charge of the business is bad.

Death of landlord.—A tenancy at will determines by the death of the landlord and no notice to quit is necessary by his representative (f).

Separate notice to representatives.—On a tenancy being sub-divided amongst the representatives of the original tenant separate notices addressed by the landlord to quit are valid (g).

Form of notice.—Every notice terminating a lease, whether given by lessor or lessee, must be in writing. In case of a monthly tenancy the form usually adopted in practice is to ask the tenant to vacate on the expiration of one month from the termination of the current month of the tenancy.

Vendor and purchaser.—On a contract of sale a purchaser has no right to give notice to quit until the conveyance is executed in his favour, but the vendor may give such notice. It is, however, doubtful whether after a vendor has given notice and the sale is completed within the last current month of the tenancy the purchaser can take the benefit of it. It is equally doubtful whether the purchaser can take the benefit of a notice given by his vendor and file a suit for ejectment.

Ejectment suit.—No suit in ejectment will lie against a tenant unless the tenancy has been determined by a proper notice to quit. Such a notice is a condition precedent to the institution of ejectment proceedings (h). The burden of proving determination of tenancy is on the landlord seeking to eject the tenant (i). Even where the tenant denies the title of the landlord notice is necessary (j). In case of several tenants in common, service on one is sufficient (k). A notice to quit is not bad owing to an error whereby lands not included in the defendant's holding are stated (l). In case of a *putni* lease verbal notice is sufficient (m). A tenant

(c) *Kikabhai v. Kalu Ghela* (1898) 22 Bom. 241.

(d) *Subadini v. Durga Charan* (1901) 28 Cal. 118; *Rajoni Bibi v. Hafisouniss Bibi* (1899) 4 C. W. N. 572; *Johendro Chunder v. Dwarika Nath* (1888) 15 Cal. 681.

(e) *Sangster v. Noy* (1867) 16 L. T. 157.

(f) *Chemminian v. Udayavarma* (1906) 10 M. L. J. 201.

(g) *Ismail Khan v. Kali Krishna* (1901) 6 C. W. N. 134.

(h) *Rejendronath v. Bassider* (1875) 2 Cal. 146; *Vithu v. Dandi* (1891) 15 Bom. 407;

Hemanjini v. Sri Gobinda (1902) 29 Cal. 203.

(i) *Narain Mundul v. Hookte Mahato* (1874) 25 W. R. 56.

(j) Sec. 111 (g), Transfer of Property Act, IV of 1882.

(k) *Rajoni Bibi v. Hafisounissa Bibi* (1899) 4 C. W. N. 572.

(l) *Shama Churn Mitter v. Wooma Churn Haldar* (1898) 25 Cal. 36.

(m) *Shaikh Golam v. Amjad Ali* (1874) 23 W. R. 312.

Ss. 106-107 who disclaims the title of his landlord cannot raise the plea of want of notice (n), even assuming it to be established that the defendant was the plaintiff's tenant (o). In a suit for ejectment against several defendants setting up various titles to different parts of the land claimed, there is only one cause of action and not several distinct and separate causes of action (p).

Co-lessors.—It was held in *Ebrahim Pir Mahomed v. Cursetji Sorabji De Vitre* (q) that though in England any joint tenant may put an end to his demise, as far as it operates on his own share, whether his companions join him in putting an end to the whole lease or not, in India the relation created by contract with several joint landlords continues, until there exists a new and complete volition to change it. So that the tenancy of the lessees cannot be put an end to except by all the lessors acting together (r). The rule is different in the case of trespassers (s), and also in the case of tenants, when *khas* possession is not sought for (t). But a co-sharer landlord who has made the other co-sharers *pro forma* defendants can maintain an ejectment suit, and obtain a decree for possession to the extent of his share jointly with the *pro forma* defendants in the suit (u).

Tenant vacating after irregular notice to quit.—The landlord is entitled to damages and not to rent for the unexpired residue of the term which has been brought to a premature termination. It is the duty of the landlord to let the premises and thus minimize the loss (v).

Lessee holding over.—A lessee holding over after the expiration of a definite term in defiance of the authority of the lessor is not entitled to a notice to quit under section 106 (w); otherwise notice is necessary (x).

Licensee.—Is liable to be evicted without notice to quit (y).

Insolvency.—A Court sitting in insolvency has no jurisdiction on a summary proceeding to make at the instance of the landlord an order for ejectment against the tenant. This was held under 11 and 12 Vict., c. 21 (z).

Receiver.—A receiver given power to let and to recover rents has power to eject without obtaining permission of the Court, a monthly tenant after due notice to quit (a).

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

- (n) *Mayan Thariyakatt v. Ithikamparambil* (1911) 20 M. L. J. 415; *Kishakkinayakath Abdulla v. K. Moidin Kutti* (1909) 17 M. L. J. 287; *Haidri Begam v. Nathu* (1895) 17 All. 45; *Agarchand v. Rakhma Hanwant* (1888) 12 Bom. 678; *Mahipat v. Lakshman* (1900) 2 Bom. L. R. 28.
 (o) *Gopalrao v. Kishor Kalidas* (1885) 9 Bom. 527.
 (p) *Ishan Chunder v. Rameswar Mondol* (1897) 24 Cal. 831.
 (q) (1887) 11 Bom. 644.
 (r) *Gopal Ram v. Dhakeswar* (1908) 35 Cal. 807; *Balaji v. Gopal* (1878) 3 Bom. 23; *Bal-krishna v. Moro* (1896) 21 Bom. 154; *Vagha Jesing v. Manilal* (1935) 37 Bom. L. R. 249; *Panchu Charan v. Binode Behari Haldar* (1935) 39 C. W. N. 246; *Harihar Bannerji v. Ramsoshi Roy* (1918) 23 C. W. N. 77, 45 I. A. 222; *Shama Churn*

- Mitter v. Wooma Churn Halder* (1897) 25 Cal. 36; *Gopal Ram v. Dhakeshwari Prasad* (1908) 35 Cal. 807; *Motilal v. Chandra Kumar* (1920) 24 C. W. N. 1064.
 (s) *Nadha Prasad v. Esuf* (1880) 7 Cal. 414; *Harendra Narain v. Moran* (1888) 15 Cal. 40.
 (t) *Kamal Kumari v. Kiran Chandra* (1897) 2 C. W. N. 229.
 (u) *Jerman Gomez v. Ram Kumar* (1933) 58 C. L. J. 133.
 (v) *Bijoy v. Howrah Amta Light Railway Co. Ltd.* (1923) 38 C. L. J. 177.
 (w) *Gokul Chand v. Shib Charan* (1912) 9 A. L. J. 574.
 (x) *Troilokya v. Sarat Chandra* (1905) 32 Cal. 123.
 (y) *Athakutti v. Govinda* (1893) 16 Mad. 97.
 (z) *In re Maud Anderson* (1909) 36 Cal. 489.
 (a) *Huri Dars v. Macgregor* (1891) 18 Cal. 477.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :—

Provided that the local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official *Gazette*, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases may be made by unregistered instrument or by oral agreement without delivery of possession.

Changes in the section.—Paragraph 3 is new, having been introduced in the section to set at rest the conflict of decisions on the question of execution. All leases made after this amendment by registered instrument must be executed by both the parties viz., the lessor and the lessee whether the transaction evidencing the lease is made by one instrument or more than one. In the latter case each such instrument shall be executed by both the lessor and the lessee. The principle being that as leases contained covenants both by the lessor and the lessee it was desirable that they should be executed by both parties. It therefore follows that leases by or to minors are void (b).

Agricultural leases.—By section 117 of the Transfer of Property Act, agricultural leases are excluded from the operation of this section. Such letting does not require a document. This may be oral or even by contract of parties (c). If made in writing they must be registered (d).

Cantonments.—The Act applies to cantonments by virtue of section 287 of the Cantonments Act (e).

Registration.—Leases may be made orally or in writing. Section 107 is exhaustive and leaves no room for a written but unregistered lease (f). By section 4 of the Transfer of Property Act section 107 has been made to form part of the Registration Act 1908 (g). Section 17 clause (d) of the latter Act dealing with registration of leases is very nearly in the same words as the first part of paragraph 1 of section 107.

Leases exempted from registration.—Proviso to section 17 of the Registration Act exempts leases from the operation of sub-section (1) in any district or part of a district notified by the local Government of which the term does not exceed five

(b) *Govinda Kurup v. Chowakkaram* (1931) 59 M. L. J. 941; *Indian Cotton Co., Ltd. v. Raghunath* (1931) 33 Bom. L. R. 111.
(c) *Alam Mulla v. Surendra Kumar*, A. I. R. (1923) Cal. 432.
(d) *Mahadeo v. Sioram*, A. I. R. (1926) Nag. 9; *Ali Hossain v. Jonabali*, A. I. R. (1936)

Cal. 770.
(e) *Kidar Nath v. Dungar Mal*, A. I. R. (1931) Lah. 501.
(f) *Mt. Nasiban v. Mohammad Sayed*, A. I. R. (1936) Nag. 174.
(g) *Kuchwar Lime and Stone Co., Ltd., v. Secretary of State for India* (1936) 15 Pat. 460.

S. 107 years and the annual rents reserved do not exceed Rs. 50 (*h*). The reservation of annual rents is not necessary to bring the document within the proviso (*i*). Leases by the Crown are outside section 107 of the Act and are exempt from registration under section 90 (1) (*d*) of the Indian Registration Act, 1908 (*j*). But when Government lands were leased by the Commissioner of a notified area to whom the lands were handed over by Government for administrative purposes, they were not excluded from the operation of section 107 (*k*). The Madras High Court held that notwithstanding the Government notification issued under this proviso leases coming within the scope of section 107 of the Transfer of Property Act were compulsorily registrable. To prevent the anomaly thus created paragraph 4 was added by the Amending Act, VI of 1904, empowering a local Government with the previous sanction of the Governor-General in Council, by notification in the local official *Gazette*, to direct leases other than those mentioned in paragraph 1 to be made by an unregistered instrument or by oral agreement without delivery of possession.

Agreement to lease.—By section, 2 clause (7) of the Registration Act, 1908, a lease includes an agreement to lease. Section 17 of the same Act requires certain leases to be registered. Section 2, clause 7, declares that ‘lease’ includes ‘an agreement to lease.’ Such agreement must be a document which affects an actual demise and must be registered. But an agreement which provides that on the happening of a contingent event at a date intermediate, and which might be far distant, a lease would be granted, does not satisfy the meaning of the phrase “agreement for a lease” as defined by the statute, which relates to some document which creates a present interest in the land and as such would require registration (*l*). Prior to this decision there was considerable conflict of opinion on this subject between the several Courts in India. The Bombay (*m*) and Madras (*n*) High Courts held that an unregistered agreement to lease was inadmissible in evidence while the Calcutta High Court (*o*) took the contrary view.

Leases under sections 106 and 107 of the Transfer of Property Act.—Those leases which require registration under section 107 and which for want of registration cannot take effect, would come within section 106 of the same Act (*p*), nor does section 107 prevent holding over under an invalid lease (*q*).

Term of a lease.—For the purpose of registration the “term” of a lease must be understood to mean the period for which the lessee is protected against dispossession at the will of the lessor (*r*). It is the space of time for which the interest is granted.

The Hindu calendar.—The Hindu year does not correspond with the year reckoned according to the British calendar. So where a lease was made for one year from *Kartuk Badi 12 Samvat 1976* to *Kartik Badi 12 Samvat 1977* corresponding to English dates 20th October 1919 to 7th November 1920, it was held that the lease

(*h*) *Viramml v. Kasturi* (1881) 4 Mad. 381; *Muragesa Chetti v. Chinnathambi Goundan* (1901) 24 Mad. 421; *Ramaswamy Ayyar v. Thirupathi Naik* (1904) 27 Mad. 43.
 (*i*) *Venkatarami Chetty v. Suppa Pillai* (1911) 34 Mad. 90.
 (*j*) *Secretary of State for India v. Nistarani Annie Miller* (1927) 6 Pat. 446.
 (*k*) *Munshi Lal v. The Notified Area of Baraut* (1914) 36 Cal. 176.
 (*l*) *Hemanta Kumari v. Midnapore Zemindari Co.* (1920) 47 Cal. 485, 46 I. A. 240; *Sanjib Chandra v. Santosh* (1922) 49 Cal. 507; *Skinner v. Skinner* (1929) 33 C. W. N. 1150, 56 I. A. 363.
 (*m*) *Purmanandas v. Dharsey* (1886) 10 Bom. 101.

(*n*) *Narayanan v. Mutiah Servai* (1912) 35 Mad. 63.
 (*o*) *Sarat Chandra v. Shyam Chand* (1912) 39 Cal. 663.
 (*p*) *Samsoonesha v. Satya Sebak* (1918) 23 C. W. N. 641; *Arunachella Chettiar v. Ramiah Naidu* (1907) 30 Mad. 109; *Sheikh Akloo v. Sheikh Emaman* (1917) 44 Cal. 403; *Sarat Chandra v. Jadab Chandra* (1917) 44 Cal. 214; *Debendra Nath v. Syama Prosanna* (1907) 11 C. W. N. 1124.
 (*q*) *Aziz Ahmad v. Alaudin*, A. I. R. (1933) Pat. 485.
 (*r*) *Munshi Lal v. The Notified Area, Baraut* (1914) 36 All. 176.

was not for a term exceeding a year. With respect, this judgment does not seem to be correct. According to the British calendar, the year would have expired on 20th October 1920 and so also as calculated according to section 110 of the present Act, and although the appellant's counsel drew attention of the Court to section 3, clause (59) of the General Clauses Act, X of 1897, and to section 4, clause (1) of the same Act, the appeal was dismissed with costs (s).

Oral lease.—A lease, which is not a lease from year to year or for any term exceeding one year or reserving a yearly rent, can be made orally. Such leases are void if not accompanied by delivery of possession. Nor can they be proved by oral contract of lease (t). It has, however, been held that an oral lease accompanied by delivery of possession for more than a year is valid for the first year (u).

Lease for less than a year.—Such a lease under section 17 (d) of the Registration Act, 1908, does not require registration. But under section 107 of the Transfer of Property Act, if it is entered into in writing it must be registered; for paragraph 2 of the Transfer of Property Act enacts that a lease not included in one of the varieties mentioned in paragraph 1 should be either made by registered instruments or by oral agreement accompanied by delivery of possession.

Lease for a year.—Lease for a year, if made in writing, must be registered under this Act, for it is only an oral agreement for a lease accompanied by delivery of possession that is exempted from registration (v).

Leases exceeding one year.—A *patta* for one *fasli* to remain in force until another *patta* is granted, is a lease for a term exceeding one year and not a lease for a year (w). So also a lease containing the words “*dar salne mate*” taken in connection with the total absence of any date for the expiry of the tenancy was construed as a lease for a term exceeding one year (x). All leases for more than a year must be in writing and registered (y).

Lease reserving annual rent.—A lease reserving a yearly rent requires registration both under the Registration Act, section 17 (1) (d) as also under the present section. Such a lease must be one which on proper construction would create tenancy from year to year (z). Where rent is annual and nothing to rebut the presumption that the tenancy was of a character corresponding thereto, the presumption ought to be drawn that the tenancy was annual (a). A tenancy to continue from year to year, though terminable at the end of any year, is not *ipso facto* terminated at the end of every year (b).

Lease for life.—A lease for life of lessee is for a term exceeding one year (c).

Indefinite term.—Where the term is determinable at the will of either party no registration is necessary, even though the rent be payable annually or in advance each year. Such leases are *prima facie* tenancies at will (d).

- (s) *Motiram v. Seth Lakhmichand*, A. I. R. (1924) Nag. 216.
 (t) *Baliram v. Sadaram*, A. I. R. (1926) Nag. 147.
 (u) *Alauddin v. Aziz Ahmad*, A. I. R. (1934) Pat. 369; *Alakhan v. A. R. A. Arumugam Chettyar*, A. I. R. (1933) Rang. 262.
 (v) *Alakhan v. Arumugam Chettyar*, A. I. R. (1933) Rang. 262.
 (w) *Venkatachellam Chetti v. Audian* (1880) 3 Mad. 358.
 (x) *Dhurabhai v. Mohanlal* (1917) 41 Bom. 458.
 (y) *Battersby v. De Cruze* (1936) 63 Cal. 31.
 (z) *Ram Rachhya Singh v. Kamakhya Narain* (1925) 4 Pat. 139.

- (a) *Jivraj Gopal v. Atmaram* (1890) 14 Bom. 319; *Sheikh Akloo v. Sheikh Emaman* (1917) 44 Cal. 403.
 (b) *Jamiruddin Saodagar v. Hari Mal Gani* (1935) 62 C. L. J. 201; *Maloddee Noshyo v. Bullubee Kant Dhur* (1870) 13 W. R. 190.
 (c) *Purshotam v. Nana* (1894) 18 Bom. 109.
 (d) *Jagjivandas v. Narayan* (1884) 8 Bom. 493; *Khayali v. Husain* (1886) 8 All. 198; *Khudo Bakhsh v. Sheo Din* (1886) 8 All. 405; *Jivraj Gopal v. Atmaram* (1890) 14 Bom. 319; *Ratnasabhpathi v. Venkatachalam* (1891) 14 Mad. 271.

Ss. 107-108

Lands held so long as tenant continues to pay rent or perform the service.—A rent note which provides that the tenant may hold the land so long as he continues to pay the rent or perform the service is a lease of immoveable property which requires registration under section 17 of the Indian Registration Act (e). Such a transaction has been regarded as a permanent lease (f).

Option of renewal.—The existence of an option for renewal in a lease for one year for a further period of one year does not make registration compulsory (g).

Effect of non-registration of documents required to be registered.—As to this reference may be made to section 49 of the Indian Registration Act, 1908.

Variation of the terms of a lease.—A document which varies the amount of rent and the incidents of such payments, such as the date and consequences of default, requires registration (h). The Madras High Court has, however, taken a contrary view (i). The Judicial Committee of the Privy Council (j) held that an agreement to pay a higher rate of interest to a mortgagee by a mortgagor required registration, so that the view of the majority of the Courts above expressed, followed the same principle.

Possession taken under an unregistered lease for a term of years.—Where tenant is in possession under a lease for a term of years which is not effective by reason of non-registration, the tenant is a tenant at will (k). The landlord can only recover for use and occupation (l). In such cases, on the tenant's admission of ownership of the landlord, no proof of the relation of landlord and tenant becomes necessary (m).

Liability of tenant under an unregistered lease.—Although no strict tenancy is created for want of registration the person in possession is nevertheless liable to pay reasonable compensation for use and occupation of the premises (n).

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and liabilities
of lessor and lessee.

A.—Rights and Liabilities of the Lessor.

- (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the

(e) *Pagi Mania v. Desai Lallubhai* (1900) 2 Bom. L. R. 488.

(f) *Bai Sona v. Bai Hiragavri* (1926) 28 Bom. L. R. 552.

(g) *Boyd v. Kreig* (1890) 17 Cal. 548.

(h) *Parbati Charan v. Bandeali Akon* (1936) 40 C. W. N. 638; *Lalit Mohan v. Gopali Chuck Coal Co., Ltd.* (1912) 39 Cal. 284, F. B.; *Durga Prasad v. Rajendra* (1910) 37 Cal. 293; *Biraj Mohinee v. Kedarnath* (1908) 35 Cal. 1010; *Dat v. Gopal* (1916) 14 A. L. J. 57; *Altar Chand v. Chandu Lal*, A. I. R. (1929) Lah. 291.

(i) *Obai v. Ramalinga* (1899) 22 Mad. 217.

(j) *Tika Ram v. The Deputy Commissioner of Bara Banki* (1899) 25 Cal. 707; 26 I. A. 97.

(k) *Ramchandra v. Syameswari*, A. I. R. (1925) Cal. 1171; see *Chunilal v. Gopiram* (1927) 45 C. L. J. 32.

(l) *Ramchandra v. Tama* (1912) 36 Bom. 500; *Syed Ajam v. Ananthanarayan* (1912) 35 Mad. 95.

(m) *Ramchandra v. Tama* (1912) 36 Bom. 500.

(n) *Pursona Soonduree v. Prohlad Chunder* (1869) 12 W. R. 289.

latter is not aware, and which the latter could not with ordinary care discover : S. 108

- (b) the lessor is bound, on the lessee's request, to put him in possession of the property :
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

- (d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :
- (e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

- (f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

S. 108

- (g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :
- (h) the lessee may even *after the determination of the lease* remove, at any time *whilst he is in possession of the property leased but not afterwards* all things which he has attached to the earth : provided he leaves the property in the state in which he received it :
- (i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :
- (j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

- (k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take of which the lessee is, and the lessor is not aware, and which materially increases the value of such interest:

- (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf.
- (m) the lessee is bound to keep, and on the determination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition : and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, is bound to make it good within three months after such notice has been given or left.
- (n) If the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :
- (o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased or *fell or sell* timber, pull down or damage buildings *belonging to the lessor*, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :
- (p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :
- (q) on the determination of the lease the lessee is bound to put the lessor into possession of the property.

S. 108

Generally.—The section deals with the rights and liabilities of the lessor and lessee of immoveable property. If the contract between the parties is silent in reference to matters dealt with in this section, the law implies a covenant to that effect. The covenants dealt with in the section need not be enumerated in the contract. They are what are known as implied covenants as opposed to express covenants. When the parties regulate their contract in express terms, the latter would exclude the application of the provisions of this section (o). The section also has no application when there is a local usage to the contrary. Clauses (a), (b) and (c) deal with the lessor's liabilities, (d) to (j) with the lessee's rights, and (k) to (q) with the lessee's liabilities. The section does not apply to a tenancy at will (p).

Clause (a).—The lessor is bound to disclose to the lessee (i) any material defect in the property (ii) with reference to its intended use, (iii) of which (a) the lessor is aware, but (b) the lessee is not aware and could not with ordinary care discover.

Agricultural leases.—The provisions of this clause do not apply to these leases. (q).

Material defect.—The lessor is under an obligation to reveal to the lessee all defects in the demised premises as are material that is, such as would affect the use to which they are to be subjected by the lessee. There is no duty to disclose defects which are either known to the lessee or which the lessee would with ordinary care discover. Unlike the duty to disclose in section 55, paragraph 1, clause (a), this clause does not deal with the lessor's title nor does it render such non-disclosure fraudulent as in the case of that section (r). But clause (c) which deals with quiet enjoyment covers the case of the lessor's title. By that clause the lessor would be liable for non-disclosure of a defective title known to him and unknown to the lessee or which the latter could not with ordinary care discover. It is an absolute covenant and not confined to the acts of the lessor and those claiming under him. Further, when there is valuable consideration, a covenant for further assurance imports a covenant against encumbrance (s). The defect in clause (a) relates to the time of commencement of the lease. For non-disclosure and concealment of defects which vitiate a contract of lease, see commentaries under section 55 (1) (a) under the caption "misrepresentation and misdescription."

Defect in building.—A lessor impliedly contracts with the lessee that the premises are fit for their intended user. So where the plaintiff hired a dwelling-house of the defendant, and in lighting a fire in the fire-place in one of the rooms, the chimney took fire, there being no vent, and the plaintiff's furniture was destroyed, it was held that the defendant was liable for the loss (t).

English Law.—In English Law there is no implied contract between a landlord and tenant that a house is fit for the purposes for which it is let (u). When the house is in a ruinous condition, there is no implied duty to inform a proposed tenant that it is unfit for human habitation (v) and no action will lie against the landlord for such omission in the absence of express warranty or active deceit (w). To create

(o) *Megh Lal v. Raj Kumar* (1907) 34 Cal. 358.
(p) *Ramkishun v. Bibi Sohaila*, A. I. R. (1933) Pat. 561.

(q) Sec. 117 of the Transfer of Property Act, IV of 1882.

(r) *H. V. Low & Co. v. Jyoti Prasad Singh* (1931) 59 Cal. 699, 58 I. A. 392.

(s) *In re Jones, Farrington v. Forrester* (1893) 2 Ch. 461.

(t) *Radha Krishna v. W. C. O'Flaherty* (1869) 3 Beng. L. R. 277

(u) *Hart v. Windsor* (1844) 12 M. & W. 68, 152 E. R. 1114; *Sutton v. Tennli* (1844) 12 M. & W. 52, 152 E. R. 1108; see *Lakshmichand Khelsey v. Ratanbai* (1927) 51 Bom. 274.

(v) *Keates v. Cadogan* (1851) 10 C. P. 591, 138 E. R. 234.

(w) *Saunders v. Pawley* (1886) 2 T. L. R. 590 C. A.; *Burstal v. Bianchi* (1891) 65 L. T. 678.

an express warranty no special words are necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties, express or implied, and must be given during the course of the dealing which relates to the bargain and should then enter into the bargain as part of it (*x*). Mere expression of opinion is not a warranty such as that a house was well built (*y*). As regards furnished and unfurnished houses, the law in England is that while in the latter case there is no implied obligation not to let the house in a defective or dangerous condition (*z*), in the former such an obligation is implied at the date fixed from the commencement of the tenancy (*a*). In case of a partially furnished house the former rule applies (*b*). There is, however, no implied warranty that the house shall continue fit in case of furnished rooms nor is there any duty in the case of a man who has let part of his house, to give information to the lodgers that an inmate of the house was suffering from an infectious disease (*c*). It is otherwise, regards furnished lodgings in which case there is a warranty of fitness during the whole term (*d*).

Tenant's remedies.—For breach of implied contract under clause (*a*), the tenant's remedy is either rescission under the Specific Relief Act (*e*) or damages under the Indian Contract Act (*f*).

Clause (*b*).—The lessor is bound on the lessee's request to put him in possession of the property.

Agricultural leases.—These are excluded from the provisions of this clause (*g*).

Entry by lessee.—Clause (*b*) imposes an obligation upon the lessor to deliver possession of the property leased to the lessee at the request of the latter. This obligation is absolute, from which the lessor is not discharged by reason of the fact that the lessee can take steps against the person in occupation. But if the property is in possession of a third party to the knowledge of both lessor and lessee, the former should arrange for possession by removing the third party, even though no express request is made by the lessee (*h*). It being the lessor's duty to put the lessee in possession, he (the lessee) cannot be rendered liable for not obtaining possession (*i*). The lessee may be put into immediate possession or the parties may stipulate for possession at a future date. The lessee's right to demand possession is not taken away by a stipulation in the lease not to raise objection on the ground of possession or dispossession. Such a stipulation would refer to dispossession after possession and not to the ordinary obligation of a lessor to put the lessee in possession (*j*). A suit for rent will not lie when the lessee has not obtained possession (*k*), delivery being a condition necessary for the maintenance of an action for rent (*l*), for in every case there is an implied contract that the lessor will give peaceful possession of the land leased to the lessee (*m*). Both under English and Indian Law, non-delivery

(*x*) *De Lassalle v. Guildford* (1901) 2 K. B. 215; *Bunn v. Harrison* (1886) 3 T. L. R. 146.

(*y*) *Kennard v. Ashman* (1894) 10 T. L. R. 213.

(*z*) *Lane v. Cox* (1897) 1 Q. B. 415.

(*a*) *Collins v. Hopkins* (1923) 2 K. B. 617 (in which a person was recently suffering from pulmonary tuberculosis); *Bird v. Greville* (measles) (1884) C. & E. 317 (measles); *Wilson v. Finch Hatton* (1877) 36 L. T. 473 (owing to defective drainage unfit for habitation); *Smith v. Manable* (1843) 11 W. & M. 5, 152 E. R. 693; (house infested with bugs).

(*b*) *Chester v. Powell* (1885) 52 L. T. 722.

(*c*) *Sarson v. Roberts* (1895) 2 Q. B. 395.

(*d*) *Cowie v. Goodwin* (1840) 9 C. & P. 378 N. P.

(*e*) 1 of 1877, sec. 35; *Collins v. Hopkins* (1923) 2 K. B. 617.

(*f*) IX of 1872, sec. 73; *Cahrsley v. Jones* (1889) 5 T. L. R. 412.

(*g*) Sec. 117, of the Transfer of Property Act, IV of 1882.

(*h*) *Narayanamasami v. Veeramili* (1910) 7 M. L. J. 119; *Bishen Sarup v. Abdul Samad*, A. I. R. (1931) All. 649.

(*i*) *Edge v. Trafford* (1831) 9 L. J. Ex. (O. S.) 101.

(*j*) *Ahamadar v. Jaminiranjani* (1930) 57 Cal. 114.

(*k*) *J. B. Bullen v. Lalit Jha* (1869) 3 Beng. L. R. 119; *Shama Prosad Ghose v. Taki Mullik* (1901) 5 C. W. N. 816.

(*l*) *Hurish Chunder v. Mohinee Mohun* (1858) 9 W. R. 582.

(*m*) *Munee Dutt v. William Campbell* (1869) 11 W. R. 278.

S. 108

of possession is a defence to an action for rent (*n*). This principle is applicable to agricultural as well as non-agricultural leases. Actual or constructive eviction of the tenant from the entire holding is a good plea in a suit for rent but not partial eviction. In the latter case he may repudiate the lease but if he does not and remains in possession of a portion, he is estopped from pleading non-liability for the rent of the portion in his occupation. He will be liable to pay rent but is entitled to damages in respect of the eviction, which he can set off in the landlord's action for rent (*o*). When the lessor is unable to put the lessee in possession of the area stipulated in the lease, he is liable to compensate the lessee by way of damages (*p*). But the mere fact of the lessee not obtaining possession of the whole is no justification for retaining possession even after the expiry of the term, on the plea that he had not received the full benefit purported to be given to him by the lease (*q*). Possession may be actual or constructive, as to which see commentaries on section 55 (1) (*f*). It may also be symbolical. Delivery of key is an ordinary symbol used to notify a change in possession of the premises to which the key gives the means of entrance. Possession cannot be changed solely by delivery of the key, but where such delivery is accompanied by an act which may amount to change in possession of the premises, delivery of the key is strong evidence that it was the intention of the parties to change possession (*r*). When in pursuance of an agreement for a lease the intended lessee has taken possession though the requisite documents have not been executed, the position is the same as if the document had been executed, provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined (*s*). But if a person who knows that he has no title to a particular property grants a lease thereof and in consequence of his defective title either fails to secure possession to the lessee in the first instance or fails to secure undisturbed possession, he has failed to carry out the obligation imposed by this clause (*t*). Possession is deemed to be given by notice to persons in occupation requiring them to attorn and pay rent to the lessee (*u*). In case where the boundaries of land to be leased are of a shifting character, the prospective lessee is entitled to rely upon the area stated in the lease and to be put into possession of an area which approximates to that which is mentioned in the lease. When alteration of the land takes place after the lessee has been put into possession the rule would be different (*v*). Where a lessee having agreed to discharge a debt of the lessor secured on the demised land, failed to do so and the lessor being sued by the mortgagee, executed a usufructuary mortgage to other persons and discharged the debt, in a suit by the lessee to recover possession from the lessor and the usufructuary mortgagee, it was held that he was entitled to recover possession though he had not discharged the debt, as agreed in the lease. A lease is an executed contract ; it is a transfer of property or of an interest in property and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer ; consequently the doctrine regarding mutual promises contained in section 39 of the Indian Contract Act has no application to

- (*n*) *Holgate v. Kay* (1844) 1 C. & K. 341, 70 R. R. 800; *Neah v. Mackenzie* (1836) 1 M. & W. 747, 150 E. R. 635.
 (*o*) *Meenakshi v. Chidambaram* (1912) 23 M. L. J. 119.
 (*p*) *Pemmarazu v. The Secretary of State for India* (1911) 34 Mad. 108.
 (*q*) *Nidha Sah v. Murte Dhar* (1903) 25 All. 115, 30 I. A. 54.
 (*r*) *Ancona v. Rogers* (1876) 46 L. J. Q. B. 121; *Guest v. Homfray* (1801) 5 Ves. 818, 31 E. R. 875.

- (*s*) *Bepin Behari v. Tincouri* (1911) 15 C. W. N. 976.
 (*t*) *Moli Lal v. Yar Muhammad* (1925) 47 All. 63; *Tayana v. Gurshidappa* (1901) 25 Bom. 269; *Navrang Singh v. A. J. Meik* (1923) 50 Cal. 68.
 (*u*) *Natesa v. Vengu* (1910) 33 Mad. 102; *Pemmarazu v. The Secretary of State for India* (1911) 34 Mad. 108.
 (*v*) *Raja Durga Prosad v. Rajendra Narain* (1909) 10 C. L. J. 570.

a lease. Section 35 of the Specific Relief Act did not apply, as the plea did not relate to any facts which vitiated the contract culminating in the lease, but to something which happened after the grant of the lease, namely, non-payment of the debt mentioned in the lease (w).

Tenant's remedy.—When the lessor under a *kanom* agreement was unable to give possession, it was held that the lessee could repudiate the contract and recover the amount advanced (x), or he could maintain a suit for ejectment against the party in possession notwithstanding the fact that at the date of the lease his lessor was not in possession of the property or sue for damages (y). The claim for damages would be governed by article 116 of the Limitation Act, 1908, and the damages awarded would be the amount of profits with interest at 6% per annum which would have accrued to the lessee if he had been put in possession and was in enjoyment during the term of the lease (z). Again, a lessee for a term can eject a lessee on a monthly tenancy by giving him notice to quit and thus obtain possession. Section 109 of the Act enacts that a transferee of any part of the lessor's interest in the property, is entitled to all the rights of the lessor (a), and although not put in possession, he can sue in ejectment, for the owner of an *inter esse termini*, as such an interest is designated by the common law, is entitled to sue in ejectment (b). Prior to entry on the land, the lessee has only an *inter esse termini* (an interest of the term). For want of possession an *inter esse termini* will not support an action for a declaration of title nor will it support an action on a covenant for quiet enjoyment: neither can the tenant maintain an action for trespass or for damages (c). But he could maintain an action for injury to his right (d). If time is of the essence and the lessee is not put in possession at the agreed date, he may rescind the contract under para 1 of section 55 of the Indian Contract Act (e). When the lessee has undertaken to get possession peacefully or by suit from a third person in possession, the lessor must join him in a suit for possession. He is only entitled to a declaratory decree (f).

Onus.—Before enforcing payment of rent the lessor must discharge his obligation to put him in possession. He must not only prove that the tenant is in possession but that such possession is attributable to the lease (g). Cases are distinguishable when the tenant has paid rent or when the tenant alleges and the landlord denies that certain subjects of which possession has not been given, were within the subjects let, in which case the onus is on the tenant.

Clause (c).—The lessor shall be deemed to contract with the lessee that (i) if the latter pays the rent reserved by the lease, and (ii) performs the covenants contained in the lease, (iii) he may hold the property during the lease without interruption.

(w) *Kandasami v. Ramasami* (1919) 42 Mad. 203.
(x) *Vayalil v. Udaya* (1864) 2 Mad. H. C. 315;
Tarachand v. Ram Gobind (1877) 4 Cal. 778.

(y) *The Zaminder of Vizianagram v. Behara* (1902) 25 Mad. 587; *Coe v. Clay* (1829) 5 Bing. 440; *Jinks v. Edwards* (1856) 11 Ex. 775; *Drury v. Macnamara* (1856) 25 L. J. Q. B. 5.

(z) *The Zamindar of Vizianagram v. Behara* (1902) 25 Mad. 587.

(a) *Manichram v. Ratnasami* (1917) 33 M. L. J. 684.

(b) *Bhutia v. Ambo* (1889) 13 Bom. 294.

(c) *Wallis v. Hands* (1893) 2 Ch. 75; *Harrison*

v. Blackburn (1864) 17 C. B. (N. S.) 678; *Turner v. Cameron's Coalbrook Steam Coal Co.* (1850) 5 Ex. 932; *Davood Mohideen v. Jayarama* (1921) 44 Mad. 937.

(d) *Gillard v. Cheshire Lines Committee* (1884) 32 W. R. 943.

(e) *Rajpal v. Municipal Committee, Arvi*, A. I. R. (1928) Nag. 328.

(f) *Krishna v. Subbanna*, A. I. R. (1929) Mad. 611.

(g) *Jogesh Chandra v. Emdad Meah* (1932) 59 Cal. 1012, 59 I. A. 29; *Durga Prasad Singh v. Rajendra Narayan* (1913) 41 Cal. 493, 40 I. A. 223; *Kumar Arun Chandra v. Bhagaban Chandra* (1922) 35 C. W. N. 1011.

S. 108

Agricultural leases.—The provisions of this clause do not apply to these leases (*h*).

Nature and incidents of section 108, clause (c).—Notwithstanding its conditional form, the clause was not intended to make the right to the benefit of the covenant for quiet enjoyment conditional on the actual payment of rent. Section 108 (*b*) does not deal with the defence of an action for rent. It enacts that the lessor is bound on the lessee's request to put him in possession of the property, but does not say that if he does not do so, the lessee is not bound to pay the rent. There is constructive eviction where the landlord, without turning the tenants out of possession, commits unlawful and wrongful acts which deprive the tenant of the beneficial enjoyment and use of the property. If therefore, the tenant be deprived of the thing, the obligation to pay the rent ceases. The rule of English Law, that where there has been material obstruction by the landlord of the tenant's enjoyment as would be regarded as tantamount to eviction, the landlord should not be entitled to recover any portion of the rent, is not applicable to India. It is difficult to hold on principle that a landlord is not entitled to any portion of the rent, if the tenant remains in possession of a portion of the land let. Strictly speaking, where the tenant has once been let into occupation of the premises leased to him, his right in law, where he is deprived of possession of a part thereof, is only in damages, while he is liable to pay the rent (*i*), unless the landlord has no title (*j*).

What words and circumstances raise a covenant in law.—A contract for quiet enjoyment will arise on the use of the words "granted and demised" (*k*). These words raise a covenant in law so as to give right to an action, though the lease was good by estoppel (*l*). By itself "demise" imports a covenant in law for quiet enjoyment (*m*). And so also from a demise by parol, the law will imply a covenant for quiet enjoyment (*n*), and on a demise of a tenement a promise of quiet enjoyment is implied (*o*). Similarly, with words "agrees to let" or any equivalent words creating the relationship of landlord and tenant (*p*). As to "agree to let," it was held otherwise in *Baynes & Co. v. Lloyd & Sons* (*q*). In that case Kay, L. J., observed, "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant but only from certain words used in creating the lease." This dictum was, however, not followed in later cases (*r*), where it was said that it was absolutely contrary to the decisions in *Bandy v. Cartwright* (*s*) and *Hall v. City of London Brewery Co.* (*t*), and was not established by the authorities there cited in support of it and they refused to follow it.

On the determination of the landlord's interest the law implies, in a tenancy from year to year, no such covenant for quiet enjoyment against eviction by title paramount, and so if, on the termination of the landlord's title the superior landlord ejects the tenant, the latter has no right of action against his own landlord

(*h*) Sec. 117, Transfer of Property Act, IV of 1882.

(*i*) *Meenakshi v. Chidambaram* (1912) 23 Mad. L. J. 119.

(*j*) *Moti Lal v. Yar Mahommad* (1925) 47 All. 63.

(*k*) *Iggulden v. May* (1804) 9 Ves. 325, 32 E. R. 628.

(*l*) *Style v. Hearing* (1605) Cro. Jac. 73, 79 E. R. 62.

(*m*) *Line v. Stephenson* (1826) 5 Bing. N. C. 183, 132 E. R. 1075; *Burnett v. Lynch* (1826) 5 B. & C. 589, 108 E. R. 220-227.

(*n*) *Bandy v. Cartwright* (1838) 8 Exch. 913, 155 E. R. 1624; *Hall v. City of London Brewery Co.* (1862) 2 B. & S. 737; *Budd-*

Scott v. Daniel (1902) 2 K. B. 351; *Robinson v. Kilvert* (1889) 41 Ch. D. 96; *Aldin v. Latimer Clark* (1894) 2 Ch. 437.

(*o*) *Hall v. City of London Brewery Co.* (1862) 2 B. & S. 737; *Budd-Scott v. Daniel* (1902) 2 K. B. 352, 121 E. R. 1245.

(*p*) *Budd-Scott v. Daniell* (1902) 2 K. B. 351; *Bandy v. Cartwright* (1853) 8 Ex. 913; *Hall v. City of London Brewery Co.* (1862) 2 B. & S. 737 followed.

(*q*) (1895) 2 Q. B. 610.

(*r*) *Budd-Scott v. Daniel* (1902) 2 Q. B. 351, *Markham v. Paget* (1908) 1 Ch. 607.

(*s*) (1853) 8 Ex. 913.

(*t*) (1862) 2 B. & S. 737.

for damages for such eviction (*u*). So also in case of a sub-tenancy, subject to agreement with the superior landlord (*v*). Similarly, with an under-lease on the termination of interest of the under-lessor, the implied covenant for quiet enjoyment determines (*w*). The case of *Hart v. Windsor* (*x*) is an authority that in this respect "let" has the same effect as the word "demise" and that any other equivalent word would have the same effect (*y*). From the use of the word "let" an unlimited covenant at law either for quiet enjoyment or for title cannot be implied. The covenant for quiet enjoyment, if one could be implied, would be limited to the acts of the lessor or those claiming under him (*z*). In India the lessor's undertaking for quiet enjoyment is implied from the relationship of landlord and tenant (*a*).

The covenant distinguished from warranty of fitness.—The two are quite different from each other. The one relates to enjoyment by the lessee and the other appertains to the premises or rather their suitability for the purpose for which they are let.

Is an implied covenant for quiet enjoyment absolute or qualified.—The question here is whether an implied contract extends to a disturbance by title paramount to the lessor's. In *Platt on Covenants* (*b*), the law is thus stated: "A general covenant for quiet enjoyment in earlier times was holden to extend to tortious evictions or interruptions: but this doctrine was never freely acquiesced in; and a different rule is now established, so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood, of all men claiming by title; for the law will not adjudge that the wrongful acts of strangers are covenanted against." And *Vaughan, C.L.J.*, in *Hayes v. Bickerstaff* (*c*), gives many reasons why the lessor should not be liable for the tortious acts of strangers. In *Baynes & Co. v. Lloyd & Sons* (*d*), the Court of Appeal observed that there was a conflict on the question. The only case there referred to as shewing that the implied covenant was limited, is *Andrew's case* (*e*), with regard to which it was said: "In *Andrew's case* it was held to be limited and that upon the covenant implied from the word 'demise.' An action would lie if the lessor himself entered upon the lessee, but not if a stranger entered."

Although not necessary for the decision of the case, *Swinfen Eady, J.*, in *Markham v. Paget* (*f*), observed: "*Baynes & Co. v. Lloyd & Sons* (*g*) is not an authority that any implied covenant is limited to the acts of the lessor, or persons claiming under him, but the subsequent case of *Jones v. Lavington* (*h*) did not decide that point, and although it only purported to follow *Baynes & Co. v. Lloyd & Sons* and notwithstanding other decisions to the contrary, it would be my duty as a Judge of first instance to follow the latest decisions of the Court of Appeal, and decide—if it were necessary to decide the point—that any implied contract did not extend to persons claiming by title paramount." Hence prior to *Jones v. Lavington* (*h*) the implied contract for quiet enjoyment though limited in duration to the lessor's estate, extended to a lawful interruption by title paramount during the continuance of that estate. The qualified form of the

(*u*) *Swaitz v. Locket* (1889) 61 L. T. 719.
 (*v*) *Hoare v. Chambers* (1895) 11 T. L. R. 185.
 (*w*) *Messent v. Reynolds* (1846) 3 C. B. 194, 136 E. R. 78.
 (*x*) (1844) M. & W. 68, 152 E. R. 1114.
 (*y*) *Mestyn v. West Mestyn Coal and Iron Co.* (1876) 1 C. P. D. 145.
 (*z*) *Jones v. Lavington* (1903) 1 Q. B. 253.
 (*a*) *Ram Chandra Chatterji v. Pramatha Nath*

Chatterjee (1922) 35 C. W. N. 146.
 (*b*) P. 313.
 (*c*) (1669) Vaugh. 118, 122.
 (*d*) (1895) 1 Q. B. 820, 826.
 (*e*) *Leon*, 104.
 (*f*) (1908) 1 Ch. 697.
 (*g*) (1895) 1 Q. B. 820.
 (*h*) (1903) 1 K. B. 253.

S. 108

covenant in India covers the case of an interruption by the superior landlord or other person claiming by title paramount but not a disturbance by person having no lawful title or right of entry (i).

Express covenant for quiet enjoyment.—This covenant, which is usually found at the end of a lease, is worded as follows:— “The landlord covenants with the tenant that if the tenant shall pay the rents hereby reserved and perform his covenants and stipulations therein contained, he shall peaceably and quietly hold and enjoy the demised premises during the term without any interruption by the landlord or any person lawfully claiming under or in trust for him” (j). However worded such a covenant may be, if the lessor is evicted by title paramount or any other interruption is caused to his enjoyment, subsequent to the lease, it cannot be said to have been caused by the lessor or by any person or persons claiming by or under him and there would be no breach of the covenant (k). The same principle would apply if the lessor is ejected by the superior landlord for non-payment of rent or other breach of any covenant in the head-lease (l); or where there is a distress by the Collector of land taxes against the lessor (m); or against the unlawful acts of third persons having no title (n), even though the covenant contained the words “or by any person or persons whomsoever.” It is, however, otherwise where the covenant names an individual or individuals against whose interruption the covenantor binds himself. In order to enable the lessee to take the benefit of this covenant, there must be some physical interference with the enjoyment of the demised premises (o). All breaches by the lessor and disturbances by him are included. Therefore, if a lessor covenants that he will not interrupt the lessee in the enjoyment of a close, the erection by him of a gate on a necessary way leading to it so as to intercept, is a breach of the covenant although the lessor had a legal right to erect the gate there, but for his covenant (p). So if a lessor of a mine excavates a stone quarry over it in such a manner, as thereby to intercept the lessee in his occupation of the mine, that is a breach of the covenant for quiet enjoyment whether the lessor had a legal right to excavate the quarry or not (q). A covenant for quiet enjoyment is not a covenant for indemnity and only extends to interruptions which might have been foreseen when the lease was granted (r).

“Any person claiming under the lessor.”—According to a dictum of Lord Esher in *Sanderson v. Mayor of Berwick-on-Tweed* (s), these words mean a person claiming under him (i.e., the lessor) the right to do the acts which caused the interruption. This limit was approved in a later case (t).

“Lawfully.”—The word “lawfully” usually occurs in this covenant, but its omission is of no importance (u).

“Paying and performing.”—In the covenant for quiet enjoyment these words frequently occur. They however, do not make “paying and performing” a condition precedent to the quiet enjoyment, so that if the lessee did not pay and

(i) *Naorang Singh v. Meik* (1923) 50 Cal. 68; *Ramchandra Chatterji v. Pramatha Nath Chatterji* (1922) 35 C. L. J. 146; *Tayanea v. Gurshidappa* (1901) 25 Bom. 269; *Moti Lal v. Yar Muhammad* (1925) 47 All. 63.
(j) *Encyclopædia of Forms*, 2nd Ed., Vol. 8, p. 195.
(k) *Line v. Stephenson* (1838) 7 Scott, 69; see *Banka Behari v. Madan Mohan* (1921) 26 C. W. N. 143.
(l) *Kelley v. Rodgers* (1892) 1 Q. B. 910.
(m) *Stanley v. Hayes* (1842) 3 Q. B. 105.
(n) *Dudley v. Folliott* (1700) 3 T. R. 584; 1

Revised Report 772; *Young v. Raincook*, (1848) 18 L. J. C. P. 193.
(o) *Browne v. Flower* (1911) 1 Ch. 219; *Matania v. National Provincial Bank, Ltd.* (1936) 154 L. T. 103.
(p) *Andrews v. Paradise* (1724) 8 Mod. 318.
(q) *Shaw v. Stenton* (1858) 27 L. J. Ex. 253.
(r) *Harrison Aninslie & Co. v. Muncaster* (1891) 2 Q. B. 680.
(s) (1884) 13 Q. B. D. 547.
(t) *Williams v. Gabriel* (1906) 1 K. B. 155.
(u) *Williams v. Gabriel* (1906) 1 K. B. 155.

perform, the lessor cannot be heard to say that he was not obliged to make good his covenant for quiet enjoyment (*v*).

"Peaceably and quietly."—This phrase which is found in a covenant for quiet enjoyment means without interference, without interruption of the possession (*w*). Interference must be physical, that is to say, disturbance of the lessee's possession is the essence of the breach, so that a person having only an *inter esse termini* cannot maintain an action on a covenant for quiet enjoyment (*x*). It is sufficient that there is a substantial interference by the acts of the lessor or those claiming under him with the lessee's lawful enjoyment, although neither title of the landlord nor the possession of the land be otherwise affected (*y*). "Quietly" does not mean undisturbed by noise. The word has nothing to do with noise. The covenant is a covenant for freedom from disturbance (*z*). To constitute such a breach there must be physical interference with the enjoyment of the demised premises, for a mere interference with comfort by the creation of personal annoyance or mere invasion of privacy is not enough (*a*). There must be substantial physical interference with the enjoyment (*b*). But acts which do not amount to a direct interference of the demised land do not constitute a breach of this covenant (*c*). The covenant is not restricted to an active disturbance of the enjoyment but even an omission which is a breach of a duty by the lessor resulting in damages, would give a cause of action on the covenant (*d*), for an act of omission may be tantamount to an act of commission (*e*). But where the lessor covenants from the time of granting the lease that the lessee's enjoyment shall not be obstructed by any act of the lessor or any one claiming under him, such a covenant is prospective and will not apply to acts done prior to the demise. A covenant for quiet enjoyment does not enlarge the grant (*f*).

Purchase of adjoining property after date of lease.—The covenant for quiet enjoyment does not apply to an act done upon other land which only indirectly affects the enjoyment of the demised land and so, where a lessor under a lease of 1897 conveyed the reversion, subject to the lease to the defendants in 1898 and the latter in 1900 purchased from a stranger the house adjoining the demised premises, pulled it down and erected on the site a new building of a height which caused the plaintiff's chimneys to smoke so as to affect materially the enjoyment of one room, it was held that the defendant was not liable inasmuch as, at the date of the demise, the lessor had no interest in the adjoining premises (*g*).

Bond of covenant sued against the lessor, the lessor is relieved in equity.—The plaintiff (lessor) let the defendant (lessee) a lease at £3 per annum rent, and to enter upon default of payment of the rent in twenty days the plaintiff gives a bond for the defendant's quiet enjoyment of the premises, and performing of the covenants; the defendant fails in the payment of the rent; the plaintiff enters and the defendant sues on the bond and gets judgment, and takes the plaintiff's surety in execution

(*v*) *Hayes v. Pickerstaff* (1675) 1 Freeman 195, 89 E. R. 138.

(*w*) *Jenkins v. Jackson* (1888) 40 Ch. D. 71.

(*x*) *Wallis v. Hands* (1893) 2 Ch. 75.

(*y*) *Sanderson v. Berwick upon Tweed Corporation* (1884) 13 Q. B. D. 547; *Robinson v. Kilvert* (1889) 41 Ch. D. 88; *Harrison Ainslie & Co. v. Muncaster* (1891) 2 Q. B. 680; *Williams v. Gabriel* (1906) 1 K. B. 155.

(*z*) *Hulson v. Cripps* (1896) 1 Ch. 265; *Jagger v. Mansions Consolidated* (1903) 87 L. T. 690.

(*a*) *Browne v. Flower* (1911) 1 Ch. 209.

(*b*) *Tebb v. Cave* (1900) 1 Ch. 642.

(*c*) *Harmer v. Jumbill (Nigeria) Tin Arcas, Ltd.* (1921) 1 Ch. 200; *Davis v. Town Properties Investment Corporation* (1903) 1 Ch. 799.

(*d*) *Booth v. Thomas* (1926) 1 Ch. 397; *Cohen v. Tannar* (1900) 2 Q. B. 609.

(*e*) *Anderson v. Oppenheimer* (1880) 5 Q. B. D. 602.

(*f*) *Potts v. Smith* (1868) L. R. 6 Ex. 311; *Leech v. Schweder* (1874) 9 Ch. 463; *Davis v. Town Properties Investment Corporation, Ltd.* (1903) 1 Ch. 797.

(*g*) *Davis v. Town Properties Investment Corporation, Ltd.* (1903) 1 Ch. 797.

S. 108

who pays the defendant £21. The Court ordered the defendant to repay the said £21 to the plaintiff (*h*). In other words, re-entry for rent is not a breach of covenant for quiet enjoyment.

Authority given before lease.—Where an act is committed by some person authorized by the prior authority of the lessor to do it and that has diminished the tenant's enjoyment of the premises, it is an act for which the lessor is responsible, he having conferred the authority to do it, and the act was done during the enjoyment of the lessee (*i*).

Premises let in floors.—Plaintiff was one of several tenants of flats, the ground floor and basement having been leased to him, containing a covenant that the plaintiff might "peaceably hold and enjoy the demised premises during the term, without any interruption by the defendant." The different floors were supplied with water from a cistern on the top of the house and the water was distributed by a main-pipe connected with the cistern. A branch service pipe burst and overflowed the basement, injuring the plaintiff's goods. It was held that there was no breach of covenant for quiet enjoyment as the branch was found to be reasonably fit and proper for the purpose for which it had been fixed and the defendant had not been guilty of any negligence in keeping and maintaining it (*j*). Here the covenant was considered to be prospective in its operation, as the only act done by the defendant was before the lease was granted to plaintiff.

Participation.—In order to render the lessor liable for breach of a covenant for quiet enjoyment on the ground of nuisance by another tenant of the same lessor, there must be an active participation on his part. A common lessor cannot be called upon by one of his tenants to use for the benefit of that tenant, all the powers he may have under agreements with other persons (*k*).

Exclusion of implied covenant by express covenant.—When in a deed you find an express covenant dealing with a particular matter as to the demised premises, there is no room for an implied covenant covering the same ground or any part of it. That is very old law. Then it is said that if an express covenant does not go far enough, you can fall back upon the implied covenant, from the word "grant" or the word "demise." That proposition would be contrary to the law which has been perfectly established for more than half a century (*l*). Holder brought an action of covenant against Taylor, and declared a lease for years made by the defendant by the word (demise) which imports a covenant; and then shews, that at the time of the lease made, the lessor was not seised of the land, but a stranger, and so the covenant in law broken. The whole Court was of opinion that an action did lie; for the breach of the covenant was, in that the lessor had taken upon him to demise that, which he could not; for the word (demise) imports a power of letting, as (dedi) a power of giving; that it was not reasonable to force the lessee to enter upon the land, and so to commit a trespass but if it were an express covenant for quiet enjoying, then perhaps it were otherwise (*m*). So far as the covenant is

(*h*) *Pope v. Day* (1636) 1 Chan. Rep. 95, 21 E.R. 518.

(*i*) *Andrews v. Paradise* (1724) 8 Mod. 318, 88 E. R. 228; *Shaw v. Stenton* (1858) 2 H. & N. 858, 157 E. R. 353; *Calvert v. Sebright* (1852) 15 Beav. 156, 51 E. R. 496.
(*j*) *Anderson v. Oppenheimer* (1880) 5 Q. B. D.

602.

(*k*) *Malzy v. Eichholz* (1916) 2 Q. B. 308; *Jaeger v. Mansions Consolidated* (1903) 87 L. T. 690 followed.

(*l*) *Malzy v. Eichholz* (1916) 2 Q. B. 308.

(*m*) *Holder v. Taylor* (1614) Hobart 12, 80 E. R. 163.

personal or collateral, it does not run with the land (*n*). On a purchase, the purchaser covenanted with the vendor that he and his assigns would not permit the sale of beer on the premises. The purchaser afterwards demised a part of the building for 21 years. The lessee for himself and his assigns covenanted not to carry on certain trades (that of beer not being one), the purchaser giving an express covenant for quiet enjoyment. The lease was assigned to the plaintiff and he without notice of the covenant entered into by the purchaser with the vendor, fitted up the premises with a beer-shop, upon which the vendor obtained an injunction restraining the plaintiff from carrying on the beer business. The plaintiff then brought an action against the purchaser for breach of the express or implied covenant in the deed of demise. It was held that the express covenant for quiet enjoyment excluded any implied covenant. The covenant for quiet enjoyment whether with or without a partially restrictive covenant, has, therefore, been regarded as a covenant to secure title and possession, and not to guarantee to the lessee that he may lawfully use the land for any purpose not mentioned in the restriction (*o*). The proceeding of a Court of Chancery or a Court of Common Law interfering with the title and possession of the land is a breach of the covenant for quiet enjoyment (*p*). On the other hand, such a proceeding of interfering only with a particular mode of enjoyment of the land or part of it, but not with the title or possession, is not a breach (*q*). If there is an express covenant either for title or for quiet enjoyment, then there is no implied covenant at all (*r*). Where lessors are mortgagor and mortgagee, and the express covenant is given by the mortgagor only, no covenant by both for quiet enjoyment can be implied (*s*).

Agreement for lease.—Where there is an agreement for a lease only, unless there be some words, of present demise, the instrument does not amount to a lease. In such a case the demise only being contracted for and not one executed, there is no implied covenant for quiet enjoyment and the lessee cannot claim to recover as for the breach of an implied promise for quiet enjoyment (*t*).

Nature of covenant.—A covenant for quiet enjoyment runs with the land and binds the assignee. Where A being possessed of certain premises for a term assigned part of them to B for the residue of the term, with a covenant for quiet enjoyment, and the latter assigned them over to C who was evicted by J. S., the lessor of A, for a breach of covenant committed by A previous to the assignment to B, it was held that C might maintain an action against A upon the covenant for quiet enjoyment as there was privity of estate between A and C (*u*).

Payment of rent.—A clause in a lease, that if the lessee pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption, is not a condition but a covenant (*v*), and the payment of rent is not a condition precedent to the

- (*n*) *Davis v. Town Properties Investment Corporation, Ltd.* (1903) 1 Ch. 797.
- (*o*) *Dennett v. Atherton* (1872) 7 Q. B. 316; *Spencer v. Marriott* (1823) 1 B. & C. 457 affirmed; *Syed Mukhtar v. Rani Sunder* (1913) 47 C. W. N. 960.
- (*p*) *Calthorp v. Heyton* (1693) 2 Mod. 54; *Hunt v. Danvers* (1680) T. Raym. 370.
- (*q*) *Morgan v. Hunt* (1690) 2 Vent. 213, 86 E. R. 400.
- (*r*) *Mostyn v. West Mostyn Coal and Iron Co.* (1876) 1 C. P. D. 145; *Line v. Stevenson* (1838) 5 Bing. N. C. 183, 132 E. R. 1075;

- Clayton v. Leech* (1889) 41 Ch. D. 103.
- (*s*) *Smith v. Pocklington* (1831) 1 Cr. & J. 445, 148 E. R. 1497.
- (*t*) *Brashier v. Jackson* (1840) 6 M. & W. 549, 151 E. R. 530, B. & Ald. 106 E. R. 706.
- (*u*) *Campbell v. Lewis* (1820) 3 B. & A. 392, 106 E. R. 706; *Booth v. Thomas* (1926) 1 Ch. 397; *Manchester, Sheffield and Lancashire Rly. Co. v. Anderson* (1898) 2 Ch. 394; *Kunhammad v. Etakarati Ammad, A. I. R.* (1929) Mad. 195.
- (*v*) *Hays v. Bickerstaff* (1675) 11 Freom. K. B. 194, 86 E. R. 926.

S. 108 performance of the covenant for quiet enjoyment. The covenant for quiet enjoyment and the covenant to pay rent are independent covenants (*w*).

Entry not necessary.—It is sufficient breach of a covenant for quiet enjoyment to shew good title in another without alleging an entry by the plaintiff (lessee) and an eviction (*x*).

Acts done under the statutory powers.—When the act complained of is done under statutory power, it does not matter when and how the plaintiff's right arose. It is a case for compensation and not for action (*y*).

Knowledge of circumstances at the time of demise.—No claim can be made on the ground of a breach of covenant for quiet enjoyment, when the lease is taken with the full knowledge of the circumstances existing at the time of the demise, in which case either the act is not a breach of the covenant for quiet enjoyment or the lease does not express the intention of the parties in that respect and ought to be reformed (*z*).

No presumption by mere letting.—Implied obligations as to the quiet enjoyment in a contract must be governed by the common intention of the parties. The fact that one lets and the other hires does not create any presumption in favour of either in construing an express covenant. Nor ought it to create a presumption in construing the implied obligations arising out of the contract. When it is a question of what is implied from the contract the purpose or purposes to which both parties intended the land to be put, should be ascertained and having discovered that, both should be held to all that was implied in this common intention (*a*).

Breach of covenant for quiet enjoyment may be an act of commission as well as of omission.—An owner of land through which ran a natural stream, enclosed the stream in a culvert and granted a lease for 99 years of the adjoining part through which the culvert did not run. The stream broke through the culvert and caused damage. The plaintiff was lessee, the defendant lessor. Held the covenant was not confined to active disturbance of enjoyment and the omission to keep the culvert in repair was a breach of the contract (*b*). Entry by one claiming title and lawful right under the covenantor is a breach of a covenant "for quiet enjoyment free from all lawful interruption" (*c*). Disturbance of a way of necessity (*d*) or setting up a gate, across a necessary way for the enjoyment of a close is a breach of covenant for quiet enjoyment (*e*). Where the act done, though it does not affect title or possession, is a substantial physical interference with the enjoyment, it is a breach of the covenant (*f*).

Acts which have been held not to be breaches of covenant.—There is not a breach of covenant for quiet enjoyment where the act complained of is that of the superior landlord, and not of the sub-lessor or any person claiming by, through or under him (*g*);

(*w*) *Dawson v. Dyer* (1833) 5 B. & Ad. 584, 110 E. R. 906; *Edge v. Boileau* (1885) 16 Q. B. D. 117; *Meenakshi v. Chidambaram* (1912) 23 Mad. L. J. 119; *Bastin v. Bidwell* (1881) 18 Ch. D. 238; *Stanbury v. Plymouth Docks Waterworks Co.* (1887) 3 T. L. R. 328 C. A.
 (*x*) *Cloake v. Hooper* (1673) 1 Freeman 122, 89 E. R. 90.
 (*y*) *Cessford v. Dover Harbour Board* (1898) 42 So. Jo. 451; *Newby v. Sharpe* (1878) 8 Ch. D. 39.
 (*z*) *Cessford v. Dover Harbour Board* (1898) 42 So. Jo. 451.
 (*a*) *Lytleton Times Co., Ltd. v. Warness, Ltd.* (1907) A. C. 476.

(*b*) *Booth v. Thomas* (1926) 1 Ch. 397.
 (*c*) *Cross v. Young* (1685) 2 Show K. B. 425, 89 E. R. 1021.
 (*d*) *Morris v. Edgington* (1810) 3 Taunt. 24, 128 E. R. 10.
 (*e*) *Andrews v. Paradise* (1724) 8 Mod. 318, 88 E. R. 228.
 (*f*) *Tebb v. Cave* (1900) 1 Ch. 642 doubted by Romer, L. J. in *Davis v. Town Properties Investment Corporation, Ltd.* (1903) 1 Ch. 797; the act complained of must be a direct interference.
 (*g*) *Spencer v. Marriott* (1823) 1 B. & C. 457, 107 E. R. 170; *Kelly v. Rogers* (1892) 1 Q. B. 910; *Dennett v. Athelton* (1872) 7 Q. B. 316.

or where there is an entry adverse to the lessor, for instance where a Collector of land tax makes an entry to levy distress for arrears of tax at the time of the demise, as it cannot be said to be an entry by, from or under the lessor (*h*); or where neither possession nor title to the land be otherwise affected (*i*); or where the act complained of was done prior to the granting of the lease (*j*). Interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy or otherwise is not enough (*k*), nor is a temporary infringement (*l*) or interference with the access of light and air (*m*), or forbidding a tenant from paying rent (*n*); nor does the covenant protect against disturbance by trespassers or persons having no lawful title or right of entry (*o*).

Damages for breach of covenant for quiet enjoyment.—On a breach of covenant for quiet enjoyment, the lessee is entitled to claim damages from his lessor. The measure of damages is usually the value of the loss occasioned by the breach, besides the premium, if any, paid, and the costs of preparing the void lease. Thus where the lessor being only a tenant for life with power to grant lease in possession and not in reversion, granted a lease which determined on the death of the lessor, the lessee was held entitled, on obtaining a fresh lease from the reversioners, to damages, being substantially the difference in value of the term professed to be granted and that which he obtained from the reversioners (*p*). The lessee is also entitled to the value of the term, the costs of defending collateral actions and action in ejectment as also the sum recovered by the remainderman, being mesne profits (*q*). Interest on damages is also awarded (*r*). But he cannot claim abatement of rent (*s*). But nominal damages only will be awarded where infringement of the lessee's rights was temporary, nor would injunction be granted in such a case (*t*). So also where evidence shewed that there was a disturbance to enjoyment but no eviction (*u*). And so where a lease was granted to enure for a term beyond the lessor's term and the superior landlord gave notice to quit, which expired prior to the date of the lease and subsequently the lessee entered into a direct lease with the landlord but at a lower rent, the Court awarded nominal damages (*v*).

Extent of implied contract for quiet enjoyment.—This was considered by Swinfen Eady, J., in *Markham v. Paget* (*w*), when on a review of the authorities from *Hart v. Windsor* (*x*) to *Jones v. Lavington* (*y*), the following propositions were deduced:—

- (1) That a lessor cannot derogate from his grant (*z*);
- (2) That a lessee was entitled to recover on the footing that a tenancy agreement imported an implied contract for quiet enjoyment, from the use of

(*h*) *Stanley v. Hayes* (1842) 3 Q. B. 105, 114 E. R. 447.
 (*i*) *Sanderson v. Berwick-upon-Tweed Corporation* (1884) 13 Q. B. D. 547; *Manchester, Sheffield and Lincolnshire Rly. Co. v. Anderson* (1898) 2 Ch. 394.
 (*j*) *Anderson v. Oppenheimer* (1880) 5 Q. B. D. 602.
 (*k*) *Browne v. Flower* (1911) 1 Ch. 219.
 (*l*) *Leader v. Moody* (1875) L. R. 20, Eq. 145.
 (*m*) *Potts v. Smith* (1868) L. R. 6 Eq. 311, *Robson v. Palace, Chambers Westminster Co., Ltd.* (1897) 14 T. L. R. 56.
 (*n*) *Witchcot Linesey v. Nine* (1612) 1 Brown 81, 123 E. R. 679.
 (*o*) *Nasrang Singh v. Meik* (1923) 50 Cal. 68; *Uday v. Katyani* (1922) 49 Cal. 948; *Tayawa v. Gurshidappa* (1901) 25 Bom. 269.
 (*p*) *Lock v. Furze* (1866) 15 L. T. 161.

(*q*) *Williams v. Burrell* (1845) 1 C. B. 402, 135 E. R. 596; *Morse v. Tucker* (1846) 5 Hare. 79, 67 E. R. 835; *Rolph v. Crouch* (1867) 17 L. T. 249.
 (*r*) *Morse v. Tucker* (1846) 5 Hare. 79, 67 E. R. 835.
 (*s*) *Indu Bhusan v. Moazam Ali* (1929) 49 C. L. J. 252.
 (*t*) *Leader v. Moody* (1875) 32 L. T. 422.
 (*u*) *Child v. Steening* (1879) 40 L. T. 302.
 (*v*) *Jones v. Hawkins* (1886) 3 T. L. R. 59; see *Grosvenor Hotel v. Hamilton* (1894) 2 Q. B. 836.
 (*w*) (1908) 1 Ch. 697.
 (*x*) (1843) 12 M. & W. 68, 152 E. R. 1114.
 (*y*) (1908) 1 K. B. 253.
 (*z*) *Markham v. Paget* (1908) 1 Ch. 697; see *Grosvenor Hotel Co. v. Hamilton* (1894) 2 Q. B. 836.

S. 108

the words "demise" or "let" (a), "let" without the word "demise" (b), "agree to let" (c), "let" (d).

(3) The implied contract relates only to the estate and not to the condition of the property (e).

(4) The implied contract does not extend to a disturbance by title paramount to the lessor (f).

Clause (d).—If during the continuance of the lease (i) any accession is made to the property, (ii) such accession shall be deemed to be comprised in the lease (subject to the law relating to alluvion).

Exception.—This rule would not apply where the parties are governed by their contract or local usage.

Agricultural leases.—This clause has no application to these leases (g).

Accretion to parental estate.—This clause deals with increments when during the currency of the lease the original land is increased by additions to it. According to this clause, in the absence of express stipulation or local usage to the contrary, such additions are deemed to be included in the land originally leased and subject to the same terms of tenancy as the parent land (h). In other words, the tenant is entitled to possession of the increment on the same right and upon the same footing as that upon which he holds the parent estate. What may be the limit of demand which the landlord is entitled to make against the tenant is not clearly prescribed by the section. The landlord cannot treat the increment as a separate tenure altogether but that treating it as part and parcel of the parent tenure he can claim such relief as under the law he is entitled to as against the tenant. He is entitled to have the rent fixed for the disputed land but not to arrears of rent nor for compensation for use and occupation (i). Encroachment by a tenant during the continuance of the tenancy is presumed to have been made not for the benefit of the tenant but of the landlord (j), even though title may have been acquired by adverse possession against a third party (k). No such presumption arises in case of premises not adjoining (l), nor in case of land occupied before the tenancy (m). If a tenant has encroached upon any land and made it a part of his tenancy, he is bound on termination of his tenancy to yield up the same with other lands (n). It is not necessary in case of waste land that the land encroached upon should be conterminous with the land held by the tenant, nor does the circumstance of the intervention of a small river and a fence and a narrow strip of waste between the holding and encroachment rebut the presumption, though there be no direct access between the two across the stream (o). In cases of encroachments,

(a) *Hart v. Windsor* (1843) 12 M. & W. 68, 152 E. R. 1114; *Bandy v. Cartwright* (1853) 22 L. J. Ex. 285, 155 E. R. 1624; *Hall v. City of London Brewery Co.* (1862) 2 B. & S. 737, 121 E. R. 1245.
 (b) *Mostyn v. West Mostyn Coal and Iron Co.*, (1876) 1 C. P. D. 145.
 (c) *Robinson v. Kilvert* (1889) 41 Ch. D. 88; *Budd-Scott v. Daniell* (1902) 2 K. B. 351.
 (d) *Jones v. Lavington* (1908) 1 K. B. 253.
 (e) *Markham v. Paget* (1908) 1 Ch. 697.
 (f) *Platt on Covenants*, p. 313; *Hayes v. Bickerstaff* (1669) Vaugh. 118, 86 E. R. 926; *Woodfall on Landlord and Tenant*, 18th Ed., p. 779; *Jones v. Lavington* (1908) 1 K. B. 253.

(g) Sec. 117, Transfer of Property Act.
 (h) *Tabor v. Godfrey* (1895) 64 L. J. Q. B. 245.
 (i) *Asaanullah v. Mohini Mohan Das* (1899) 26 Cal. 739.
 (j) *Whitmore v. Humphries* (1871) 41 L. J. C. P. 43; *Esubai v. Damodhar* (1892) 16 Bom. 552; *Gooroo Doss v. Issur Chunder* (1875) 22 W. R. 246; *Saroj Kumar Bose v. Surjya Kunta Sarkar* (1935) 40 C. W. N. 121.
 (k) *Nuddyarchand v. Meahan* (1883) 10 Cal. 820.
 (l) *Hastings (Lord) v. Saddler* (1898) 79 L. T. 355.
 (m) *Dixon v. Baty* (1866) L. R. 1 Exch. 259.
 (n) *Indu Bhusan v. Atul Chandra* (1925) 42 C. L. J. 276.
 (o) *Lisburne (Earl) v. Davies* (1866) 13 L. T. 795.

it is open to the landlord to treat the tenant as a trespasser or as a tenant, but he cannot change after he has once made the election (*p*). But a tenant on landlord's land without his consent would not be subject to the above rules. These the tenant cannot claim to hold with the parent tenure during the subsistence of the tenancy (*q*).

Exception.—Although the accreted lands form part of and follow the parent land, an exception is made in respect of alluvial lands which are subject to special legislation.

Cost of accession.—The clause is silent as to who is to bear the burden of accretion. The act lays down certain rules as to how and by whom the expenses are to be borne in case of mortgages but there is no similar provision in this clause. It is submitted that the same rule would apply. Where a tenant built a substantial house on the land leased to him with the knowledge of the landlord and enjoyed it for several years, the landlord was compelled to compensate the tenant for retaining the building (*r*). In this connection it is to be remembered that the English maxim "*quid quid plantatur solo solo*" does not apply to India.

Clause (e).—If (i) by fire, tempest or flood or violence of an army or of a mob or other irresistible force, (ii) any material part of the property be wholly destroyed, or (iii) rendered substantially and permanently unfit, (iv) for the purposes for which it was let, (v) the lease shall, at the option of the lessee, be void.

Exception.—The rule in this clause would not apply where the injury is caused by the (a) wrongful act or default of the lessee. Nor would it apply where the parties have regulated their contract by express terms on the subject.

Agricultural leases.—The provisions of this clause do not apply to agricultural leases (*s*).

Limited right of avoidance.—The lessee has no right to avoid the lease unless : (1) a material part of the property be wholly destroyed, or (2) a material part of the property be substantially and permanently rendered unfit for the purpose for which it was let, and (3) the injury was not occasioned by the wrongful act or default of the lessee.

Fire.—Where a coffee garden was leased under an instrument, which was held to be a lease of the coffee plants which only were destroyed by fire, and consequently abandoned by the lessee, the lessor could not recover the rent. Here if the land only had been demised it was doubtful whether this clause would have applied. It was further held that a lease of a coffee garden was not an agricultural lease (*t*). So also where godowns let for storage were wholly destroyed by fire and rendered unfit for the purpose for which they were leased, the lessee was entitled to avoid the lease (*u*). It was similarly held in case of partial destruction rendering them unfit (*v*).

Flood.—This is not restricted to flooding by other than sea-water (*w*).

(*p*) *Khondakar v. Mohini* (1899) 4 C. W. N. 508 ;
Gadi Kunbi v. Ramlal (1902) 16 C. P. L. R. 36.

(*q*) *Venkateshwar v. Kesavashetti* (1879) 2 Mad. 187 ; *Nuddyarchand v. Meajan* (1884) 10 Cal. 820 ; *Proplad Teor v. Kedar Nath* (1898) 25 Cal. 302 ; *Maidin Saiba v. Nagappa* (1883) 7 Bom. 96.

(*r*) *Ramchandra v. Vishnu* (1920) 22 Bom. L. R. 948.

(*s*) Transfer of Property Act, sec. 117 ; *Sinappa*

Pillai v. Ramaswami Ayyar, A. I. R. (1929) Mad. 575 ; *Ballabha Das v. Murat Narain Singh* (1926) 48 Ali. 385 ; but see *Kunhiraman Nambiar v. Kunhikannan Nambiar* (1936) 71 M. L. J. 352.

(*t*) *Kunhayen v. Mayan* (1894) 17 Mad. 98.

(*u*) *Dhurumsey v. Ahmedbhai* (1899) 23 Bom. 15.

(*v*) *Siddick Haji Hossein v. Brud & Co.* (1911) 35 Bom. 333.

(*w*) *Kunhiraman Nambiar v. Kunhikannan Nambiar* (1936) 71 M. L. J. 352.

S. 108

Other irresistible force.—This means some matter *ejusdem generis* in the fire, flood, etc, and would include invasion by foreign enemy, military or usurped power, enemy air raids, but not damage caused by the tenant himself. The phrase covers fire (x).

Earthquake.—Destruction through such a cause would entitle the lessee to the benefit of this clause. But where a lessee undertook without restriction or exception to keep the premises wind and water tight and in habitable condition, it was held that this was a contract to the contrary and that the lessee was bound to restore the property on termination as in its original state (y).

The lease shall be void.—The lessee is given an option to dissolve the lease if the subject-matter be destroyed wholly or be rendered unfit substantially and permanently for the purpose for which it was let by any of the casualties mentioned in this clause. This option the lessee can exercise when there is no express stipulation to the contrary. In a well-drafted lease the rights of the parties are regulated to meet such events.

Vacant possession.—If the avoidance of the lease be effectual without surrender or vacant possession the lessee, by failing to give vacant possession, would be holding over after termination of the lease and would be liable for rent under an implied monthly tenancy on the same terms as before. If the avoidance be ineffectual, the lease is continued until put an end to by mutual consent (z). On an avoidance the lease is determined and on determination of the lease the lessee is bound to put the lessor into possession of the property under clause (q) of section 108 of the Transfer of Property Act. It is, therefore, submitted that the former alternative would not be correct.

Fire near the end of the term.—The lessee's covenant to reinstate in the absence of any special provision fixing time and performance, does not come to an end at the end of the term, but he is allowed a reasonable time for reinstatement (a).

While rent paid in advance.—A tenant who has paid rent in advance, on destruction of the premises entitling him to avoid the lease under this clause, is entitled to a refund of the rent for the unexpired residue of the term under section 65 of the Indian Contract Act, IX of 1872 (b).

Insurance against fire.—There is no provision in the Act to insure demised premises either by landlord or tenant. It is not a usual covenant in a lease (c). One has therefore to look to the express contract between the parties. Generally, provision is made for the insurance by the lessee where the structure belongs to him, and forms the only security of the landlord for ground rent. In short-term leases and monthly tenancies the landlord insures, though not under an express contract, but by usage. An insurance by a lessee is usually arranged to be in joint names of lessor and lessee so that the lessor may have control over the funds in case of casualties by fire.

Excepted risks. Under the ordinary covenant for insurance, a lessee is not bound to insure against excepted risks which are not included in usual policies issued by underwriters (d).

(x) *Girdaridas v. Ponnu Pillai* (1920) 39 M. L. J. 233.

(y) *Heehel v. Tellery* (1899) 4 C. W. N. 521.

(z) *Siddick Haji Hossein v. Brud & Co.* (1911) 35 Bom. 333.

(a) *Matthey v. Curling* (1922) 2 A. C. 180.

(b) *Dharamsey v. Ahmedbhai* (1899) 23 Bom. 15.

(c) *Hampshire v. Wickens* (1878) 7 Ch. D. 535.

(d) *Upjohn v. Hitchens*, *Upjohn v. Ford* (1910) 2 K. B. 48.

Nature of covenant for insurance.—It runs with the land (*e*). The covenant to insure and keep insured is a continuing covenant (*f*); so that acceptance of rent though a waiver of the breach (*g*) will not operate beyond the date to which the rent is accepted (*h*). Forfeiture is incurred by omission to insure even for a part of the term, so that a purchaser may object to the vendor's title though the lessor does not appear to have taken advantage (*i*). Even so where failure to insure is subsequent to the date fixed for completion of the purchase (*j*).

Form of covenant for insurance.—During the term (*k*), to keep insured in the joint names of the landlord and tenant (*l*), the demised premises from loss or damage by fire (*m*), in some insurance office (*n*), or with underwriters to be named by the landlord (*o*) in the sum of £ at least of a sum equal at least to three-fourths part of the amount required to rebuild the same in case of total destruction (*p*) (and during such period as this country may be engaged in war with any foreign State to keep insured the demised premises against destruction or damage by shots, shells, bombs or missiles projected from or used against aerial craft or by bombardment of hostile guns) and to make all payments necessary for the above purposes within seven days after the same shall respectively become due and to produce to the landlord or his agent on demand the several policies of such insurance and the receipt for such premium (*q*) and to cause all moneys received by virtue of any such insurance to be forthwith laid out in rebuilding and reinstating the said premises and to make up any deficiency out of his own moneys (*r*), provided always that if the tenant shall at any time fail to keep insured the said premises as aforesaid the landlord may do all things necessary to effect or maintain such insurance and any moneys expended by him for that purpose shall be repayable by the tenant on demand and may be recovered by action forthwith (*s*).

Insurance of two properties.—Where by the same instrument two properties are leased for different terms for an undivided rent, and an undivided sum for insurance was fixed on the expiration of the shorter term the lessee was not excused from insuring the remaining property for the full amount specified during the continuance of the longer term nor could he claim to insure for a proportionate amount (*t*).

Insurance moneys on an option to purchase.—Under the terms of a lease, the landlord covenanted to insure and the tenant had the option to purchase for a fixed sum. Prior to the date of exercising option, the premises were destroyed by fire, the lessor receiving the purchase-money. The lessee then exercised his option to

- (*e*) *Vernon v. Smith* (1821) 5 B. & Ald. 1, 106 E. R. 1094.
- (*f*) *Doe d Flower v. Peck* (1830) 1 B. & Ad. 428, 109 E. R. 847.
- (*g*) *Doe d Baleman v. Darby* (1844) 2 L. T. O. S. 355.
- (*h*) *Doe d Murton v. Gladwin* (1845) 6 Q. B. 953, 115 E. R. 359.
- (*i*) *Wilson v. Wilson* (1854) 23 L. J. C. P. 138, 139 E. R. 253.
- (*j*) *Palmer v. Goren* (1856) 25 L. J. Ch. 841.
- (*k*) *Doe d Pitt v. Shewin* (1811) 3 Camp. 134 N.P. (held breach where insurance was for a part of the term).
- (*l*) *Doe d Muston v. Gladwin* (1845) 6 Q. B. 953; 115 E. R. 359 (covenant broken, insurance being in name of lessee only); *Havens v. Middleton* (1853) 22 L. J. Ch. 746, 68 E. R. 1085; *Penniall v. Harborne* (1848) 11 Q. B. 368; 116 E. R. 514; (forfeiture, covenant to insure in lessor's name lessee

- adding his own).
- (*m*) *Enlayde, Ltd. v. Roberts* (1917) 1 Ch. 109; (construed in primary and strict insurance and not in any secondary insurance).
- (*n*) *Doe d Pitt v. Shewin* (1811) 3 Camp. 134 N. P. (not void for uncertainty).
- (*o*) *Crane v. Batten* (1854) 23 L. T. O. S. 220; (assignee covenant enforce breach committed during lessor's estate without appointment).
- (*p*) *Doe d Knight v. Rowe* (1826) 2 C. & P. 246; (insured for less than amount stipulated).
- (*q*) *Doe d Bridger v. Whitehead* (1838) 8 A. & E. 571; (in the absence of such provision production not compulsory and refusal no proof of omission to insure).
- (*r*) *Matthey v. Curling* (1922) 2 A. C. 180.
- (*s*) *Encyclopædia of Forms*, 2nd Ed., Vol. 8, p. 157.
- (*t*) *Heckman v. Isaac* (1862) 6 L. T. 383.

S. 108

purchase and claimed insurance money as part of his purchase which the lessor denied and his contention was upheld (u). To be distinguished is the case of *Reynard v. Arnold* (v). There the lessee had the option to purchase and under his covenant had insured his premises, it being agreed that the money received under that insurance should be applied in reinstating the premises. Without knowledge of the lessee, the lessor had insured in another office. In both policies there were the usual average clauses. The effect of this was that the lessee could recover part of the insured amount of £800 and the lessor could recover the other part, and, therefore, it was thought inequitable that the lessor should refuse to treat the insurance money as part of the purchase price. Here the doctrine of contribution applied. In the first mentioned case it was contended that when the option to purchase was exercised it operated retrospectively and made the property the property of the purchaser from the date of the contract. This argument was held not sustainable on the ground that conversion cannot relate back to an earlier date than the contract which gives rise to it (w).

Extent of tenant's liability to restore.—A covenant to keep the premises in repair is not co-extensive with the same for which the premises are to be insured. Hence where premises are destroyed by fire the tenant's liability is not limited to the sum insured (x). Under the repairing covenant, the tenant in English Law is liable on the premises being gutted by fire, which liability in India is laid down by section 108 (a), so that where plaintiff had let his house to the defendant company as a liquor warehouse, the latter agreeing to make structural alterations to suit their business, and at the end of the term to restore the property in its original state, and the premises were destroyed by fire without any negligence on the part of the lessees, they were liable for damage caused (y).

Liability for rent though premises destroyed.—In India the lease is, at the option of the lessee, void only in the event of a material part being wholly destroyed or rendered substantially and permanently unfit. So if a part only of the premises be destroyed by fire or other casualties mentioned in the clause, the lessee is not exonerated from liability to pay rent. In English Law the liability continues even in case of total destruction, whether there be a covenant to repair or not (z).

Breach and its consequences.—A breach of covenant to insure takes place by not insuring the property for however short a time and though no damage may have been caused. It is so also when the covenant is not strictly complied with although the insurance be effected. The covenant to insure generally contains a proviso that in the event of lessee's failure to insure, the lessor may do all things necessary to effect or maintain such insurance, and moneys so expended by the lessor shall be recoverable from the lessee on demand. Hence the lessor may sue to reimburse the amount spent by him. Another remedy open to the lessor is to proceed as for a breach of any of the covenants of the lease which includes the insurance covenant, and exercise his right of re-entry after giving notice of forfeiture of the lease.

Eviction by title paramount.—Eviction by title paramount has in *Neale v. Mackenzie* (a) been by Lord Denman defined or described to be "eviction by title

(u) *Edwards v. West* (1878) 7 Ch. D. 858.

(v) (1875) 10 Ch. A. 386.

(w) *Haynes v. Haynes* (1861) 1 Drew. and Sm. 426, 62 E. R. 442.

(x) *Digby v. Atkinson* (1815) 4 Camp. 275.

(y) *The East India Distilleries and Factories,*

Ltd. v. Mathias (1928) 51 Mad. 994.

(z) *Matthey v. Curling* (1922) 2 A. C. 180; *Marshall v. Schofield & Co.* (1892) 52 L. J. C. Q. B. 53; *Belfour v. Weston* (1786) 1 T. R. 310.

(a) (1836) 1 M. & W. 747, 759.

superior to the titles both of lessor and lessee : against which neither is enabled to make a defence." The case of *Doe v. Maylor* (b) is a good example of an eviction of a portion of demised premises by title paramount requiring the rent reserved to be consequently apportioned. If the eviction is from the entire property then the lease is considered to be dissolved. But a temporary occupation by military authorities under the Defence of the Realm Regulations of a portion of the premises is not an eviction by title paramount, and the lessee therefore remains liable for the rents and is not excused for the performance of the covenant. Upon eviction of a lessee by title paramount from part only of the demised premises, the personal covenants of the lessee are not apportionable, though the covenant for payment of rent may be apportioned (c).

Doctrine of frustration.—This doctrine rests on the principle that the fact and circumstances of the contract are such as to enable the parties to dissolve the same and be released from their covenants.

When the common owner of two houses lets or sells one of them and the land so let or sold includes a strip, the situation and nature of which shew an intention that it should be available as a way for the convenience of the other house, no subsequent owner or occupier can hold the land free from the right of way of the occupier of the other house and so frustrate the intention with which the original owner let out the land, so long as the circumstance remained substantially unchanged (d). Generally speaking, no easement can be reserved by a grantor for the benefit of the retained land except by express words (e). "But it is equally well settled that there are exceptions to this rule, the governing authority being the case of *Thomas v. Owen*, 20 Q.B.D. 225. There the parties long prior to 1873 had been tenants for year to year of adjoining farms under the same landlord. There was an old lane from the plaintiff's farm over part of the defendants, connecting the plaintiff's farm with a highway and as such most convenient. The origin of the lane was not known. In 1873 the landlord granted the defendant a lease of his farm including the lane, but mentioning neither the lane nor any right of the plaintiff over it. In 1878 the landlord granted to the plaintiff a lease of his farm which was equally silent as to any right to use the lane. Defendant's lease preceded the plaintiff's by several years. It was held that in the lease to the defendant there was an implied reservation in favour of the occupier of the plaintiff's farm of the right to use the lane. It has been observed that although such a rule exists alike in implied reservations and in implied grants and confined to easements of necessity and to continuous easements, an exception has been engrafted by other decisions in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement (f). If the doctrine applies to a lease the lease as a whole is at an end at the instance of either party. This doctrine has never been extended to a lease, for a lease is not a divisible contract, and when applied it is applicable equally at the instance of either party to the bargain, and the result of the application is to work the instant dissolution of the contract (g).

Distinction between covenant to repair and to reinstate.—In the former case the liability arises and the breach is complete at the end of the term ; the damage

(b) (1814) 2 M. & S. 276.

(c) *Matthey v. Curling* (1922) 2 A. C. 180 ;
Stevenson v. Lambard (1802) 2 East
575 ; *Newton v. Allin* (1841) 1 Q. B. 518.

(d) *Liddiard v. Waldron* (1933) 49 Times L. R.
p. 448.

(e) *Wheelton v. Burrows* (1878) 12 Ch. D. 31.

(f) *Longley v. Hammond* (1868) 37 L. T. Ex. 118 ;
Watts v. Kelson (1870) 40 L. J. Ch. 126.

(g) Per Younger, L. J., in *Matthey v. Curling*
(1922) 2 A. C. 180 ; *London and Northern
Estate Co. v. Schlisinger* (1916) 1 K. B. 20 ;
Bank Line v. Capel and Co. (1919) A.C. 435.

S. 108

has been done ; a right of action has accrued. It is otherwise in the reinstatement covenant. The obligation under that part of the insurance covenant arises only on receipt of the insurance money, and there can be no breach of that covenant until the moneys have been received which may be long after the end of the term. This particular obligation is *sui generis* and must be construed accordingly (*h*).

Proviso.—As already observed, the operation of this section in favour of the lessee is excluded if the premises are destroyed by his wrongful act or default. The demised premises used for storing cotton bales were left in charge of a watchman who left a kerosene lamp in close proximity to it, unattended and exposed to the draft wind and went for his meals. The lamp burst and the fire destroyed the premises. The lessee disclaimed liability in reply to the lessor's notice and exercised his option to avoid the lease under this clause. It was held that the lessee was liable for the damage caused by his negligence (*i*).

Clause (f).—If the lessor neglects to make—

- (i) within reasonable time after notice
- (ii) any repairs which he is bound to make to the property
- (iii) the lessee may make the same himself and
- (iv) deduct the expenses with interest from the rents or otherwise recover from the lessor.

The clause has no application in the case of a contract or local usage to the contrary (*j*).

Agricultural leases.—The clause has no application to agricultural leases under section 117 of the Act.

Implied contract by landlord to repair.—This clause as to repairs is defective. Placed as it is amongst the group of sub-sections dealing with the rights of a lessee, it imposes no obligation on the lessor to repair (*k*). It gives the lessee the right to make repairs and deduct the costs of such repairs with interest from the rent or recover the same otherwise, when the lessor neglects to make such repairs within a reasonable time after notice. As to what repairs a lessor "is bound to make" are by no means clear. Nor is it clear whether the tenant is liable if he does not make those repairs himself as the words used are "the lessee may make the same himself." The clause does not state who should give notice to the lessor, whether it should be by the lessee or a trustee. A covenant to repair may be implied in law or expressed by stipulation between the parties forming a term of the letting. A covenant by deed excludes a covenant in law.

English Law.—Apart from express contract or modern statutory provisions such as those under the Housing of the Working Classes Act, 1850 (*l*), there would be no obligation on the English landlord to repair or to warrant the fitness of premises at the commencement of the tenancy or to disclose defect in the premises. And so a landlord was held not liable where injury was caused to a tenant's wife through a danger known to the husband and wife (*m*), to a customer or guest of a tenant through letting of a house known to be in a dangerous state (*n*), and to the tenant himself (*o*). So too in the case of an ordinary easement there is in general

(*h*) Per Younger, L. J., in *Matthey v. Curling* (1922) 2 A. C. 180, 219.

(*i*) *Girdharidas v. Ponna Pillai* (1920) 39 M. L. J. 233.

(*j*) *Bijay Chandra Sinha v. Howrah Amla Light Rly. Co., Ltd.*, A. I. R. (1923) Cal. 524.

(*k*) *Bijay Chandra v. Howrah Amla Light Railway Co., Ltd.*, A. I. R. (1923) Cal. 524.

(*l*) 53 and 54 Vict., c. 70.

(*m*) *Cavalier v. Pope* (1906) A. C. 428.

(*n*) *Robbins v. Jones* (1863) 33 L. J. C. P. 1.

(*o*) *Lane v. Cox* (1897) 1 Q. B. 415.

no obligation on the part of the owner of the servient tenement to do anything in the nature of repairs apart from express contract (*p*). Even in case of destruction by fire there is no obligation to rebuild out of the insurance money and the landlord may claim rent (*q*). Even as to substantial repairs there is no obligation implied by law by reason of the relationship of landlord and tenant, (*r*) not even where the repairs are undertaken by the landlord "fair wear and tear excepted" (*s*) or "casualties by fire and tempest excepted" (*t*). But to these general principles the English Law has engrafted a well recognized exception, namely, that a landlord must not lay a trap for persons coming to the property by his invitation or licence (*u*), and where part only of the premises are demised he must take precautions that the part retained by him is not in such a condition as to cause damage to the demised portion of the premises (*v*).

Form of covenant.—The liability to repair is usually regulated by express contract between the landlord and the tenant. The usual form, which may be modified to suit individual requisites, is "at all times to keep interior and exterior of the power loom shed warehouse and premises connected therewith (except the window glass) and the sewers, drains and water-courses and all the main and cross shafting and fixtures in good and sufficient repair and tenantable condition and working order, and upon receiving a written notice from the tenants that any repairs are absolutely necessary, to execute the same with all convenient speed. Provided that in default of the landlords so executing the necessary repairs mentioned in such notice within two months from the date thereof, the tenants may execute the same and charge the landlords with the costs thereof, and deduct the same out of the rent that may then be or at any time thereafter become due under this lease" (*w*).

Implied contract by a tenant to repair.—Just as there is no obligation on the part of a landlord to repair, none is implied by this clause on a tenant, but under section 108 sub-clause (*m*) a tenant's liability is to repair in the absence of a contract to the contrary. An express covenant excludes an implied obligation (*x*).

Repairs which he is bound to make.—These would include such as are necessary to keep the premises usable. When the landlord denies liability the tenant cannot rely on execution of similar repairs in previous years as an estoppel or as relieving the tenant from the onus of proving the landlord's liability to execute such repairs (*y*). None of the clauses of section 108 entitles the lessee to call upon the lessor to repair the property and unless there is a contract to the contrary, the lessor is not bound to make any. Even if the lessor were under an obligation to repair and failed to do so, the lessee could not on that account terminate the tenancy. Under this clause he could remedy the breach himself after reasonable notice to the lessor, and recover the expenses with interest, either from the rent or otherwise (*z*). In a recent Bombay case a house of small tenements had on each floor a common privy and a common washhouse for the use of tenants on each floor. A tenant owing to

(*p*) *Huggell v. Miers* (1908) 2 K. B. 278 (keeping a common staircase lighted for a tenant's employee; *Evans v. the Trustees of the Port of Bombay* (1887) 11 Bom. 329 (case of a hole dug in a path).
 (*q*) *Lofft v. Dennis* (1859) 1 E. & E. 474, 120 E. R. 987.
 (*r*) *Goth v. Gandy* (1853) 23 L. J. Q. B. 1, 118 E. R. 984.
 (*s*) See "Reasonable wear and tear," *post*, p. 867.
 (*t*) *Weigall v. Waters* (1795) 5 Term. Rep. 488, 101 E. R. 663.

(*u*) *Lakhmichand v. Ratanbai* (1927) 51 Bom. 274; *Fairman v. Perpetual Investment Building Society*, (1923) A. C. 74; *Dobson v. Horsely* (1915) 1 K. B. 634.
 (*v*) *Cockburn v. Smith* (1924) 2 K. B. 119.
 (*w*) *Encyclopædia of Forms*, 2nd Ed., Vol. 8, p. 422.
 (*x*) *Hoke's case* (1599) 4 Rep. 80b; *Line v. Stephenson* (1838) 4 Bing. N. C. 678.
 (*y*) *H. Bolton v. F. G. Donald* (1906) 3 A. L. J. 134.
 (*z*) *Bijoi Chandra v. Howrah Amta Railway Co., Ltd.*, A. I. R. (1923) Cal. 524.

S. 108

bad repairs of the privy was killed, and the landlord who had retained control of the privy and washhouse was held liable (a).

Expenses of repairs.—The tenant making repairs under sub-clause (f) is given authority to deduct the same from the rent or recover by other means. This deduction is in the nature of a payment to the landlord and does not bear the character of a set-off. So where a landlord sues a tenant for rent and the latter claimed a deduction of the expenses which exceeded the Court's pecuniary jurisdiction, it was held that the Court was not precluded from making such investigation (b).

Interest.—No rate is fixed. Presumably interest at 6 % would be allowed from the date the expenses are incurred.

Clause (g).—If the lessor neglects to make any payment (i) which he is bound to make, and (ii) which if not made by him, (iii) is recoverable from the lessee or against the property, (iv) the lessee may make the same himself, and (v) deduct it with interest from the rent or otherwise recover it from the lessor. The clause has no application in the case of a contract or local usage to the contrary.

Agricultural leases.—These leases are excluded from the operation of the provisions of this section (c).

Payment recoverable from the lessee or against the property.—This clause gives liberty to the lessee to make payment of such sums as the lessor is bound to make, and which, if not made by him, would be recoverable either from the lessee or against the property. Payments contemplated by this clause are, land tax, house tax, water rates, income-tax, ground rent, land revenue and other charges of a public nature to which the property is liable. Payment which neither the lessor nor lessee is bound to make cannot be recovered by virtue of this clause (d). Similar provisions are to be found in this Act as regards mortgages (e) and sales (f).

Liability for property taxes.—Property taxes are primarily leviable from the actual occupier of the premises upon which the said taxes are assessed, if such occupier holds immediately from the Government or from a *Fazendar*: otherwise from the lessor, and in case of a sub-lease, from the superior lessor. If the premises are not let, they are recoverable from the person in whom the right to let the same vests, but if land has been let for any term exceeding one year to a tenant who has built upon the land, the property taxes assessed upon the land and upon the building shall be primarily leviable from the tenant or his legal representative, whether the premises be in occupation of the said tenant or his legal representative or of a sub-tenant (g). A tenant may pay taxes due before he became a tenant, and deduct same from the rent (h) although the lessor may not be liable for them and even be exempted therefrom (i).

Deduct it with interest from the rent.—Payments made by a lessee under compulsion are allowed to be deducted with interest from the rent. The deduction must, however, be made from the next payment of rent, for if he omits to do so, he cannot deduct subsequently (j). There is no such limitation in the Act. No rate of interest is mentioned. The usual 6% per annum would be allowed.

(a) *Lakhmichand Khetsay v. Ratonbai* (1927) 51 Bom. 274.

(b) *Katic Graham v. The Colonial Government of British Guiana* (1910) 12 C. L. J. 351.

(c) Sec. 117, Transfer of Property Act, IV of 1882.

(d) *Bepin Behary v. Kalidas* (1901) 6 C. W. N. 336.

(e) See sec. 73.

(f) See sec. 55 (i), (g) and 55 (5) (d).

(g) Sec. 146, City of Bombay Municipal Act, III of 1888.

(h) *Re. Hayman, Christy and Lillt, Ltd.* (No. 2). *Christy v. The Company* (1917) 1 Ch. 545.

(i) *Swatman v. Ambler* (1852) 24 L. J. Ex. 185.

(j) *Hill v. Krishenstein* (1920) 3 K. B. 556; *Beaufort (Duke) v. Inland Revenue Commissioner* (1913) 3 K. B. 48.

Remedy under the clause.—The lessee's remedy is twofold—either deduct the payments made by him from the rents with interest or recover the same by action with interest. The latter remedy would be under section 69 of the Indian Contract Act. The lessee's rights are elucidated by an illustration appended to that section. Both under this clause and section 69, above referred to, the payment must be one which the lessor is bound by law to pay, and in which, the lessee is interested as being for the preservation of the property or the protection of his own interest (*k*). A lessee cannot charge his lessor after having once treated his transferee as liable (*l*). It is not uncommon in leases to find these words "to bear and pay taxes, assessments, etc.," together or with other words such as charges, outgoings, etc., they being general words added to the *reddendum*. It is a usual covenant in a lease reserving a net rent (*m*). The covenant is wide or narrow, according as it is intended to include permanent charges for the betterment of the property such as duties, charges, impositions, or the usual recurring charges such as taxes and assessments. It is usually worded as follows:—"To bear, pay, defray and discharge all existing and future rates (*n*), assessments (*o*), duties (*p*), charges (*q*), impositions (*r*) and outgoings (*s*) whatsoever, imposed or charged upon the demised premises or payable by law by the owner or occupier thereof" (*t*). Frequently to such a clause the phrase "except landlord property tax" meaning income-tax is appended.

Clause (h).—The lessee may :

- (i) Even after the determination of the lease
- (ii) Remove all things attached to the earth at any time whilst he is in possession but not afterwards
- (iii) Provided he leaves the property in the state in which he received it

The clause has no application in the case of a contract or local usage to the contrary.

Agricultural lease.—These leases under section 117 are excepted from the operation of the provisions of this clause.

Changes in the law.—The original clause has been amended and the words "at any time during the continuance of the lease" have been substituted by the words, "even after the determination of the lease . . . whilst he is in possession of the property leased but not afterwards." The change has been made with a view to set at rest the conflict of judicial opinions in India, as also in consequence of the uncertainty which prevails in English Law on the subject of fixtures between landlord and tenant. It is doubtful whether this purpose has been achieved. In

(*k*) *Bama Sundari Dasi v. Adhar Chandar* (1895) 22 Cal. 28; *Smith v. Dinonath* (1885) 12 Cal. 213; *Janki Prasad v. Baldeo Prasad* (1908) 30 All. 167; *Subramania v. Rungappa* (1910) 33 Mad. 232.

(*l*) *Iswara v. Ramappa A. I. R.* (1934) Mad. 658.

(*m*) *Bennet v. Wornack* (1828) 7 B. & C. 627.

(*n*) *Re. Floyd, Floyd v. Lyons (J) & Co.* (1897) 1 Ch. 638; *Drieselman v. Winstanley* (1909) 53 So. Jo. 631; (lessee liable for water supplied for trade purposes); *Salaman v. Holford* (1909) 2 Ch. 602; (lessee not liable for increased assessment).

(*o*) *Thompson v. Lapworth* (1868) 37 L. J. C. P. 74 (assessment levied for pavement of street).

(*p*) *Bret v. Rogers* (1897) 1 Q. B. 525 (cost of laying a new drain).

(*q*) *George v. Coals* (1903) 88 L. T. 48 (expenses of removing under notice of a public

authority a defective drain causing a nuisance).

(*r*) *Foulger v. Arding* (1902) 1 K. B. 700, (expenses of removal of offensive privy and replacing a water closet); *Re. Warriner, Brayshaw v. Ninnies* (1903) 2 Ch. 367; *Louther v. Clifford* (1926) 70 So. Jo. 544 (cost of pavement incurred after holding over tenant liable).

(*s*) *Henman v. Berlinger* (1918) 2 K. B. 236, (does not include payment for repairs to drain undertaken by lessor); *Harris v. Hickman* (1904) 1 K. B. 13 (does not include expenses incurred by owner without obligation); *Mile End Old Town Vestry v. Whitby* (1898) 78 L. T. 80; (without agreement to the contrary does not apply to new rates).

(*t*) *Encyclopædia of Forms*, 2nd Ed., Vol. 8, p. 156.

S. 108

their report in clause 55, the Special Commissioners have said that if the tenant be allowed to remove his fixtures so long as he is in possession of the property even if the tenancy has come to an end, it would make the period of removal certain, it being immaterial whether the tenant vacates voluntarily or by process of law. The landlord does not suffer even if the tenant is in wrongful possession because the landlord is entitled to damages, and if the tenant is in rightful possession he obviously ought to have a right to remove his fixtures. It seems, however, that the phraseology of the section is somewhat obscure as it does not carry out the intention as expressed in the report, and the use of the word "possession" in the clause is open to contention whether tenant's possession is rightful or wrongful.

Leases prior to the amendment.—The clause has a retrospective effect. Leases executed prior to the amendment are governed by the present clause as amended.

Whilst in possession.—According to clause (h) the lessee is permitted to remove the fixtures whilst he is in possession. It is not, however, clear as to whether this possession is lawful or otherwise, for a tenant may be in possession after he has no right to remain, and thus the question arises whether, when his tenancy is lawfully determined, he is a trespasser, for a person holding over can be deemed in possession within the meaning of this section. In *Minshall v. Lloyd* (u) the case was heard by three Judges. Two of them said that the right of a tenant was only to remove during his term, the fixtures he may have put up and so to make them cease to be any longer fixtures, while Alderson, B., agreeing with the view of the two Judges, said, "The fixtures cannot become goods and chattels until the tenant has exercised his right of making them so, which he can only exercise during his possession. The moment it expires, he cannot remove and trover cannot be maintained for them." This, therefore, raises the question whether the possession is physical or possession as understood in law.

Fixtures.—This clause deals with the right of a lessee to remove what is known in English Law as fixtures, such as buildings and walls, doors and windows, machinery, plants and other trade and agricultural fixtures, so also trees planted in the soil during the term by the lessee. His right to sever things so attached to the soil depends, in English Law, on two ancient rules of the Common Law, whilst in India unless such right is governed by some legal custom or express agreement between the lessor and the lessee, the rules as to severance of walls and buildings erected by the lessee and trees, shrubs and plants planted by him, are governed by the provisions of this clause qualified by the proviso.

English Law.—The English Law of fixtures is based on two ancient rules of the Common Law, one expressed in the maxim, "*quid quid plantatur solo solo cedit*," that which is fixed to the inheritance becomes a part of the inheritance and the other enunciated by Lord Cairns in *Bain v. Brand* (v), that whatever once becomes a part of the inheritance vests in the freeholder and cannot be removed by a limited owner whether he be owner for life or years, for if he did so he would be committing what by the law of England is called waste. To the first maxim exception is created by custom (w), unless overridden by provision to the contrary (x), but to the second rule exceptions have been engrafted, the most important being fixtures put up for trade and agriculture, the latter including buildings permanently

(u) (1837) 2 M. & W. 450, 150 E. R. 834.
 (v) (1877) 1 A. C. 762, 767.
 (w) *Wake v. Hall* (1883) 8 A. C. 195.

(x) *Martye v. Bradley* (1832) 9 Bing. 24, 131 E. R. 523.

fixed to the soil. On the tenant's failure to remove fixtures during the continuance of the term, the fixtures become the absolute property of the lessor (*y*), whether the term determines by effluxion of time (*z*) or re-entry on forfeiture (*a*) or surrender (*b*). Both the English and Indian cases prior to the Amending Act (*c*), were considered by a Full Bench of the Madras High Court (*d*). The English Law on the subject of fixtures has been summed up by Parker, J., in *Leschallas v. Woolf* (*e*) thus, "The right to remove fixtures erected during the term, is, I think, a right coupled with and dependent upon the termor's interest. *I'rima facie*, when this interest ceases the right is gone, though there are no doubt, exceptional cases in which where the termor has remained in possession after the expiration of his term under such circumstances that the period of such possession can be looked upon as a mere prolongation of the term, he has been allowed to exercise the right after the term is ended. This seems to be the effect of *Fitzherbert v. Shaw* (*f*), *Heap v. Barton* (*g*), *Weeton v. Woodcock* (*h*), *Mackintosh v. Trotter* (*i*), and *Thresher v. East London Water-works Co.* (*j*), and I do not think that *Penton v. Robart* (*k*) really contains anything to qualify the effect of these decisions. The law on the subject is summed up by Thesiger, L. J., in *Ex-parte Brook* (*l*). The following passage is from his judgment: "The general presumption of law with reference to tenant's fixtures remaining fixed to the freehold when a term comes to an end, is that 'they become a gift in law to him in reversion,' and are, therefore, not removable [per Lord Holt in *Poole's case* (*m*).] That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer in *Weeton v. Woodcock* (*n*) in these terms, viz., that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant' or, in the language of Parke, B., in *Mackintosh v. Trotter* (*o*), 'that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term'."

Indian Law.—As to the forfeiture of things not removed by a tenant, a different rule is prevalent in this country. Here the law as to tenant's right of removal has not been uniform. The English Law of fixtures and the principle upon which it is based has no general applicability in this country (*p*). It has been judicially settled in this country that the maxim "*quid quid plantatur solo solo cedit*," is not generally applicable here. Prior to the Transfer of Property Act, under Hindu Law as explained in *Narada*, the Mahomedan Law as explained in *Hedaya*, and the Common Law of the land as laid down in *Paramanick's case* (*q*), a tenant who erects a building on land let to him can only remove the same and not get compensation for it on eviction by the landlord. The rules laid down by the Transfer of Property Act substantially reproduced the law as it stood before the Act. According to the Madras High Court, the tenant is entitled to remove

(y) *Poole's case* (1703) 1 Salk. 368, 91 E. R. 320.

(z) *Pugh v. Arton* (1869) 38 L. J. Ch. 619.

(a) *R. v. Topping* (1825) M'Cle. & Yc. 544, 148 E. R. 529; *Pugh v. Arton* (1869) 38 L. J. Ch. 619.

(b) *Re. Roberts ex-parte Brook* (1878) 10 Ch. D. 100.

(c) XX of 1929.

(d) *Angallam v. Aslami Sahib* (1913) 38 Mad. 710.

(e) (1908) 1 Ch. 641.

(f) (1789) 1 Hy. Bl. 258, 126 E. R. 150.

(g) (1852) 12 C. B. 274, 138 E. R. 909.

(h) (1840) 7 M. & W. 14, 151 E. R. 659.

(i) (1838) 3 M. & W. 184, 150 E. R. 1108.

(j) (1824) 2 B. & C. 608, 107 E. R. 510.

(k) 2 East, 88 (1801), 102 E. R. 302.

(l) (1878) 10 Ch. D. 100, 109.

(m) (1703) 1 Salk. 368, 91 E. R. 320.

(n) (1840) 7 M. & W. 14, 151 E. R. 659.

(o) (1838) 3 M. & W. 184, 150 E. R. 1108.

(p) *Sitabai v. Sambhu Sonar* (1914) 38 Bom. 716.

(q) *In the matter of the petition of Thakoor Chunder Paramanick* (1866) B. L. R. Sup. Vol. F. B. R. 595.

S. 108

the building during the term (*r*). The Calcutta High Court held that the tenant was entitled either to remove materials during the tenancy and after the tenancy either to get compensation or remove at the option of the landlord (*s*). In Allahabad the tenant was allowed to remove the building even after the decree (*t*). In this state of the authorities the Legislature intervened and it is now enacted that the lessee is entitled to remove all structures erected by him so long as he remained in possession but not afterwards provided he leaves the property in the same state in which it was when he entered (*u*). It will thus be observed that the test in India as to the tenant's right of removal is "possession" and not whether he is a tenant or not and the distinction made in English Law, that a tenant may remove fixtures even after the expiration of the term if he is in a position to consider himself a tenant, does not obtain in India. The effect of this clause may be excluded by provision or local usage to the contrary.

Permanent tenant.—A permanent tenant, the origin of whose tenancy is lost in antiquity, has a right to cut down or use trees planted by him upon the land demised (*v*).

Attached to the earth.—The clause is confined only to things which are attached to the earth and not articles which a tenant brings upon the land but does not attach to the land or permanently fasten to the walls or buildings and are in the nature of domestic fixtures. The clause relates to buildings and trees which are rooted or embedded in the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is so attached (*w*). Hence a shed, which rests by its own weight on the foundation constructed for it and the roof of the shed is connected with the wall of the main building by a dammered canvas, is not a fixture (*x*). Here also English Law differs from the Indian, for while in England a distinction is made in the case of fixtures according to the mode and object of their annexation, no such distinction prevails in India where the term "fixtures" is confined to things which are included in the phrase "attached to the earth."

Stipulation in a lease.—In a written lease between the parties the rights and liabilities as to fixtures are governed by the contract and not by this clause. In that case, for instance, where he does not act according to the terms of the lease, the lessor may choose to treat him as holding on a monthly tenancy on the expiration of the lease, in which case the removal would be governed by clause (*h*). Even if the lessor does not choose to treat him as tenant and gives him notice to quit, still clause (*h*) would apply so long as he remains in possession. If, however, the removal is after quitting possession, the lessor would be entitled to claim damages unless the latter's conduct amounted to acquiescence.

Express covenant for removal how construed.—Clause (*h*) does not apply when the lease contains an express covenant regarding the removal of fixtures. A lease ought to be construed so as not to take away the ordinary legal right of a tenant to remove fixtures unless such an intention is clearly expressed (*y*). When general words occur in the covenant they must be construed as applying only to things *ejusdem generis* with those described in the previous particular enumeration and when in such a covenant the things particularly enumerated belong to one genus,

(*r*) *Angammal v. Aslami Sahib* (1913) 38 Mad. 710.

(*s*) *In the matter of the petition of Thakoor Chunder Paramanick* (1866) B. L. R. Sup. Vol. F. B. R. 595; *Russicklal v. Lokenath* (1880) 5 Cal. 688.

(*t*) *Beni Ram v. Kundan Lal* (1899) 21 All. 496, 26 I. A. 58.

(*u*) See sec. 63 of the Amending Act, IX of 1929.

(*v*) *Sitabai v. Sambhu* (1914) 38 Bom. 716.

(*w*) See definition 3 of the Act.

(*x*) *Chatterbhuj v. Bennett* (1905) 6 Bom. L. R. 1073.

(*y*) *Beaufort (Duke) v. Bates* (1862) 6 L. T. 82, 45 E. R. 926.

general words which follow must be construed as applying only to things of the same genus. If the landlord wishes to restrict his tenant's ordinary right of removal the covenant must expressly state so. If the language of the covenant is doubtful, the ordinary right of the tenant to remove fixtures will not be affected (z).

Particular instances.—(a) Plaintiff demised salt springs to defendant, who was to erect salt works on the premises, and pay rent in proportion to the number of works erected: defendant covenanted to leave the works in good repair at the end of the term. Held, that iron salt pans placed by defendant on a frame of brick, and used in the boiling of salt, were parcel of such work, and that defendant was not entitled to remove them (a).

(b) Covenant to leave at the end of a term a water-mill, with all fixtures, fastenings, and improvements fastened during the demise, was held to include a pair of new millstones set up by the lessee during the term, although the custom of the country authorized him to remove them (b).

(c) A tenant of a house, covenanting to keep in repair the premises and to yield up the same at the end of the term, cannot remove a verandah erected during the term, the lower part of which is affixed to the ground by means of posts (c).

(d) A covenant by tenant to yield up in repair at the expiration of his lease, all buildings, which should be erected during the term, upon the demised premises, includes buildings erected and used, by the tenant, for the purpose of trade and manufacture, if such buildings be let into the soil or otherwise, fixed to the free hold, but not where they merely rest upon blocks or patterns (d). Erection is a wider term than buildings and might include trade fixtures (e).

(e) The lease contained a covenant to repair and yield up in repair, the furnaces, fire-engine, iron-works, dwelling-houses and all other erections, except the iron-work castings, machines and the moveable implements and materials used in or about the said furnaces, etc. Held, the defendants had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron (f).

(f) A lease contained a covenant to yield up certain scheduled articles, together with (over 25 enumerated) "and other additions improvements, fixtures and things" which were and should be any ways fixed or fastened upon the premises. Held the words, "other additions, improvements, fixtures and things" include landlords' and tenants' fixtures and in a case between vendor and purchaser, the doubt cannot be decided in favour of the vendor (g).

"Ejusdem generis" doctrine.—In *Bishop v. Elliott* (h) and *Dumergue v. Rumsey* (i), the Court of Exchequer Chamber laid down the *ejusdem generis* rule in this way, viz., that if you can find that things described by particular words have some common characteristics which constitute them a genus, you ought to limit the general words which follow them to things of that genus, for instance, if the particular words have the common characteristic of irremovability, the general words should be applied only to articles which possessed this characteristic. A

(z) *Lambourn v. McLellan* (1903) 2 Ch. 268; *Re. British Red Ash Collieries* (1920) 1 Ch. 326.

(a) *Mansfield (Earl of) v. Blackburne* (1840) 6 Bing. N. C. 426, 133 E. R. 165.

(b) *Martyr v. Bradley* (1832) 9 Bing. 24, 131 E. R. 523.

(c) *Penry's Administratrix v. Brown* (1818) 2 Stark 403, N. P.

(d) *Naylor and Another v. Collinge* (1807) 1

Taunt. 19, 127 E. R. 736.

(e) *Bidder v. Trinidad Petroleum Co.* (1868) 17 W. R. 153.

(f) *Foley and Another v. Addenbrooke* (1844) 13 M. & W. 174, 173 E. R. 72.

(g) *Wilson v. Whateley* (1860) 1 J. & H. 436, 70 E. R. 817.

(h) (1855) 11 Ex. 113.

(i) (1863) 2 H. & C. 777, 159 E. R. 322.

S. 108

lease to a boot and shoe manufacturer contained a covenant to yield up the premises with all doors, locks, marble and other chimney-pieces, etc., and all other erections, buildings, improvements, fixtures and things which are now or which may at any time during the term be fixed or fastened to the demised premises. The word "machinery" did not occur in the covenant. There was also a covenant in the lease not to carry on any business except that of a boot and shoe manufacturer, without the licence of the lessor and that the tenant would not erect any machinery other than that propelled by hand or foot. For the purpose of his business the tenant fixed various machines which were fastened by screws or nails to the floor or to the walls of the premises. On the tenant's bankruptcy the trustee claimed to sell the machinery separately from the premises. His claim was allowed. When in such a covenant things particularly enumerated belong to one genus, general words which follow must be construed as applying only to things of the same genus (*j*).

Express reservation for removal of fixtures.—According to English Law, the tenant's right of removal synchronises with the expiration of the term so that after forfeiture the tenant has no right of entry for any purpose. Under Indian Law, the rule differs, and he is entitled to remove at any time whilst he is in possession. It must, however, be remembered that this provision is in the absence of any agreement to the contrary, so that where there is a reservation in the lease giving the tenant a right to the fixtures, the case stands differently. By an Indenture of lease the lessors covenanted with the lessee, *inter alia*, that the articles specified in the schedule should be the property of the lessee and be removable by them, they making good all the damage done by the removal. Cave, J, doubted whether the lessees were entitled to enter and remove the articles after the determination of the term and whether in that case the lessees' right was not confined to requiring the lessor to deliver those articles to them, the lessees compensating the lessors for any expense the latter were put to in removing them (*k*). Whichever view is correct, it makes no practical difference except that in the one case the lessees must remove the articles, and inasmuch as the lessors are actually in possession of the premises, convenience seems to point to the lessors doing it, as they will be less likely to damage their own premises unnecessarily.

Disclaimer of trustee in bankruptcy.—The principles applicable to fixtures under ordinary circumstances are applied when a lease is determined by a disclaimer of a trustee in bankruptcy. On leave to disclaim being granted to the trustee, the landlord must give him an opportunity of removing the fixtures or take them over at a valuation, in which case their value will be set off against the rent. Usually the time is fixed, say two days within which the landlord is to decide to take over the fixtures, and if he declines, the trustee is given two days within which to remove them. Where on lessee's bankruptcy, the lessor re-entered for the forfeiture, the assignee was entitled to enter for the purpose of removing them and to a reasonable time for that purpose (*l*). In India, subject to rules as may be made in that behalf, the Official Assignee cannot disclaim any leasehold interest without the leave of the Court, and the Court before granting such leave requires such notice to be given to persons interested and imposes such terms as a condition of

(j) *Lambourn v. McLellan* (1903) 2 Ch. 268.

(k) *Ex-parte Gould in re Walker* (1884) 13 Q. B. D. 454; *Thomas v. Jennings* (1896) 66 L. J. Q. B. 5.

(l) *In re Moser* (1884) 13 Q. B. D. 738; *Slansfeld*

v. the Mayor of Portsmouth Corporation, 4 Jur. N. S. 440, 140 E. R. 1027; *Sumner v. Bromilow* (1865) 11 Jur. N. S. 471; *Pugh v. Acton* (1869) L. R. 8 Eq. 626.

granting leave, and make such orders with respect to fixtures, tenants, improvements and other matters arising out of the tenancy, as the Court thinks fit (*m*).

Failure to remove fixtures.—Where the tenant has failed to remove fixtures whilst in possession of the property he cannot remove them afterwards, so that as soon as possession is gone, the fixtures become the property of the landlord.

Compensation.—Connected with the subject of removal of fixtures is that of compensation claimable by tenant for fixtures left behind. Under the clause he has no right to claim compensation. Upon his yielding up possession the fixtures vest in the reversioner. But this raises the question of estoppel as to whether the landlord having knowledge of the construction of buildings can forfeit things planted by the tenant, if he has not removed them. In *Beni Ram v. Kundan Lal* (*n*), the tenant erected a house on the land at a considerable cost with the knowledge of the landlord and without interference or objection on his part. A suit in ejectment brought after the termination of lease was dismissed on the ground that the landlord had acquiesced in the erection of the permanent structure. The Privy Council reversed the decree of the Courts below and passed a decree in ejectment with liberty to the tenant to remove the houses built on the land. In *Venkatavaragappa v. Tirumalai* (*o*), where a tenant from year to year had sunk wells with the permission of the landlord, compensation was given on the termination of the tenancy. But in *Jugmohan v. Pallonji* (*p*), compensation was refused to a tenant who erected building and effected improvements on the demised land under a mistaken belief, shared by his landlord, that he had a larger interest (a lease for 999 years) than he really had (one from year to year). In a Madras case it was stated that there was no room for presumption that there was any undertaking by the landlord to pay for the house to the tenant when he did not remove it even though it was built with the knowledge of the landlord, for during the term the law gives ownership to the tenant, and the landlord's recognition of it will not estop him or be evidence of an agreement (*q*).

Re-entry for removal.—Removal of fixtures gives no right to the landlord to re-enter, although there may be a covenant to deliver up the fixtures to the landlord on the determination of the lease, for the tenant may during the term replace them, but if the removal has been so reckless as to cause damage, it would amount to want of repair and thus give a right to re-enter (*r*).

Measure of damages.—Where a tenant removed his trade fixtures after the tenancy had come to an end and a writ of possession had been served, but before physical possession had been given up, his right to remove them was regarded as having been lost, and for wrongful removal the landlord was held entitled to damages, the measure being the value of the fixtures as chattels only and not their value as fixtures if the premises were carried on as a going concern (*s*).

Right of mortgagee of lease.—It is settled that a surrender by a lessee cannot affect the rights of third parties and a mortgagee has a right to re-enter and remove them notwithstanding the surrender, provided that he does so within a reasonable time (*t*). A similar view was expressed where a lease to a limited company contained a proviso for the determination of the term on liquidation. The company

(*m*) Sec. 63, Presidency Town Insolvency Act, 111 of 1909.

(*n*) (1899) 21 All. 496, 26 I. A. 58.

(*o*) (1887) 10 Mad. 112.

(*p*) (1898) 22 Bom. 1.

(*q*) *Angammal v. Aslami Sahib* (1913) 38 Mad. 710.

(*r*) *Davis v. Burrell & Lane* (1851) 17 L. T. O. S. 56 N. P.

(*s*) *Barff v. Probyn* (1894) 64 L. J. Q. B. 557.

(*t*) *London and Westminster Loan and Discount Co. v. Draze* (1859) C. B. (N. S.) 798; *Saint v. Pilley* (1895) 10 Ex. 137.

S. 108 issued debentures which constituted a floating charge on all the property, both present and future, and a receiver was appointed in a debenture-holder's action. The receiver took possession of the leasehold premises and obtained leave from the Judge to sell the tenant's fixtures, the lessor being present and not objecting. After the fixtures had been advertised for sale, the company went into voluntary liquidation and the lessor thereupon demanded possession of the leasehold premises including the fixtures (*u*).

Does tenant's right to remove fixtures continue after the determination of his tenancy by the acceptance of a new tenancy.—“It seems to me that there is no precise authority deciding that a tenant loses his right to remove tenant's fixtures by the surrender of his tenancy to, and the acceptance of a new tenancy from his landlord. It is quite clear that he loses his right by a surrender alone but it is said that this applies only when he ceases to be tenant, and not to cases where the tenancy is merely surrendered in order that a new tenancy on the same or different terms may be created, so that he does not go out of possession of the property at all. In my opinion, however, if the tenant upon the surrender of his lease in order that a new lease may be granted, makes no stipulation to the contrary, he does not lose his right to remove tenant's fixtures, for the surrender of the demised premises *prima facie* includes fixtures and the subject of the new lease is *prima facie* what is surrendered in order to be re-demised. Furthermore, it may well be that the value of the fixtures, the right to remove which is thus abandoned, is a material consideration in settling the terms of the new lease (*v*).

What happens when a new lease is granted.—When a tenant quits the premises leaving the fixtures behind and a new lease is granted to another lessee, the fixtures are to be treated as parcel of the property demised by the landlord so that the new tenant has no right to claim them as tenant's fixtures (*w*). Similarly, if the lease is granted to the same lessee consequent on a surrender (*x*), an outgoing tenant after the expiration of his term has no right to enter the premises to remove fixtures (*y*), *quare* whether a tenant at sufferance has?

Proviso.—The lessee's right to remove fixtures is subject to the condition that he must leave the property in the state in which he found it, that is, the removal must be without material damage to the freehold or the building (*z*). In such cases the law disregards trifling injuries, and injury to the freehold must be spoken of with less than literal strictness, and when all the harm done is that which is unavoidable to the mortar laid on the brick walls, this is so trifling that the law will disregard it. Upon any other principle the criterion of injury to the freehold would be idle (*a*). If in the removal any disturbance of brick work becomes necessary, the lessee may do so and is not bound to restore it to a perfect state in which it was, as if the articles it was intended to support or cover were still there. But if in the course of removal the lessee causes any unnecessary disturbance of brick-work he is liable (*b*), or if in the removal he has occasioned any injury to it amount-

(*u*) *In re Glasdir Copper Works, Ltd., English Electric Metallurgical Co., Ltd. v. Glasdir Copper Works, Ltd.* (1904) 1 Ch. 819.
 (*v*) *Parker, J., in Leschallas v. Woolf* (1908) 1 Ch. 641.
 (*w*) *Re. Thomas ex-parte Silloughby D' Eresby (Baroness)* (1881) 44 L. T. 781.
 (*x*) *Leschallas v. Woolf* (1908) 1 Ch. 641; *Pole-Carew v. Western Counties and General Manure Co.* (1920) 2 Ch. 97.

(*y*) *Leadrer v. Homewood* (1858) 4 Jur. N. S. 1062, 141 E. R. 221.
 (*z*) *Trapper v. Harter* (1833) 2 Cc. & M. 153, 181; *Avery v. Cheslyn* (1835) 2 Ad. El. 75; *Gibson v. Hammersmith and City Rly. Co.* (1862) 2 Drew. & Sm. 603.
 (*a*) *Martin v. Roe* (1857) 7 E. & B. 237, 244, 119 E. R. 1235.
 (*b*) *Foley v. Addenbrooke* (1844) 13 M. & W. 174, 153 E. R. 72.

ing to waste, he must restore it (c). Hence a tenant may remove electric or gas fittings though such removal cause a disfiguration of the walls.

S. 108

Clause (i).—When a lease of uncertain duration determines, (i) the lessee or his legal representative is entitled (a) to all crops planted or sown by him, and (b) growing upon the property when the lease determines, and (ii) to free ingress and egress to gather and carry them.

Exception.—The provisions of this clause do not apply when such a lease as above determines by the fault of the lessee.

Agricultural lease.—The clause does not apply to agricultural leases (d).

Lessee's rights.—The right of the lessee and his legal representatives under this clause to the growing crops is limited.—It only arises when a lease of uncertain duration comes to an end without his fault. Such determination may be under circumstances mentioned in section 111, clause (b), when it is limited conditionally on the happening of some uncertain event or under clause (c), when the lessor's interest in the property terminates or under (h), when the lessor gives notice to quit. It would even arise when a lease determines under section 108 (e).

Crops.—The word is used in its general and popular sense as including any crops. It would not include natural produce, but *fructus industriales*. It must have been not only planted or sown by the lessor but actually growing upon the property when the lease determines. If only the seeds are sown but the crop has yet to grow, the clause would not apply. The crops must be in existence at the termination of the lease. Reference may be made to section 51 of the Act.

Ingress and egress.—The tenant is given the right to enter upon the lease after the termination of the lease to gather and carry the crops. The tenant cannot claim to retain possession until the crops are cut. All that the clause gives to the outgoing tenant is a right to enter upon the land to gather harvest and carry it away. This right would not be confined to the tenant personally but his servants and such others as would be employed in the task would be allowed to pass and re-pass with liberty to take carts, etc., for the purpose of gathering and carrying away the crops.

Clause (j).—The lessee may transfer the whole or any part of his interest in the property, (i) absolutely, or (ii) by way of mortgage, or (iii) sub-lease. So also any transferee of such interest or part may again transfer it. Such transfer shall not exonerate him from liabilities attached to the lease.

Exception.—This right of assignment shall not be exercisable by (a) a tenant having an untransferable right of occupancy, (b) a farmer of an estate in respect of which default has been made in paying revenue, (c) the lessee of a Court of Wards. Nor does the clause apply when there is a contract or local usage to the contrary.

Form of covenant.—Covenant against an assignment is entered into by the tenant who for himself and his assigns covenants with the landlord, "Not to assign, under-let or part with possession of any part of the demised premises or any part thereof without the written consent of the landlord (such consent, however, not to be unreasonably withheld in the case of a respectable and responsible person" (e).

(c) *Martin v. Roe* (1857) 7 E. & B. 237, 119 E. R. 1235.

d) Sec. 117, Transfer of Property Act.

(e) *Encyclopædia of Forms*, Vol. 8, 2nd Ed. p. 157.

S. 108

Nature of the covenant.—It runs with the land and binds assignees though not mentioned (*f*). It applies to a reassignment to the original lessee and an injunction will lie on a threat to commit a breach of it (*g*). Though not a usual covenant (*h*), it is so common that there can be no hardship in regarding it (*i*). It does not operate retrospectively (*j*); when there is a restriction against assignment only, an under-lease would not be a breach of it (*k*), but when the prohibition is against assignment of the whole or part, even an under-lease would amount to a breach of the covenant (*l*), even of a wall for bill pasting (*m*). The grant of a licence is not a breach (*n*). The contract binds the contracting parties. As between the lessee and sub-lessee, the alienation is not invalid though not against those where there is a contract not to alienate (*o*).

Assigns.—The fact of the word “assigns” not being in the contract is immaterial, if it is ascertained that the intention of the contract is that it should be assigned. Its omission does not shew that the benefit of the contract is not assignable. An agreement for a lease, and even an option to require a lease or renewal of a lease, is assignable in equity, even though there is no mention of executors, administrators or assigns (*p*).

Declaration to stand possessed upon trust.—A lessee covenanted not to assign or under-let the demised premises without the consent of the lessor, and there was a proviso for re-entry on breach of any of the covenants, or if the lessee should, *inter alia*, execute an assignment for the benefit of his creditors. The lessee executed an assignment of all his real and personal property, except that of a leasehold tenure, to a trustee for the benefit of his creditors, and he declared that he would stand possessed of all his leasehold property upon trust for the trustee and to assign and dispose of the same in such manner as the trustee should direct for the purposes of the deed. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor served upon the trustee a notice alleging as ground of forfeiture the execution by the lessee of the assignment. In an action against the lessee to recover possession of the premises, held that as there had been no legal assignment of the premises there had been no breach of the covenant against the assignment (*q*), but such a declaration followed by change of possession in favour of a person or company would be a breach (*r*).

Parting with possession.—Assignment of a term by a person out of possession of the premises at the time of the assignment is void (*s*). Where the covenant is not to assign, transfer, under-let or part with possession, merely putting the intended assignee into possession, although no assignment has been made, is a breach

- (*f*) *Re. Stephenson (Robert) & Co., Ltd. v. The Company* (1915) 1 Ch. 802; *Goldstein v. Sanders* (1915) 1 Ch. 549.
 (*g*) *McRacharn v. Colton* (1902) A. C. 104.
 (*h*) *Church v. Brown* (1808) 15 Ves. 258, 33 E. R. 752.
 (*i*) *Smith v. Capron* (1849) 7 Hare. 185, 68 E. R. 75.
 (*j*) *Sarada v. Nabin* (1927) 54 Cal. 333; *Madhab v. Bejoy Chand* (1901) 4 C. W. N. 574; *Madhusudan v. Kamini* (1905) 32 Cal. 1023; *Ambica Prasad v. Baldeo Lal* (1916) 20 C. W. N. 1113; *Ram Charan v. Hari* (1906) 7 C. L. J. 107.
 (*k*) *Mashiter v. Smith* (1887) 3 T. L. R. 673; *Church v. Brown* (1808) 15 Ves. 258, 33 E. R. 752.

- (*l*) *Doe d Holland v. Worsley* (1807) 1 Camp. 20 N. P.
 (*m*) *Heard v. Stuart* (1907) 24 T. L. R. 104.
 (*n*) *Edwardes v. Barrington* (1902) 50 W. R. 358.
 (*o*) *Abdulla v. Mammod* (1902) 26 Mad. 156; *Bhikanbhai v. Hiralal* (1900) 24 Bom. 622; *Gauri v. Mumtaz Ali Khan* (1879) 2 All. 411 (admitting a partner does not render the partnership void by reason of the covenant).
 (*p*) *Tolhurst v. Associated Portland Manufacturers* (1900), *Ltd.* (1903) A. C. 414.
 (*q*) *Gentle v. Faulkner* (1900) 2 Q. B. 267.
 (*r*) *Richards v. Crawshaw* (1892) 8 T. L. R. 446.
 (*s*) *Doe d Williams v. Evans* (1845) 14 L. J. C. P. 237, 135 E. R. 724.

of the covenant not to part with possession (*t*), but if legal possession be retained there is no such breach (*u*). S. 108

Licence not to be withheld unreasonably.—The covenant against assignment without the consent of the lessor usually contains a proviso that the consent is not to be unreasonably withheld, with the usual qualification as to refusal in the case of a respectable and responsible tenant. It is inserted in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee. A vendor agreed to sell his property to the purchasers who were brewers under an open contract. The lessor refused his consent, his main objection being that he desired the house to remain a free-house. It was held that the refusal was reasonable (*v*). But a refusal is unreasonable where the reason for it is one which has no reference either to the personality of the proposed assignee or the subject-matter of the lease. A lessor who refused to give his consent to an assignment on the ground that he would lose good tenants of the adjoining premises, which also belonged to him, and would have great difficulty in re-letting them, was held to have withheld his consent unreasonably and the lessee was free to assign without his consent (*w*).

“Arbitrary refusal” is equivalent to an “unfair and unreasonable” refusal: but a refusal “upon advice,” though the grounds of refusal be not specified, is not “arbitrary” (*x*). The proviso in the covenant is expressed by phrases of different varieties and the word “person” includes “corporation” (*y*). The refusal may be conditional on the lessee disclosing the terms of the assignment or under-lease (*z*).

When is an assignment in contravention of the covenant not a breach.—In spite of the covenant not to assign without the lessor’s consent, such consent not to be unreasonably withheld in case of a respectable and responsible person, a lessee may make an assignment without his lessor’s consent if the consent be withheld on unreasonable grounds (*a*), or there is considerable delay in the reply (*b*), or when the lessor imposed a condition which he was not entitled to do (*c*).

Non-applicability to certain classes of lands.—The incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands created before the passing of the Transfer of Property Act (*d*). Also a permanent tenancy created before the Transfer of Property Act for the purpose of habitation cannot be transferred when there have been no *pucca* buildings erected on the land leased, when the lessee has no transferable right under the lease and there is no local custom in favour of alienation (*e*). The onus is on the plaintiff to prove that the tenancy commenced prior to the passing of the Transfer of Property Act (*f*).

- (*t*) *Abrahams v. Mac Fisheries, Ltd.* (1925) 2 K. B. 18.
- (*u*) *Chaplin v. Smith* (1926) 1 K. B. 198.
- (*v*) *In re Marshall & Salls Contract* (1900) 2 Ch. 202.
- (*w*) *Houlder Bros. & Co. v. Gibbs* (1925) 1 Ch. 575.
- (*x*) *Treloar v. Bigge* (1874) 43 L. J. Ex. 95; *Sheppard v. Hongkong & Shanghai Banking Corporation* (1872) 20 W. R. 459; *Harrison Ainslie & Co. v. Barrow-in-Furness Cor.* (1891) 63 L. T. 834.
- (*y*) *Willmott v. London Road Car Co., Ltd.* (1910) 2 Ch. 525.
- (*z*) *Re Spark's lease, Berger v. Jenkinson* (1905) 1 Ch. 456.
- (*a*) *Houlder Bros. & Co., Ltd. v. Gibbs* (1925) 1 Ch. 575; *Sear v. House Property Investment*

- Society* (1880) 16 Ch. D. 387.
- (*b*) *Lewis & Allenby (1909), Ltd. v. Pegge* (1914) 1 Ch. 782.
- (*c*) *Premier Rinks, Ltd. v. Amalgamated Cinematographs Theatres, Ltd.* (1912) 56 So. Jo. 536; *White v. Hay* (1895) 72 L. T. 281.
- (*d*) *Sarada v. Nabin* (1927) 54 Cal. 333; *Madhab v. Bejoy Chand* (1899) 4 C. W. N. 333; *Madhusudan v. Kamini* (1905) 32 Cal. 1023; *Ambica Prasad v. Baldeo Lal* (1915) 20 C. W. N. 1113; *Ram Charan v. Hari* (1908) 7 C. L. J. 107; *Sm. Kamala Mayee v. Nibaran Chandra* (1931) 36 C. W. N. 149.
- (*e*) *Safar Ali v. Abdul Rasid, A. I. R.* (1924) Cal. 1012.
- (*f*) *Mahadeo v. Dharamnath, A. I. R.* (1924) Pat. 324.

S. 108

Agricultural leases.—Although the Transfer of Property Act does not apply to agricultural leases the principle of this clause applies, and the assignee of an agricultural lease becomes liable for the rent payable to the lessor from the date of assignment (*g*).

Transfer by lessee.—This clause permits a lessee, unless controlled by the terms of his grant, to assign his whole interest in the term absolutely as a lessee or to mortgage such interest or to grant a sub-lease or under-lease, that is, for a shorter term. There are several kinds of transfer to which a lessee may resort. It may be a sale, mortgage or lease. He may sell his entire interest in the demised premises by means of an assignment of the term. He may mortgage his leasehold interest or may carve out a lesser estate and execute an under-lease or sub-lease. A lessee cannot make an under-lease for a longer term than his own lease (*h*), nor is he the agent of the landlord so as to bind him by granting leases for any time he may think fit. When an under-lease specifies no term of tenancy, it cannot be construed to have effect beyond the interest (*i*) of the grantor. The transferor is called the assignor and the transferee the assignee, which term applies to all subsequent transferees, however removed from the first. The assignor's covenants are for good right to assign, that the rents have been paid, the covenants and conditions have been performed and observed for quiet enjoyment, freedom from encumbrance and further assurances, while the assignee covenants to pay the rents, observe the conditions, perform the covenants of the lease, and save harmless and indemnify the assignor against all actions, claims and demands in respect of any breach thereof. On an assignment of a leasehold the assignee is not entitled to call for the title to the freehold in English Law (*j*). In India, however, the case would come within section 55 of the Transfer of Property Act, 1882, by which the vendor must make out a title both to the freehold and the leasehold unless the latter has been for such a term as to exclude all probabilities of a defect in the freehold. There is no obligation to give notice of assignment to the lessor or any intermediate holder immediately prior to the assignor.

"The whole or any part of his interest."—These words which occur in the clause relate to the interest of the lessee. For practical purposes there cannot be a transfer of the whole of the lessee's interest unless an assignment is executed on the very day simultaneously with the execution of the lease in favour of the lessee. The word "whole," therefore, means the whole of the remaining interest of the lessee or the residue of the unexpired term and "any part of his interest" means portion of such unexpired residue. When the whole of the unexpired residue is transferred the transaction is carried out by way of an assignment and the entire interest of the lessee is transferred to the transferee and privity of estate is established between the transferee and the lessor, so that the transferee or assignee is liable to the lessor on all covenants that run with the land including the covenant to pay rent (*k*), and in case where a portion of the unexpired residue is assigned, the transaction is an under-lease or sub-lease and does not establish any privity of estate between the transferee and the lessor. Between the lessee and the

(*g*) *Monica v. Subraya* (1907) 30 Mad. 410.

(*h*) *Wollaston v. Hakevill* (1841) 3 Man. & G. 297, 133 E. R. 1157.

(*i*) *Harish Chander v. Sree Kalu* (1874) 22 W. R. 274.

(*j*) Vendor and Purchasers Act, 1874 (37 & 38 Vict. c. 78), sec. 2; Law of Property Act, 1925, sec. 44.

(*k*) *Walker v. Reeves* (1780) 2 Doug. 462n., 99

E. R. 517; *Williams v. Bosanquet* (1819) 1 Brod. & Bing. 238; *Kamala Nayak v. Ranga Ram* (1862) 1 M. H. C. 24; *Kunhanujan v. Anjelu* (1894) 17 Mad. 296; *Timmappa v. Rama* (1897) 21 Bom. 311; *Ardeshtir v. K. & Bros.* (1925) 27 Bom. L. R. p. 558, doubted in *Keshavlal v. Adhyam Maganlal* (1934) 58 Bom. 327.

transferee, however, this portion would be regarded as the "whole." The lessee would be the lessor and the transferee would be the lessee, so that if the transferee assigns the whole of his interest in that portion, it would be an assignment of the whole and would establish privity between transferee's assignee and the original lessee who in such case will be the lessor. Hence where the covenant is merely against an assignment of the term and the lessee makes a sub-lease or under-lease, this is not a breach (*l*). A covenant not to sub-let does not include the letting of lodgings (*m*).

Licence.—The vendor and not the purchaser must obtain the licence (*n*). There is no duty to take action, having used all reasonable efforts to induce the lessor to grant the licence (*o*). The licence relates to the particular assignment for which it is granted and has not, as held in *Dumpor's* case (*p*), the effect of doing away with the restriction once the licence has been granted. The lessee must pay the lessor's costs of granting the licence. The licence should be obtained. It cannot be excused on the ground that the lessor could not have withheld it. Such an omission is not one for which the Court would grant equitable relief (*q*). If the lessor refuses, the lessee may assign without consent (*r*), or he may bring an action against the lessor for a declaration of his right (*s*).

Rights of lessor on transfer.—The lessor is entitled to sue the lessee upon his express covenant and the transferee upon the privity of estate, though he can have execution against one only (*t*).

Liability of lessee on transfer.—After a transfer by the lessee and notice thereof to the lessor, the liability of the former does not cease merely at his pleasure without any act or consent on the part of the latter. The law here follows the English Law that a lessee cannot by assignment escape personal liability on the covenant of the lease (*u*), but the lessor does not thereby entitle himself to claim against him damages attributable to his own laches (*v*). Receipt for rents, though not expressly describing the transferee as tenant of the holding but describing the rent paid as rent of the holding and the person making payment as occupier of the holding and as paying on her own account, is quite a sufficient recognition of the transferee as a tenant (*w*). Section 108, clause (j), expressly declares that by reason of assignment of the whole or part of the premises demised, a lessee shall not cease to be subject to any of the liabilities attaching to the lease. This liability rests on privity. Privities are of three kinds, privity of contract, privity of contract and estate and privity of estate. On the execution of a lease between lessor and lessee there arises a privity of contract and privity of estate which become separated either on assignment by the lessor of the reversion or the lessee of the term. When lessor assigns the reversion between the grantee of the reversion and the lessee, there is a privity of estate. So also when a lessee assigns the term, between the assignee and the lessor there is a privity of estate. On either assignment as between

(*l*) *Crusoe d Blencowe v. Bogly* (1771) 3 Wm. Bl. 766, 95 E. R. 1030.

(*m*) *Doe v. Lamirag* (1814) 4 Camp. 73.

(*n*) *Lloyd v. Crispe* (1813) 6 Taunt. 249, 128 E. R. 685.

(*o*) *Lehman v. McArthur* (1868) 3 Ch. App. 496.

(*p*) (1603) 4 Co. Rep. 119b.

(*q*) *Barrow v. Isaacs & Son* (1891) 1 Q. B. 417; *Eastern Telegraph Co., Ltd. v. Dent* (1899) 1 Q. B. 835; *Upjohn v. Macfarlane* (1922) 2 Ch. 256.

(*r*) *Ideal Film Renting Co., Ltd. v. Nicolson* (1921) 1 Ch. 575.

(*s*) *Young v. Ashley Gardens Properties, Ltd.* (1903) 2 Ch. 112; *Evans v. Levy* (1910) 79

L. J. Ch. 383; *Ideal Film Renting Co., Ltd. v. Nicolson* (1921) 1 Ch. 575.

(*t*) *Monica v. Subraya* (1907) 30 Mad. 410; *Vithal v. Shriram Savant* (1905) 29 Bom. 391; *Kunhanujan v. Anjelu* (1894) 17 Mad. 296; *Brett v. Cumberland* (1619) Cro. Jac. 521.

(*u*) *Eaton v. Jaques* (1780) 2 Doug. 455, 99 E. R. 290; *Auriol v. Mills* (1790) 4 T. R. 94, 100 E. R. 912; *Sasi Bhushun v. Tara Lal* (1895) 22 Cal. 494; *Manmatha v. Balai Chandra, A. I. R.* (1924) Cal. 359.

(*v*) *Tucker v. Linga* (1881) 21 Ch. D. 18.

(*w*) *Naba Kumari Debi v. Behari Lal Sen* (1907) 34 Cal. 902, 34 I. A. 160.

S. 108

the lessor and the lessee, the privity of contract originally established remains. As between the lessee and his assignee there is a privity of contract. When the assignee in his turn assigns, he goes out of the transaction altogether and between the new assignee and the lessor a privity of estate is established. Hence privity of contract is not dissolved by assignment so that the lessee remains liable on all the covenants of the lease which run with the land to his lessor. Privity of contract is a personal privity and extends only to the person of the lessor and the person of the lessee. An assignee whenever he pleases may assign and the moment he divests himself of his character of assignee, he also shakes off his liability on the covenants under the lease. The assignee becomes liable to the lessor for performance of the covenants, while liability of the lessee is that of a surety for the assignee (x). In Bombay it has been doubted whether the English doctrine of privity extends to India (y). The point again arose in a later case when it was decided that an assignment was not destructive of the personal liability of the lessee on his covenant (z).

Liability of assignee on assignment.—The assignee is liable to the lessor by reason of privity of estate on the covenants in the lease and also to the lessee, that is, his assignor, by virtue of privity of contract. The assignee is under an obligation to indemnify the original lessee against breaches of covenant in the lease committed during the continuance of his own tenancy and that obligation is not affected by the covenants which the assignee may have made with his immediate assignor (a). He is not liable for the lessee's personal covenants. This privity of estate is created by the transfer, hence the assignee's liability arises from the date of transfer and not from the date when he obtains possession (b). As between the lessor and the lessee the effect of the assignment is that the lessee becomes surety to the lessor for the assignee, who as between himself and the lessor is the principal person bound whilst he is assignee, to pay the rent and to perform the covenants running with the estate, and the surety after paying the debt or discharging the obligation to which he is liable, has his remedy against the principal (c). This duty is commensurate with the time during which the assignee had an interest in the premises (d). So that after he has assigned over, his liabilities cease. The liability to keep assignor indemnified is restricted to breaches committed after assignment unless they be continuing. A lease the reversion on which was vested in the plaintiff contained a covenant to repair and to keep in repair the demised premises. By diverse mesne assignments and other acts in the law, the term became vested in the defendants, who as trustees assigned the premises which were then out of repair for the residue of the term to an assignee, the latter covenanting to pay rent, perform the covenants, and keep the lessee indemnified against payment of rents and performance of covenants. The premises remaining out of repairs, the plaintiff brought an action against defendants for breach of covenant to repair and they brought, on their part, the assignee as third party. The plaintiff having recovered damages in the action, held the third party was liable under his covenant to indemnify against those damages recovered by the plaintiff against them for breaches of covenant in the lease prior to the assignment (e).

(x) *Humble v. Langston* (1841) 7 M. & W. 517, 151 E. R. 871; *Manmatha v. Nalinaksha*, A. I. R. (1925) Cal. 423; *Ouslow v. Corrie* (1817) 2 Mad. 330, 56 E. R. 357; *Monica v. Subraya* (1907) 30 Mad. 410; *Mehla v. Godadhar Rao* (1910) 37 Cal. 683.
(y) *Keshavlal v. Adhyam Maganlal* (1934) 58 Bom. 327; *Monica v. Subraya* (1907) 30 Mad. 410; *Ardeshir v. K. D. & Bros.* (1925) 27 Bom. L. R. 553 doubted.

(z) *Abdul Rehman v. Phiroze Sethna* (1936) 60 Bom. 394.
(a) *Moule v. Carrett* (1872) 41 L. J. Ex. 62.
(b) *Monica v. Subraya* (1907) 30 Mad. 410.
(c) *Wolveridge v. Steward* (1833) 2 L. J. Ex. 303, 149 E. R. 557.
(d) *Burnett v. Lynch* (1826) 5 B. & C. 589, 108 E. R. 220.
(e) *Gooch v. Clutterbuck* (1899) 2 Q. B. 148.

The assignee's covenant.—On an assignment of a lease the purchaser or assignee is bound to give a covenant for indemnity against payment of rent and performance of covenants even though the assignor be an executor or trustee and unable to give him a covenant for title (*f*).

Mortgagee and lessor.—A mortgagee with possession from the lessee of a part of the term is not liable to the lessor for rent, as there is neither privity of estate nor of contract between them (*g*). On a mortgage by way of assignment, the mortgagee renders himself liable to the lessor on the lessee's covenants just as any other assignee and this irrespective of the question of possession, and so to escape such liability on this privity of estate it is usual to make a mortgage by way of sub-demise though in such a case the mortgagee is exposed to the risk of forfeiture, if the lessee commits a breach of covenant and before he is aware of it and can make it good the lessor re-enters. It follows, therefore, that a receiver appointed in an action by a mortgagee of leaseholds by sub-demise is not liable for rents to the head-lessor (*h*).

Under-lessee and lessor.—A sub-lease differs from the assignment of a lease. It creates no privity of estate between the sub-tenant and the landlord (*i*). An under-lessee is not bound at law by the covenants contained in the original lease nor is he liable on the principle of *Tulk v. Moxhay* (*j*) to be restrained by injunction for a breach of which he is not guilty (*k*). The landlord has to deal with his lessee and not with the sub-tenants of the latter. The English authorities shew conclusively that a landlord putting an end by a proper notice to the tenancy of his tenant, thereby determines the estate of the under-tenants of the latter (*l*).

Mortgage by lessee.—A mortgage executed by a tenant under an express agreement with the landlord will not be put an end to by the ejection of the tenant by the Revenue authorities (*m*).

Mortgage by under-lessee for residue of the term.—Under the Transfer of Property Act, 1882, having regard to section 105 and section 108 (*j*), an under-lease for the entire residue of the under-lessor's term operates, in the absence of a contract to the contrary, as an under-lease, and does not, as ordinarily under English Law, constitute an assignment of the lease (*n*). This ruling proceeded on the reasoning that under English Law a reversion in the grantor was essential to the relation of landlord and tenant (*o*), but that it was not so under the Transfer of Property Act, by section 105 of which a lease may be made in perpetuity and by section 108 (*j*) a lessee can transfer the whole of his interest in the property in the absence of a contract to the contrary. In this case the lease was not in perpetuity. It was only for 61 years and the lessee demised and sub-let the premises to the mortgagee for unexpired residue of the term of 61 years subject to redemption. The lease permitted under-letting but prohibited assignment. Here the lease was not in perpetuity and by express contract section 108 (*j*), so far as it related to assignment, was ousted. It could not, therefore, be said that this was an under-lease and not an assignment of the term. Plaintiff was lessee of a certain area, a portion of

(*f*) *Staines v. Morris* (1812) 1 Ves. & B. 8, 35 E. R. 4; *Hornby v. Cardwell* (1881) 8 Q. B. D. 329.

(*g*) *Thethalan v. Eralpad Rajah, Calicut* (1917) 41 Mad. 1111; *Vithal v. Shriram* (1905) 29 Bom. 391 (*contra*); see *Keshavlal v. Adhyan Maganlal* (1934) 58 Bom. 327.

(*h*) *Hand v. Blow* (1901) 2 Ch. 721; *Re. Abbott. Abbott v. Abbott* (1913) 30 T. L. R. 13.

(*i*) *Taylor v. Gillott* (1875) 44 L. J. Ch. 740.

(*j*) (1848) L. J. Ch. 83, 47 E. R. 1345.

(*k*) *Hall v. Ewin* (1887) 37 Ch. D. 74.

(*l*) *Timappa v. Rama* (1897) 21 Bom. 311.

(*m*) *Bahadur v. Raja Moti* (1925) 47 All. 589.

(*n*) *Hansraj v. Bejoy Lal* (1930) 57 Cal. 1176, 57 L. A. 110.

(*o*) *Parmenter v. Webber* (1818) 8 Taunt. 593.

S. 108

which he sub-leased to the first defendant for a period less than his own term. The sub-lessee covenanted to pay certain rent, ground rent and taxes, being a proportionate part of the rents and taxes reserved by the head lease. The first defendant, with the consent of the plaintiff, the original lessee, assigned by way of mortgage his interest as sub-lessee to the third defendant. In a suit for ground rent and taxes which had never been paid, it was held that an absolute assignment by a lessee of his interest in a lease created privity of estate between the sub-lessee and the landlord so that the assignee was liable to the lessor on all covenants running with the land, which included payment of rents and taxes (*p*). A covenant to pay the rent and covenant to pay ground rent and taxes are covenants running with the land (*q*).

Assignment by a partner.—If two partners take a lease with a covenant against assignment, on dissolution an assignment by one of his interest to the other is a breach of the covenant (*r*).

Right of transferee from lessee.—The Act defines the rights and liabilities of the lessor's transferee in section 109 but is curiously silent as to the assignee of the lessee.

Deposit of lease as security.—This is not a breach of covenant not to assign (*s*).

Exception to the restriction.—The contractual restriction of assignment does not apply to an assignment by a person on whom the property has devolved by operation of law and who is under an obligation to assign. Notwithstanding the covenant against assignment the demising of a term (*t*) or vesting of property on bankruptcy in the assignee (*u*) does not operate as a breach. The cases in bankruptcy, in which it has been held that a trustee in bankruptcy can assign free from the bankrupt's covenants against assignment without licence, depend on the circumstances that the bankrupt's leasehold interest vests in his trustee by operation of law, so that he is not an assign of the bankrupt and consequently not bound by the covenant. These cases, therefore, have no application to the liquidator of a company because the company's leasehold interest remains vested in the company after a winding-up order and the liquidator acts on behalf of the company in assigning it. A covenant in a lease to a company against assignment without the consent of the lessor, is binding on the liquidator in a compulsory winding-up of the company. There is no distinction for this purpose between a voluntary and compulsory winding-up (*v*). Again, a compulsory purchase of the land (*w*), disposal of the term by the executors (*x*) allowing the property to be taken in execution (*y*) when the assignment is by the Sheriff who not being an assignee is not bound by the covenant, do not come within the restriction, so that the covenant to obtain the consent of the lessor is not broken. Where the condition is to assign to a particular individual and that assignment has been effected, the subsequent assignment may be made without licence. Similarly, a covenant not to assign to a particular individual is not broken by assignment to a third party who assigns to the person to whom the alienation is prohibited.

(*p*) *Ardeshir v. K. D. & Bros.* (1925) 27 Bom. L. R. 553.

(*q*) *Ardeshir v. K. D. & Bros.* (1925) 27 Bom. L. R. 553.

(*r*) *Varley v. Coppard* (1872) 7 C. P. 505; *Langton v. Henson* (1905) 92 L. T. 805.

(*s*) *Re. Hand ex-parte Cocks* (1836) 2 Deac. 14 Ct. of R.

(*t*) *Doe d Goodbehere v. Bevan* (1815) 3 M. & S. 353, 105 E. R. 644.

(*u*) *Re. Riggs, ex-parte Lovell* (1901) 2 K. B. 16.

(*v*) *Re. Farrow's Bank, Ltd.* (1921) 2 Ch. 164; *Cohen v. Popular Restaurants, Ltd.* (1917) 1 K. B. 480; *Re. Birbeck Permanent Benefit Building Society, ex-parte Official Receiver* (1913) 57 So. Jo. 559.

(*w*) *Slipper v. Tottenham & Hampstead Junction Railway Co.* (1867) 36 L. J. Ch. 841.

(*x*) *Seers v. Hind* (1791) 1 Ves. 294, 30 E. R. 351.

(*y*) *Doe d Mitchinson v. Carter* (1798) 8 T. R. 55, 101 E. R. 1264.

Mortgage by way of sub-demise.—A lease contained a covenant not to assign, under-let or part with the possession of the premises without the consent in writing of the lessor, a clause providing for re-entry upon breach of any of the covenants. The lessee mortgaged the premises by way of sub-demise without obtaining permission of the lessor. It was held that the sub-demise to the mortgagee without the consent of the lessor constituted a breach of the covenant as to assignment (z).

Contract Act, IX of 1872, section 23.—The breach of the covenant does not bring the case within the provisions of section 23 of this Act. Consequences of the breach are not such as to render the contract between the lessee and his under-lessee void (a).

Absence of any clause as to re-entry.—A clause in a lease whereby the lessee covenanted not to alienate, unaccompanied by any clause for re-entry upon breach, is a covenant merely and not a condition. The alienation cannot be treated as void, nor can the lessor recover possession from the lessee (b). But where the lease contained a condition that on such alienation the lease would be void and the lessee alienated, it was held at the suit of the assignee of the lessor who had not exercised his rights to avoid the lease, that the lease terminated and the lessee could recover possession of the lands (c), and herein lies the distinction between a covenant and a condition.

Sub-lease or under-lease.—This is a lease or demise for a term less than the residue, may be by a day or otherwise as agreed. A sub-lease or under-lease of the whole term amounts to an assignment (d). In India it has been held otherwise (e). Such would be the case where the deed, though in form an under-lease, creates a term expiring at the same time as the original term. And even where the term of the sub-lease or under-lease exceeds that of the original lease, such a demise operates in law as an assignment (f). On re-entry, what are the respective rights of lessor and lessee? The lease is determined, thus accelerating the reversion expectant on the expiration of the term and the relation of landlord and tenant is determined. A clause for re-entry is not a usual term in a lease (g), though even without it, a lessor may re-enter (h). The lessor is entitled to all arrears of rent down to the date of re-entry.

Lessor's remedy.—On lessee's breach of covenant the lessor's remedy would be by way of damages or injunction or if there be a clause for re-entry he may forfeit the lease and re-enter. Against a forfeiture arising from a breach of this covenant, there is no relief.

Limitations on the lessee's right to transfer.—See caption "Exception" above.

Clause (k).—The lessee is bound to disclose to the lessor (i) any fact as to the nature and extent of the interest which the lessee is about to take, (ii) of which the lessee is, and the lessor is not, aware, and (iii) which materially increases the value of such interest.

(z) *Serjeant v. Nash-field & Co.* (1903) 2 Q. B. 304.

(a) *Bikanbhai v. Hiralal* (1900) 24 Bom. 622; *Gauri v. Mumtax Ali Khan* (1880) 2 All. 411.

(b) *Madar Saheb v. Sannabawa* (1897) 21 Bom. 195; *Narayan v. Ali Saiba* (1894) 18 Bom. 603; *Madhab v. Narottam* (1890) 17 Cal. 828; *Parmeshri v. Vittappa* (1903) 26 Mad. 157.

(c) *Bishveshwar v. Mahableshwar* (1918) 20 Bom.

L. R. 767.

(d) *Beardman v. Wilson* (1868) 4 L. R. C. P. 57; *Parmenter v. Webber* (1818) 8 Taunt. 593, 129 E. R. 515.

(e) *Hunsraj v. Bijaylal Seal* (1930) 57 Cal. 1176, 57 I. A. 110.

(f) *Wollaston v. Hakewill* (1841) 3 Man. & G. 297, 133 E. R. 1157.

(g) *Hodgkinson v. Crowe* (1875) 10 Ch. 622.

(h) *Knight v. Mary* (1587) Cro. Eliz. 60.

S. 108

Exception.—There is no such duty when there is a contract or local usage to the contrary.

Agricultural leases.—The clause has no application to these leases (i).

Non-disclosure by lessee.—By this clause there is a duty to disclose to the lessor the interest which the lessee is about to take, of which he is aware and the lessor is not aware, and which knowledge materially enhances the value of that interest. The provisions of this clause are similar to clause (a) of sub-sections (1) and (5) of section 55, except that the Act does not render non-disclosure fraudulent in the case of leases as in the case of sales and purchases. The commentaries on clause (a) of section 55 (1) would be applicable to the present clause.

The lessor's remedy.—In the event of non-disclosure by the lessee of an advantage taken by him, the lessor's remedy would be not avoidance of the lease but compensation or damages.

Clause (l).—The lessee is bound

- (i) to pay or tender
- (ii) at the proper time and place
- (iii) the premium or rent
- (iv) to the lessor or his agent on his behalf

Exceptions.—Only in the absence of a contract or local usage to the contrary, this clause applies.

Agricultural leases.—These leases are excluded from the operation of the provisions of this section (j)

Rent.—Payment, suspension, eviction, etc., are dealt with more fully in the commentaries on section 105, to which reference may be made.

Right of co-lessor to sue for the whole rent.—When rent is payable to several joint lessors or the heirs of a deceased lessor, payment to one co-lessor is a valid discharge (k). On the analogy of payment to one of several joint promissors, co-sharer landlords can sue their tenant jointly for their rent (l), making co-sharers defendants if they refuse to join as plaintiffs (m). On general principles of legal procedure, a sharer whose co-sharers refuse to join him as plaintiffs can bring them into the suit as defendants and sue for the whole rent of the tenure (n). A distinction is made when the suit is for enhancement of rent under the Bengal Tenancy Act, VIII of 1885, where all "joint landlords" must "act together" and take a common action. It is not sufficient for one of them to sue as plaintiff making those who refuse defendants. It is otherwise when the suit is to recover arrears of rent which is debt, the right to recover which, arises under the general law and does not require the authority of the Bengal Tenancy Act (o).

Eviction.—Under section 108 (1), a lessee is bound to pay or tender at the proper time and place the premium or rent to the lessor or his agent in this behalf. The question here is whether the plaintiffs are liable to pay rent when the premises

(i) Sec. 117 of the Transfer of Property Act.
 (j) Sec. 117, Transfer of Property Act.
 (k) *Sambhu v. Kamalrao* (1898) 22 Bom. 794;
Krishnarav v. Manaji (1874) 11 Bom.
 H. C. R. 106.
 (l) *Akshoy Kumar Mitra v. Gopal Kamini Debi*
 (1906) 33 Cal. 1010; *Shyame Charan v.*
Akhoy Kumar Miller (1905) 10 C. W. N.
 187; *Girish Chunder v. Chhatradhar Ghose*
 (1905) 3 C. L. J. 379.
 (m) *Pergash Lal v. Akhourri Balgobind Ghose*

(1905) 3 C. L. J. 379; the contrary view in
Manohar Das v. Manur Ali (1883) 5 All.
 40 is no longer law in view of the Agra
 Tenancy Act, II of 1901.
 (n) *Pramoda Nath Roy v. Ramani Kanta Roy*
 (1908) 35 Cal. 331, 35 I. A. 73; *Shashi*
Kumar Mirbahar v. Seeta Nath Bannerjee
 (1908) 35 Cal. 744.
 (o) *Jatindra Nath Chowdhri v. Prasanna Kumar*
Bannerjee (1911) 38 Cal. 270, 38 I. A. 1.

have been rendered uninhabitable by reason of the lessor's acts and deeds. The liability to pay rent ceases on eviction by the landlord or by a person lawfully claiming by title paramount, while the eviction continues (*p*). If the landlord brings ejectment for a forfeiture, he cannot recover rent accruing after the issue of the writ; his remedy is in damages for the detention of the premises (*q*). An eviction by the landlord, in addition to stopping the rent, prevents him from forfeiting the lease for non-performance of covenants (*r*). But it does not discharge the tenant from his covenants other than for payment of rent, or put an end to the tenancy (*s*). To constitute an eviction, physical expulsion is not necessary. Any act which deprives the tenant of the enjoyment of the demised premises will amount to an eviction (*t*), such as the fact that the landlord enters while the tenant is in possession (*u*), or induces the under-tenants to leave by notice to quit (*v*), but not if the landlord commits trespass (*w*).

To whom the payment or tender should be made.—According to this clause, payment or tender of the premium or rent must be made either to the lessor or his agent duly authorized for the purpose. The agent may be a person holding a power-of-attorney to receive the rent and give sufficient discharge for the purpose or he may be a servant employed by the landlord and being armed with the receipt for the rent, the tenant may exchange, as is usually the case, the rent with the receipt. An authority given to an agent is revocable (*x*). A bailiff executing a warrant of distress has implied authority to revoke rent if tendered by the tenant (*y*). Payment to a servant expressly authorized to receive, discharges the lessee (*z*).

Rent on disclaimer by trustee in bankruptcy.—When leave to disclaim is given to a trustee, the landlord is entitled to some compensation and must be paid the rent accruing from the last quarter down to the day on which the lease is disclaimed (*a*).

Clause (m).—The lessee is bound

- (i) to keep, and
- (ii) on the termination of the lease to restore the property in as good a condition as it was at the time when he was put in possession,
 - (a) subject only to changes caused by reasonable wear and tear or irresistible force;
- (iii) to allow the lessor and his agent, at all reasonable times during the term
 - (a) to enter upon the property and
 - (b) to inspect the condition thereof and
 - (c) to give or leave notice of any defect,
- (iv) to make good, within three months after notice, any defect caused by the act or default of the lessee, his servants or agents.

(*p*) *Tomlinson v. Day* (1821) 2 Brod. & Bing. 680, 129 E. R. 1128; *Prentice v. Elliot* (1839) 5 M. & W. 606.
 (*q*) *Birch v. Wright* (1786) 1 Term. Rep. 378, 99 E. R. 1148; *Jones v. Carter* (1846) 15 M. & W. 718, 153 E. R. 1040.
 (*r*) *Pellatt v. Boosey* (1862) 31 L. J. C. P. 281.
 (*s*) *Morrison v. Chadwick* (1849) 7 C. B. 266; *Newton v. Allin* (1841) 1 Q. B. 518.
 (*t*) *Upton v. Townend* (1855) 17 C. B. 30; *Henderson v. Mears* (1859) 7 W. R. 554; *Baynton v. Morgan* (1888) 22 Q. B. D. 74 C. A.

(*u*) *Smith v. Ralceigh* (1814) 3 Camp. 513; *Griffith v. Hodges* (1824) 1 C. & P. 418, 420.
 (*v*) *Burn v. Phelps* (1815) 1 Stark. 94.
 (*w*) *Hunt v. Cope* (1775) 1 Cowp. 242, m. 98 E. R. 1065; *Newby v. Sharpe* (1878) 8 Ch. D. 39, 51 C. A.
 (*x*) *I'ennig v. Bray* (1862) 2 B. & S. 502, 121 E. R. 1159.
 (*y*) *Hatch v. Hale* (1850) 15 Q. B. 10, 117 E. P. 361.
 (*z*) *Cropp's case* (1586) Godb. 38, 78 E. R. 24.
 (*a*) *In re Moser* (1884) 13 Q. B. D. 738.

S. 108

Agricultural leases.—These are excepted from the provisions of this section (b).

Good condition.—There is no implied contract to use demised premises in a tenant-like manner when the tenant has expressly contracted to repair (c).

Usually the covenant is expressed thus.—“To keep and maintain the glass of the windows, locks, latches and fasteners and the interior of the demised premises and of all additions thereto and the sanitary and water apparatus thereof in good and tenantable repair and condition (accidents by fire and tempests excepted) throughout the term and in such repair and condition to yield up the same at the determination of the tenancy and also to make good any stoppage of or damage to the drains caused by the negligence of the tenants, his servants, family or visitors” (d). Not seldom the liability is distributed between the landlord and tenant expressly. But where there is no such stipulation, the law implies an obligation on the tenant’s part to maintain the demised premises and to restore them at the termination of the tenancy, in the same state in which they were at the date, not of the commencement of the lease but at the date when the lessee was put in possession, subject to certain exceptions, namely, changes caused by fair wear and tear or irresistible force. In India, under section 106 of the Act, a tenancy is either from month to month or year to year, according to the purpose for which the premises were let. In England there are several varieties of tenancies. There it has been held that a tenant from year to year of a farm and buildings at a fixed rent, who has not entered into any other express agreement with the landlord than as to the amount of rent, is under an obligation, implied by law, to use and cultivate the lands in a husband-like manner according to the custom of the country (e), and to keep the buildings wind and water-tight (f) but is not liable “to sustain and uphold” the premises (g); and as covenants implied by law run with the reversion at common law, the assignee of the reversion can at common law enforce the implied obligation against the tenant (h). By this clause the lessee is rendered liable to maintain the property leased in the same condition in which it was at the time of possession, subject only to changes caused by reasonable wear and tear or irresistible force. Incidental to this liability, the lessor is given a right at all reasonable times during the currency of the lease, to enter the premises to view the state of the property and give or leave notice of any defect in the condition. Now as to defect in condition, the clause is sub-divided into two parts, one of which relates to defects caused by any act or default on the part of the lessee, his servants or agents, as to which the clause presents no difficulty, for the obligation is imposed on the lessee to make good the same. But the defect referred to in the previous part of this clause is not as clear. It must be one which is not covered by clause (f), for although the Act creates no obligation on the lessor to repair, it imposes a qualified obligation on the tenant by this clause in that respect. It is submitted that the defect contemplated in the first part of the clause is such as is caused by the lessee remaining passive.

Express covenant to repair.—Usually this covenant obliges the tenant and not the landlord to keep the premises in repair, with a proviso that the liability shall only extend to keeping them in the condition in which they are at the time when he was put in possession. The covenant is seldom restricted to the tenant doing

(b) Sec. 117, Transfer of Property Act, IV of 1882.

(c) *Standen v. Christmas* (1847) 10 Q. B. 135, 116 E. R. 53.

(d) *Encyclopædia of Forms*, 2nd Ed., Vol. 8, p. 162.

(e) *Horsefall v. Mather* (1815) Holt N. P. 7;

Powley v. Walker, 5 T. R. 373; *Onslow v. Anon* (1809) 16 Ves. 173.

(f) *Anworth v. Johnson* (1832) 5 C. & P. 239; *Leach v. Thomas* (1835) 7 C. & P. 327.

(g) *Anworth v. Johnson* (1832) 5 C. & P. 239.

(h) *Wedd v. Porter* (1916) 2 K. B. 91.

the inside repairs and paint. The proviso is important as a distinction is made between a general covenant to repair, which binds the tenant to keep them in the condition existing at the time of demise, and "put" them or "keep" them in repair, which words would bind the tenant to improve their condition as at the date of the demise (*i*). On the repairing covenant in a lease, the leading authority is *Lurcott v. Wakeley and Wheeler* (*j*) in which the previous authorities have been reviewed, as a result of which the following propositions may be summed up:—

- (a) When an habitable old house is rendered worse by mere lapse of time and the effects of wind and weather, the loss falls on the landlord (*k*).
- (b) That the covenantor is absolved when, owing to change of circumstances, what he is required to do could not have been in the contemplation of the parties and involved giving an entirely new subject-matter (*l*).
- (c) Good, tenantable repair and similar phrases in common use import such repair as having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it (*m*).
- (d) The question of repair is in every case one of degree and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts or the renewal or replacement of substantially the whole (*n*).

Form of covenant to repair.—No importance is to be attached to the particular form of words used in the covenant. The effect is the same whatever words are used provided they plainly express the intention that the premises are to be repaired, kept in repair and yielded up in repair. In framing the covenant a variety of phrases are used to denote substantially the same obligation, and many of these phrases in common use have received judicial interpretation. These cases cannot be regarded as material when the construction of the covenant is in issue, for they lay down no general principles of law, as each case depends upon its own facts and circumstances. Cases are referred to as they supply a useful working rule for the normal covenants to repair, however variously they may be worded. Phrases which have received judicial determination are such as "good tenantable repair" (*o*) "kept in thorough repair and good condition" (*p*) "tenantable repair" (*q*), "in as good repair and condition" (*r*), "habitable repair" (*s*), "well and substantial repair" (*t*) "substantially repaired upheld and maintained" (*u*), "to do necessary repairs" (*v*) "forthwith to put into repair" (*w*), "good", "sufficient," "tenantable," repair (*x*), "well and substantially," "good, substantial," repair (*y*). On this subject

(i) *Harris v. Jones* (1832) 1 Moo. & R. 173 N. P.; *Welker v. Halton* (1842) 10 M. & W. 258; *Encyclopædia of Forms*, 1st Ed., Vol. 7, p. 192 (*g*).
 (j) (1911) 1 K. B. 905.
 (k) *Gutteridge v. Maynard* (1832) 1 Moo. & R. 334.
 (l) *Tonens v. Walker* (1906) 2 Ch. 166; *Lister v. Lane* (1893) 2 Q. B. 212.
 (m) *Proudfoot v. Hart* (1890) 25 Q. B. D. 42.
 (n) *Lurcott v. Wakeley and Wheeler* (1911) 1 K. B. 905.
 (o) *Proudfoot v. Hart* (1890) 25 Q. B. D. 42.
 (p) *Lurcott v. Wakeley and Wheeler* (1911) 1 K. B. 905.

(q) *Crawford v. Newton* (1886) 36 W. R. 54.
 (r) *Jones v. Joseph* (1918) 87 L. J. K. B. 510.
 (s) *Belcher v. M'Intosh* (1839) 8 C. & P. 720.
 (t) *Moxon v. Townshend* (1886) 3 T. L. R. 392; *Anstruther-Gough-Calthorpe v. McOscar* (1924) 1 K. B. 716.
 (u) *Monk v. Noyes* (1824) 1 C. & P. 265 N. P.
 (v) *Truscott v. Diamond Rock Boring Co.* (1882) 20 Ch. D. 251.
 (w) *Doe d Pittman v. Sutton* (1841) 9 C. & P. 706 N. P.
 (x) *Anstruther-Gough-Calthorpe v. McOscar* (1924) 1 K. B. 716.
 (y) *Bracen v. Trumper* (1858) 26 Beav. 11, 53 E. R. 800.

S. 108

a much misunderstood case and one frequently misapplied is *Proudfoot v. Hart* (z), a case of a rotten floor, in which it was held that the tenant's obligation under the repairing covenant was to put and keep the premises in such repair as having regard to the age, character and locality of the house would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. *Proudfoot v. Hart* (z) contains no general principle. It was a question as to what was performance of a covenant to keep in good tenantable repair. The floor was a subsidiary part of the whole. The house could not be occupied if the floor was rotten, and the tenant to comply with the covenant as to tenantable repair, meant either to make it good by repair or replace it, for otherwise the house could not be tenantable. The extent of a tenant's obligation under repairing covenants in a lease was considered by the Court of Appeal in the leading case of *Lurcott v. Wakeley and Wheeler* (a). There a lease of a London house contained a covenant by the lessee to substantially repair and keep it in thorough repair and good condition. Shortly after, the front external wall was required to be pulled down by a Local Authority as being a dangerous structure and the plaintiff called upon the defendants to comply with the notice, which they failed to do. After the expiration of the term the plaintiff, in compliance with a magistrate's order, took down the wall and then, in compliance with a further notice from the Local Authority, rebuilt it in accordance with modern requirements. The home was very old and the condition of the wall was caused by old age and the wall could not have been repaired without rebuilding it. It was held that the defendants were under their covenant liable for the costs of taking down and rebuilding the wall. The principle established by the authorities is that where the house as a whole or the subject-matter of the covenant as a whole, has by lapse of time fallen into such a condition that it is necessary to rebuild it, the covenant to repair does not apply, but that principle does not extend to a case where only subsidiary portion of the whole requires rebuilding (b). There is an analysis of the meaning of "repair" by Buckley, L. J., in *Lurcott v. Wakeley and Wheeler* (c), according to which, repair and renew are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. Repair is restoration by replacement of subsidiary parts of a whole. Renewal as distinguished from repair is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. This was approved in a later case (d).

"Standard of repair."—The question as to whether the standard of repair is to vary from time to time or to remain as it was, when the subject-matter was demised, was raised in the Court of Appeal (e), which followed *Morgan v. Hardy* (f). It was held that the Court was bound to look to the character of the house and its ordinary uses at the time of the demise. An improvement of its tenants or its neighbourhood will not increase the standard of repair nor will their deterioration lower that standard.

Further instances of breaches of a covenant to repair.—In addition, a variety of cases are to be found relating to the breach of the express covenant to repair, construed not for the purpose of determining the extent of the tenant's liability to

(z) (1890) 25 Q. B. D. 42.

(a) (1911) 1 K. B. 905.

(b) *Lurcott v. Wakeley and Wheeler* (1911) 1 K. B. 905; *Lister v. Lane* (1893) 2 Q. B. 212; *Wright v. Lawson* (1903) 19 T. L. R. 510.

(c) (1911) 1 K. B. 905, 923.

(d) *Anstruther-Gough-Calthorpe v. Mc'Oscar* (1924) 1 K. B. 716.

(e) *Anstruther-Gough-Calthorpe v. Mc'Oscar* (1924) 1 K. B. 716.

(f) (1886) 17 Q. B. D. 770.

repair, but as dealing with the subject-matter of repair and thus affording further illustration of this covenant, such as leaving premises infested with bugs (*g*), leaving the glass of windows cracked and not repairing pavement (*h*), not yielding up a farm as he found it (*i*), removing a fixture, for example, a verandah, the lower part of which is affixed to the ground by means of posts (*j*), the breaking of a door-way through the wall of a demised house into an adjoining house (*k*), pulling down the premises wholly or partly (*l*), non-repair of a mill-wheel (*m*), all of which have been held to be breaches of covenant for repairs.

Nature of covenant to repair.—Covenant to repair runs with the land and binds assigns though not named (*n*) and being divisible, an assignee of part of the premises is also liable (*o*); but a covenant by a sub-lessee to indemnify against breaches of covenant in the head-lease is merely personal and does not bind his assignee (*p*), for it is *prima facie* collateral, as it does not touch or concern the land demised. A lease for years of land contained a covenant to repair buildings erected on the land and a proviso for re-entry for breach. Of several houses erected on the land two were demised by an under-lease, in which the under-lessor covenanted for himself and his assigns with the under-lessee and his assigns for (1) quiet enjoyment, (2) for the performance of the covenants of the head-lease by the lessee thereof so far as they affected the land included in the head-lease and not demised in the under-lease, (3) to indemnify under-lessees and his assigns against breaches of those covenants. The under-lessor's assignee (in whom the head-lease had vested) failed to perform the covenant in repair in the head-lease, and the head-lessor re-entered on all the land demised by the head-lease and ejected the assignee of the under-lessee from the two houses. It was held that the covenant in the under-lease did not run with the land, as it did not touch or concern the land demised in the under-lease so that the assignee of the under-lessor was not liable for breaches of the above-mentioned covenants (*q*). The covenant also runs with the reversion so that the lessor's assignee can sue on it (*r*), but not when the reversion is assigned after the expiration of the term and the tenant is holding over without a written agreement (*s*), for if there be a written agreement the original terms are implied (*t*). It is a usual covenant (*u*).

Original structural defect.—The covenant to repair does not extend where the defect has been caused by faulty construction or inherent defect, thus leading to earlier collapse of the building than it would have done if the construction had been different (*v*).

Reasonable wear and tear.—An exception to the general liability of a tenant, this phrase is often expressed as fair wear and tear or fair or reasonable wear and tear. There is no authority as to the meaning of these words, but where these words appeared in a lease in which there was no covenant to repair during the term,

(*g*) *Jones v. Joseph* (1918) 87 L. J. Q. B. 510.

(*h*) *Pyot v. St. John (Lady)* (1613) Cro. Jac. 329; 79 E. R. 281.

(*i*) *Wim v. White* (1772) 2 Wm. Bl. 839, 96 E. R. 495; *Payne v. Haine* (1847) 16 M. & W. 541.

(*j*) *Perry's Administratrix v. Brown* (1818) 2 Stark. 403 N. P.

(*k*) *Doe d. Vickery v. Jackson* (1817) 2 Stark. 293 M. P.

(*l*) *Garage v. Lockwood* (1860) 2 F. & F. 115 N. P.

(*m*) *Openshaw v. Evans* (1884) 50 L. T. 156.

(*n*) *Spencer's case* (1583) 5 Co. Rep. 16a, 77 E. R. 72.

(*o*) *Stevenson v. Lambard* (1802) 2 East 575, 102 E. R. 490.

(*p*) *Doughty v. Bowman* (1848) 11 Q. B. 444.

(*q*) *Dewar v. Goodman* (1909) A. C. 72.

(*r*) *Ellis v. Torrington* (1920) 1 K. B. 399; *Cuthertson v. Irving* (1860) 29 L. J. Ex. 485, 158 E. R. 56.

(*s*) *Blane v. Francis* (1917) 1 K. B. 252.

(*t*) Conveyancing and Law of Property Act, 1881, c. 41, s. 10 (1); *Cole v. Kelly* (1920) 2 K. B. 106.

(*u*) *Doe d. Dymoke v. Withers* (1831) 2 B. & Ad. 896.

(*v*) *Lister v. Lane & Neshan* (1893) 2 Q. B. 212; *Torrens v. Walker* (1906) 2 Ch. 166; *Hugall v. McKean* (1884) 1 T. L. R. 53; *Wright v. Lawson* (1903) 19 T. L. R. 510.

S. 108 it was held that the lessee was not liable for dilapidations caused by friction of the air by exposure and by ordinary use (*w*); although these words include destruction of surface by ordinary friction, they do not include total destruction by a catastrophe which was never contemplated by either party.

Plaintiffs had demised certain floors in a warehouse for seven years to defendant at a yearly rent. The lessee covenanted to repair, maintain and keep the inside in good and tenantable repair and condition and to deliver them up at the end of the term, damage by fire, storm or tempest or other inevitable accident or reasonable wear and tear only excepted. The lessors covenanted to keep the walls, roof and main timbers in good and substantial repair and condition. Sub-lessees of defendant overloaded one of the upper floors which brought the whole building down. The plaintiff rebuilt it and sued for rent during the term the building remained unoccupied. The defendant denied liability and claimed damages from the plaintiff. It was held, in the absence of notice to the plaintiffs for any damage for want of repair, they were not liable on the express covenant to keep the walls, roof and main timbers in repair; that the tenant was not liable, if destruction was caused by using the property in what was apparently a reasonable and proper manner, having regard to its character and for the purpose for which it was intended to be used; that under his express contract he was liable for the costs of putting the inside of the floors and fixtures in good and tenantable repair (*x*).

Where a lease contained a covenant by the lessee to keep the interior in good and tenantable repair and to deliver them up in good and tenantable repair, reasonable wear and tear excepted, it was held that he was not liable for damage caused by bursting of an outside water-pipe which the tenant was under no liability to repair (*y*). Where a tenant undertakes to keep the premises in as good repair as when he took it fair wear and tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term. The landlord is under no implied obligation to do any repairs in such a case (*z*). A special case was stated by an arbitrator as to the covenants of a lease to keep premises which were old and in a bad state of repair at the date of the lease, in the same state of repair in which they then were, fair wear and tear excepted, and to deliver up the same in such repair and condition on the determination of the term. The Court agreed upon a "formula" for the guidance of the arbitrator to the effect that while the tenant was responsible for repairs necessary to maintain the premises in the same state as when he took them, yet if wind and weather had a greater effect on the premises, having regard to this character, than if the premises had been sound, the tenant was not bound so to repair as to meet the extra effect of the dilapidations so caused (*a*).

Where covenants to repair are separable.—An absolute covenant is not the same as a qualified covenant if they differ in substance. A covenant to repair at all times when, where and as often as occasion shall require during the term and at the furthest within three months after notice for want of reparation, is one covenant; and it cannot be stated as an absolute covenant to repair at all times when, where, and as often as occasion shall require during the term (*b*). The authorities establish that general and special covenants of this nature are separate and distinct covenants

(*w*) *Terrell v. Murray*, 45 So. Jo. 579; *Manchester Bonded Warehouse Co. v. Carr*, 49 L. J. Q. B. 809.

(*x*) *Manchester Bonded Warehouse Co. v. Carr*, 49 L. J. Q. B. 809.

(*y*) *Citron v. Cohen* (1920) 36 T. L. R. 560.

(*z*) *Arden v. Pullen*, 10 M. & W. 321; 152 E. R. 492.

(*a*) *Miller v. Burt* (1918) 68 So. Jo. 117.

(*b*) *Horsefall v. Testar* (1817) 7 Taunt. 385; 129 E. R. 154.

which severally make a complete sentence. Hence a general covenant to repair and further to repair within three months after written notice from the lessor, are independent and separate covenants (c), the latter being a special covenant. A right of re-entry attaches for a breach of the former, though no notice be given under the latter, which right of re-entry may be effected by letting to an under-tenant and subsequently receiving rent from him (d).

Entry by landlord to view and repair.—Without some stipulation to that effect, the landlord has no right to enter the premises while the relation between landlord and tenant subsists (e). Any such entry would be deemed as a trespass which would be restrained by injunction, although the non-repair may cause a forfeiture of his own lease (f). A covenant for a landlord to be allowed to enter a house to view the repairs at convenient times, is not broken if he is not permitted to enter some of the rooms if he comes without notice (g). In India the law is different. The tenant is bound under this clause to allow the landlord and his agents, at all reasonable times during the term, to enter upon the property and to inspect the condition thereof and to give or leave notice of any defect in such condition.

Give or leave notice.—On this subject the Act is silent. The notice may be given to the tenant.

His servant or agent.—It may be oral or in writing and may be given or left, that is, served by hand or through the post or affixed to the property.

Defect in such condition.—A distinction is made between notice of a defect as to condition and making good a defect after notice. In the former case the defects in the condition are such for which the tenant is not liable. The landlord is under an obligation to inform the tenant of this. In the latter case the defects are caused by the wrongful acts or defaults of the lessee, his servants and agents, which he is bound to make good within three months after notice has been given or left. It is not stated who is to repair the defects in the former case. Presumably the landlord. Under clause (f) these defects would be repairs which a landlord is bound to make and if he neglects within a reasonable time after notice to repair, the tenant may make them himself as authorized by clause (f) to this section.

Notice to repair.—The lessor may charge the lessee without notice but the latter cannot (h), unless the lessor is presumed by circumstances to have personal knowledge (i), or is in possession of a defective portion of the premises (j); but the mere possibility of knowledge will not suffice (k). A latent defect, however, will render the landlord liable without notice (l).

Measure of liability for repairs.—This is fixed with reference to the beginning of the lease and not with reference to the end of the term (m). It should be measured by the requirements of tenants who would be likely to take the premises at the commencement of the term. This is really covered by *Morgan v. Hardy* (n), which was affirmed on this point by the Court of Appeal (o), though reversed on another (p). It is an open question when after the commencement of the term the

(c) *Doe d Morecraft v. Meux* (1925) 4 B. & C. 606, 107 E. R. 1185.

(d) *Baylis v. Le Gros* (1858) 4 C. B. N. S. 537, 140 E. R. 1201.

(e) *Barker v. Barker* (1829) 3 C. & P. 557 (N. P.).

(f) *Stocker v. Planet Building Society* (1879) 27 W. R. 793.

(g) *Doe d Wetherell v. Bird* (1833) 6 C. & P. 195.

(h) *Tredway v. Machin* (1904) 91 L. T. 310; *Manchester Bonded Warehouse Co. v. Carr*

(1880) 43 L. T. 476.

(i) *Murphy v. Hurly* (1922) 1 A. C. 369.

(j) *Meller & Co. v. Holme* (1918) 2 K. B. 100.

(k) *Hugall v. M'Lean* (1885) 53 L. T. 94.

(l) *Fisher v. Walters* (1926) 2 K. B. 315.

(m) *Anstruther-Gough-Calthorpe v. McOscar* (1924) 1 K. B. 716.

(n) (1886) 17 Q. B. D. 770.

(o) (1887) 35 W. R. 588.

(p) (1887) 18 Q. B. D. 646.

S. 108 tenant's possession has been delayed, how the date is fixed as to the tenant's liability to repair, keep in repair and yield up in repair. A different rule obtains in this country whereby the tenant is obliged to leave the property in the condition he found it when he obtained possession.

Covenant for repair how construed when premises destroyed by various causes.—A tenant is liable to repair though the premises demised be burnt by lightning or blown down by enemies (*q*) or damaged by bomb discharged from an enemy aeroplane (*r*). In an Indian case where there was an express covenant to repair by the tenant, he was absolved from liability for damages caused by earthquake, hurricane or the like (*s*). Clause (e) of section 108 of the Transfer of Property Act empowers the tenant to avoid the lease where through any of the above causes a material part of the property be wholly destroyed or permanently and substantially rendered unfit for the purpose for which it was let.

Construction of covenant to repair, when premises held from a date then last past.—In an action for breach of covenant in a lease, the tenant is not liable for acts done before the time of the execution of the lease although the *habendum* of the lease states that the premises are to be held from a day prior to its execution. The lease in question was executed on the 9th of November 1842 which stated that the premises were to be held from the 22nd of June then last past. It was held that the plaintiff was not entitled to recover for the acts complained of, which were done before the date of the execution of the lease. The *habendum* in a lease only marks the duration of the tenant's interest and its operation as a grant is merely prospective (*t*).

Landlord's fixtures.—Covenant to repair does not include repair of things forming part of the original structure itself. In a lease of a house the term "fixture" means something affixed to the premises after the structure is completed. A tenant of business premises, the sides of which mainly consisted of plate-glass windows of the ordinary kind which do not open, covenanted to repair the landlord's fixtures. The landlord claimed that the windows were landlord's fixtures and the tenant was liable to repair. It was held that the windows formed part of the structure of the house, and the covenant did not extend to them (*u*). Covenant to repair does not include repair of party wall.

Covenant to do specific repairs in a particular year.—The liability of the lessee under such a covenant, assuming the lease to be then subsisting, attaches as soon as the year begins, and the fact that the lease is determined by lessee by notice expiring before the end of the year does not relieve the lessee of his obligation to perform the contract unless he shews some excuse for their non-performance. A lease contained the following covenant by the lessee:—"And will in the year 1909 and also in the year 1916 if this lease shall so long last paint, etc." The lessee died in 1915 and his executors under a power in that behalf contained in the lease gave six months' notice to the lessor to determine the lease on March 1, 1916. On the determination of the term the covenant not having been performed, the lessor claimed damages for breach and the executors were held liable (*v*).

Newly erected buildings.—How far the covenant extends to these is a matter of construction of the covenant. If it is general in form, it would include these

(*q*) *Paradine v. Jane* (1647) Aley 26, 82 E. R. 897.

(*r*) *Kedmond v. Dainton* (1920) 2 K. B. 256.

(*s*) *Bolton v. Donald* (1906) 3 A. L. J. 134.

(*t*) *Shaw v Kay* (1847) 17 L. J. Ex. 17, (1847)

154 E. R. 175.

(*u*) *Boswell v. Crucible Steel Co.* (1925) 1 K. B. 119.

(*v*) *Kirklington v. Wood* (1817) 1 K. B. 332.

but if it is a particular covenant to repair demised buildings, then no such liability would arise. If there is an addition to the old house it would be within the covenant, but if it is a new and independent dwelling-house, it would be outside the covenant (*w*). The covenant was extended to newly erected houses when the demised premises included, "all other erections and buildings which at any time hereafter during the said term shall be built on the same piece of ground or any part thereof" (*x*).

Extent of landlord's obligation to repair.—The principles of construction which have been applied to lessee's covenant to repair, apply equally to similar covenants by lessors. A covenant by lessor to keep the outside walls in repair was construed as a covenant to repair on notice and there could be no breach until the lessor had notice of want of repair, which must be from the tenant and not *aliunde* (*y*).

Effect of landlord's collateral agreement on tenant's covenant to repair.—Defendant agreed to take a lease of the plaintiff's house, if the latter would put the drains in sound and proper condition. A lease executed subsequently contained a covenant by the lessee to pay all outgoings in respect of the premises and to keep the premises in repair. The plaintiff did not put the drains in order before or after the execution of the lease and had to incur expenses for complying with the order of the sanitary authorities, to recover which he sued the defendant, who was held not liable, on the grounds (1) that the covenant to pay outgoings did not apply to the payment for work rendered necessary by the plaintiff's failure to repair the drains in accordance with the agreement and (2) that the covenant to keep the premises in repair did not apply to the drains unless and until they had first been put in repair by the plaintiff (*z*).

Covenant to build and covenant to repair.—Where there is an express covenant to build both as to time and mode of building no further covenant to build can be implied from a covenant to repair. An express covenant to build within 10 years which could only be broken once cannot be consistent with an implied covenant to build which might be continuously broken. The repairing covenant attaches only to the buildings when built, and does not in a lease, where there is an express building covenant, imply an obligation to build. A different opinion was expressed by Sterling, J. in *Jacob v. Down* (*a*) on the authority of cases of *Bennett v. Herring* (*b*) and *Sampson v. Easterby* (*c*). These cases, however do not support the proposition. In *Bennett v. Herring* (*b*) there were unfinished existing buildings to which the covenant attached, and in *Sampson v. Easterby* (*c*) the obligation to build was implied not from the covenant to repair but from a recital (*d*). In *Jacob v. Down* (*e*) lessee covenanted, within twelve months, to erect certain buildings and to keep the premises "so to be erected as aforesaid in good and substantial repair and the same in good and substantial repair" to deliver up at the end of the term. There was a proviso for re-entry on breach of any of the lessee's covenants. The buildings were never erected but the lessor accepted rent which accrued after the expiration of the twelve months aforesaid. It was held that the building covenant was broken once for all at the expiration of twelve months and was not a continuing covenant: that the repairing covenant implied an obligation to erect the buildings and there was,

(w) *Cornish v. Cleife* (1864) 34 L. J. Ex. 19, 159 E. R. 605.

(x) *Field v. Kurnick* (1926) 2 K. B. 374.

(y) *Torrens v. Walker* (1906) 2 Ch. 166.

(z) *Henman v. Berliner* (1918) 2 K. B. 236.

(a) (1900) 2 Ch. 156.

(b) (1857) 3 C. B. N. S. 370.

(c) (1829) 9 B. & C. 505.

(d) *Stephens v. Junior Army & Navy Stores, Ltd.* (1914) 2 Ch. 516; The dictum of Sterling, J. in *Jacob v. Down* (1900) 2 Ch. 156 (disapproved).

(e) (1900) 2 Ch. 156.

S. 108

therefore, a continuing breach of it (*f*). In respect of a forfeiture thus incurred the assignee of the reversioner might sue (*g*).

Remedies for breach.—Tenant cannot quit the premises owing to default on the part of the landlord to repair (*h*). He may sue for damages and costs of repair effected by him but not for occupation of other premises during the progress of repairs (*i*). If the agreement provides for repairs being done by a fixed day after which a daily sum is agreed to be paid till completion, such a stipulation is not a penalty (*j*).

Breaches of covenant whether continuing or not.—For not putting in repair there could be only one breach of that portion of the covenant and one recovery of damages. For not keeping in repair the breach is a continuing one (*k*).

Action on the covenant.—In general, the form of action on a breach of covenant to repair is one for damages. In estimating the damages it has to be considered that the landlord is not bound to expend them in repairs, neither can he do so, for he cannot enter the premises without the tenant's permission and the damages may vary according to the unexpired residue of the term of the lease. Then again, the covenant to repair consists of three items, to repair, keep in repair, and yield up in repair. In estimating damages distinction would have to be made when the action is on the covenant to keep in repair which is different from an action for damages to yield up in repair, for one is during the term and the other is on the termination of the term. The measure of damages for breach of covenant to keep in repair is not the same as if the covenant were to yield up in repair at the end of the lease. The cases establish that in an action brought before the term has expired the true question is to what extent is the reversion injured by the non-repair and the measure of damages is depreciation or deterioration in the value of the reversion. The basis on which damages should be assessed is to ascertain how much it would require to put the premises in the state of repair in which they would have been if the covenant had been observed and then allowing a rebate from that sum in consideration of the fact that the lease had still some years to run. In other words, to arrive at the damages you must determine the difference in value between the reversion with this covenant observed and the value of this reversion with the covenant unobserved (*l*). In case of a lessee and of a sub-lessee, where the former brings an action against the latter for breach of his covenant to keep in repair it is right, in assessing the damages, to take into account the liability of the lessee upon the covenants in the original lease (*m*). Whilst in case of action for breach of covenant to yield up in repair at the end of the lease, the lessor is entitled to the exact amount of dilapidation at the determination of the tenancy (*n*), and to such costs as will put the premises in a state of repair in which the lessee was bound to leave them (*o*), and the rule is not affected by the fact that while the term was running and the lessee was in possession the lessor made a demise of the premises to commence on the determination of the term to a third person, which demise contained a covenant to alter and rebuild part of the premises and a covenant to repair. The measure of damages is independent of what circumstances have occurred after the end of the term and of what

(*f*) (1900) 2 Ch. 156.

(*g*) *Bennett v. Herring* (1857) 3 C. B. N. S. 370.

(*h*) *Surplice v. Farnsworth* (1844) 13 L. J. C. P. 215, 135 E. R. 232.

(*i*) *Green v. Eales* (1841) 2 Q. B. 225.

(*j*) *De Soysa v. De Pless Pol* (1912) A. C. 194.

(*k*) *Coward v. Gregory* (1866) 36 L. J. C. P. 1.

(*l*) *Conquest v. Ebbetts* (1896) A. C. 490.

(*m*) *Conquest v. Ebbetts* (1896) A. C. 490.

(*n*) *Inderwick v. Leech* (1885) 1 T. L. R. 484.

(*o*) *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Co. of London* (1912) A. C. 673.

the lessor proposes to do with the property (*p*). But in estimating such damages, any damages allowed during the currency of the lease for breach of covenant to keep in repair must be deducted (*q*). As between lessor and under-lessee the latter is not liable where there is a covenant by the lessee to repair, unless the first lessee is insolvent (*r*), whilst as between lessee and under-lessee the latter's contract to perform the covenants of the head-lease is a contract of indemnity (*s*). Such a covenant is not a covenant of indemnity, where there is a difference in the date of the two instruments and the under-lease contains a covenant to repair in terms precisely similar to those of the covenant in the original lease inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age and character of the premises at the time of the demise (*t*). There can be no specific performance of a covenant to repair as the tenant could not be compelled to repair, for compensation in money would be an adequate relief for non-performance of the contract (*u*). Nor can there be any remedy by way of injunction (*v*), except it be to restrain the tenant from committing injury to the reversion (*w*). Neither is the remedy to re-enter available, for a proviso in a lease giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to or in breach of any of the covenants" does not apply to a breach of covenant to repair, the omission to repair not being an act done within the meaning of the proviso (*x*).

Clause (n).—A lessee who is aware is bound to give, with reasonable diligence, notice to the lessor

- (i) of any proceeding to recover the property or any part thereof, or
- (ii) of any encroachment made upon, or
- (iii) or any interference with the lessor's rights concerning such property.

Exception.—No such duty would be incumbent when there is a contract or local usage to the contrary.

Agricultural lease.—To these leases the clause does not apply (*y*).

Lessee's liability to inform.—This clause is for the protection of the lessor's interest in the property. All acts tending to prejudice the lessor's property which a lessee as being a person in possession is likely to know and which would materially affect the lessor's interest would by this clause create a duty which the lessee is liable to discharge. In respect of all these acts and deeds which trench upon the lessor's rights, the lessee is bound to give him notice with reasonable diligence.

The instances enumerated in the clause are cases of injuries to the reversion, namely,

- (a) Proceedings to recover the property or any part thereof.
- (b) Encroachment made upon such property.
- (c) Interference with the lessor's rights concerning such property.

The lessor is entitled to damages or he may apply for injunction to restrain the injury. The extent of his reversionary interest is material for the purpose of estimating the damage. The injury may consist of damage to buildings, encroachment, nuisance or interference with easements and the like. If it be of a temporary nature it cannot be actionable at the instance of the lessor, for in order that he should

(*p*) *Joyner v. Weeks* (1891) 2 Q. B. 31.
 (*q*) *Henderson v. Thorn* (1893) 2 Q. B. 164.
 (*r*) *Goddard v. Keate* (1682) 1 Vern. 87, 23 E. R. 330.
 (*s*) *Hornby v. Cardwell* (1881) 8 Q. B. D. 329.
 (*t*) *Pontifex v. Foord* (1884) 12 Q. B. D. 152.

(*u*) Sec. 21 (a), Specific Relief Act, I of 1877.
 (*v*) Sec. 56 (f), Specific Relief Act, I of 1877.
 (*w*) *Heard v. Stuart* (1907) 24 T. L. R. 104.
 (*x*) *Doe d. Abdy v. Stevens* (1832) 3 B. & A. L. 299, 110 E. R. 112.
 (*y*) Sec. 117, Transfer of Property Act.

S. 108

have a right of action the injury must be of a permanent nature, as will be continued after the expiration of the term of the lease unless remedied.

Clause (o).—The lessee—

- (i) may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own.
- (ii) must not or permit another
 - (a) to use the property for purposes other than those for which it was let,
 - (b) to fell or sell timber, pull down or damage buildings belonging to the lessor, or
 - (c) to work mines or quarries not open when the lease was granted, or
 - (d) to commit any other act destructive or permanently injurious to the property let.

Exception.—The clause applies only in the absence of a contract or local usage to the contrary. By Malabar custom wilful or extensive waste on the part of the *kanomdar* results in a forfeiture of the holding (z).

Addition to the clause.—The words “or sell” have been added by the Amending Act. So also the phrase “belonging to the lessor” to distinguish destruction or loss caused or waste committed as to the lessor’s timber or building from those of the lessee (a).

Agricultural leases.—These are excepted from the operation of the provision of this clause (b). As the Transfer of Property Act will not apply to a permanent tenure in respect of agricultural land, the tenure holder possesses all underground rights in the absence of stipulation to the contrary. The common law of England regarding the mining rights of lessees for a term cannot be made applicable to permanent tenures in the rural parts of Bengal (c).

Waste.—Clause (o) deals with the subject known to law as waste. According to this clause various acts of waste are defined which are prejudicial to the inheritance or reversion. There is an implied covenant in every lease not to commit waste (d). Besides acts, which are destructive or permanently injurious to the inheritance, the clause includes the user of the property otherwise than as a prudent owner would use if it were his own, subjecting it to uses other than for which it was leased (e), or felling or selling timber or pulling down or damaging buildings belonging to the lessor or working mines or quarries not open when the lease was granted (f). According to English Law, waste may be permissive, which is an act of omission on the part of the lessee, or it may be voluntary, which is an act of commission on his part, or it may be ameliorating or equitable waste. Acts of commission and not of omission are punishable under this clause. A man cannot commit waste even technically, if he is doing that which he is entitled to do by contract; that is to say,

(z) *Mallarkandi v. Narayana* (1905) 9 M. L. J. 306.

(a) Sec. 56, Transfer of Property Amending Act, 20 of 1929.

(b) Sec. 117, Transfer of Property Act, IV of 1882.

(c) *Sriram v. Hari Narain* (1906) 33 Cal. 54.

(d) *Whitham v. Kershaw* (1886) 16 Q. B. D. 613.

(e) *Peter Nicholl v. Tarinee* (1875) 23 W. R. 298 (making bricks on the land); *Noyna Misser v. Rupikun* (1882) 9 Cal. 609 (converting cultivation land into a tank); *Tarinicharan v. Debnarayan* (1871) 8 Beng. L. R. (App.) 69 (conversion of paddy land into tank); *Lakshmana v. Ramachandra* (1887) 10

Mad. 351 (converting land under cultivation into a mango grove); *Bholai v. The Rajah of Bansi* (1882) 4 All. 174 (planting trees on the holding *contra* in *Venkaya v. Ramsami* (1899) 22 Mad. 39 and *Krishna Das v. Venkatappa* (1905) 9 M. L. J. 146); *Girish Chandra v. Sirish Chandra* (1904) 9 C. W. N. 255 (excavation causing substantial damage though lease permits the making of excavation).

(f) *In re Purmanandas Jeewandas* (1883) 7 Bom. 109, see *Megh Lal v. Raj Kumar* (1907) 34 Cal. 358 (where lease was perpetual the underground minerals passed).

he cannot commit waste as against his landlord if his landlord has entered into a special contract enabling him to do it (*g*).

S. 108

Alteration of nature of demised premises.—By a lease dated September 29, 1830, certain meadow land was leased for the construction of a reservoir. The lessees instead used the land for grazing purposes upto 1896 when they sub-demised it to B for the rest of the term less last three days for the purpose of being used as a rubbish shoot. The under-lessee took possession and shot quantities of soft and hard rubbish on the land, thereby raising the surface about 10 feet. The lessor brought an action claiming injunction restraining the land from being so used. It was held, irrespective of the question whether the added material was offensive or inoffensive, the alteration had been such as to constitute waste and both the lessee and his under-lessee were restrained (*h*). In this case the test laid down was whether the act which the lessor says is waste alters the nature of the thing demised. If the permanent character of the property demised is not substantially altered, as, for instance, by the conversion of pasture land into plough land by breaking up ancient meadows, or the like, it is not waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing. Within those covenants and conditions he may use his holding as he pleases. The clause deals with the ordinary rights of a lessee in an ordinary lease but its terms do not cut down the right to work a mineral field expressly conveyed (*i*).

Ameliorating waste.—This is one in which not only the land but also the inheritance is improved (*j*), and one in which the Court would properly refuse to interfere by injunction (*k*).

Equitable waste.—Created by equity it includes acts which are destructive and cases of gross or wanton waste. It is that which a prudent man would not do in the management of his own property (*l*).

Permissive waste.—This is caused by omission on the part of the lessee as when he lets a house fall or a wall in disrepair to tumble down. The law does not compel him to do certain acts and for their omission he is not punishable. The doctrine of permissive waste does not go further than that a tenant is bound to take reasonable care of the property entrusted to him and see that through no neglect of his own it is irreparably damaged (*m*).

Trivial waste.—The waste complained of must be of an injurious character, for if it be really ameliorating waste or if it be so small as to be indifferent with the one party or the other, a Court of Equity will not interfere (*n*).

Voluntary waste.—Instances of voluntary waste mentioned in this clause are the felling or selling of timber, pulling down or damaging buildings belonging to the lessor or working mines or quarries not open when the lease was granted or committing any other act which is destructive or permanently injurious thereto. It includes actual waste, and is divisible into ameliorating waste and equitable waste,

(*g*) *Meux v. Copley* (1892) 2 Ch. 253.

(*h*) *West Ham Central Charity Board v. East London Water Works Co.* (1900) 1 Ch. 624; *Darcy (Lord) v. Askwith* (1618) Hob. 234, 80 E. R. 380.

(*i*) *Kumar Satya Niranjan v. Ram Lal Kaviraj* (1925) 48 M. L. J. 328 P. C.

(*j*) *Meux v. Copley* (1892) 2 Ch. 253 (converting farm into a market garden).

(*k*) *Doherty v. Allman* (1878) 3 A. C. 709 (con-

verting a storehouse into a dwelling house).

(*l*) *Turner v. Wright* (1860) 29 L. J. Ch. 598, 45 E. R. 612.

(*m*) *Doongersey v. Keshavji Meghji & Co.* (1917) 19 Bom. L. R. 878.

(*n*) *Coppinger v. Gubbins* (1846) 3 J. & Lat. 411; *Governors of the Harrow School v. Alderton* (1800) 2 B. & P. 86; *Barry v. Barry* (1820) 1 Jac. & W. 651, 37 E. R. 516.

S. 108

the latter being the creation of equity comprising cases of destructive gross or wanton waste. To prove voluntary waste the lessor must shew that the lessee has not used the demised premises in a fair, reasonable and tenantable manner (o).

Particular instances of acts of waste.—The following have been held as such. Ploughing meadow land (p), erection of building which causes injury to the reversion (q), enclosing and ploughing up waste land (r), destroying evidence of title (s), increasing the value of the estate but causing injury to the reversion (t), diminishing the value of the estate or increasing the burden on it (u), pulling down and rebuilding a house (v), overloading a floor known to be in a ruinous condition and thus pulling it down (w), removal of fixtures attached to the freehold (x).

Acts which have been held not to amount to waste are.—To erect buildings which improve the value of the lease-hold land without consent of lessor (y), pulling down a building on the rectory and substituting another in a different part (z), dividing meadow into several parcels by making ditches (a), converting a chapel into a theatre for a cinematograph when the lease did not prohibit such a user (b).

Its products (if any).—These would include fruits, flowers and vegetables growing on the demised premises. The lessee is entitled to use and enjoy all such produce of the land.

Timber.—The prohibition in this section against felling timber applies only to timber standing at the date of the lease, as to timber subsequently grown the lessee will be entitled under clause (h) of the section (c).

Timber.—A mango tree which is primarily a fruit tree might not always come within the term "standing timber" as defined by the Registration Act, but it may be classed as such where, according to custom of a locality, its wood is used in building houses. By the term "timber" is meant properly such trees only as are fit to be used in building houses (d).

Property in trees growing on land.—Where a lease was made for the purpose of clearing jungle land and bringing it under cultivation and no reservation of trees was made, it was held that the lessee had the right to appropriate the trees when cut (e). Before the Transfer of Property Act the property in trees was in the landlord and the tenant had a right to them only if there was a custom or local usage to the contrary. There was no distinction between trees standing when the tenancy was created and those planted by the tenant. In case of tenancies after the Transfer of Property Act and governed by it, the ownership in trees is in the tenant except of those standing on the land at the time the tenancy was created (f).

Remedies for waste.—There are two remedies open to the lessor, injunction and damages, the former being usually adopted to prevent injury, actual or

- (o) *Doongersey v. Keshavji Meghji & Co.* (1917) 19 Bom. L. R. 878.
 (p) *Simmons v. Norton* (1831) 7 Bing. 640, 131 E. R. 247.
 (q) *Jones v. Chappell* (1875) L. R. 20 Eq. 539.
 (r) *Queen's College, Oxford v. Hallett* (i) (1811) 14 East 489, 104 E. R. 689.
 (s) *Young v. Spencer* (1829) 10 B. & C. 145, 109 E. R. 405.
 (t) *Doe d Grubb v. Burlington (Earl)* (1833) 5 B. & Ad. 507, 110 E. R. 878.
 (u) *Doe d Grubb v. Burlington (Earl)* (1833) 5 B. & Ad. 507, 110 E. R. 878.
 (v) *Cole v. Forth* (1872) 1 Mod. Rep. 94, 86 E. R. 759.
 (w) *Edwards v. Halinder's Case* (1594) 2 Leon 93,

- 74 E. R. 385.
 (x) *Kimpton v. Eve* (1813) 2 Ves. & B. 349, 35 E. R. 352.
 (y) *Jones v. Chappell* (1875) L. R. 20 Eq. 539.
 (z) *Huntley v. Russell* (1849) 13 Q. B. 572.
 (a) *Anon v.* (1587) 2 Leon 174, 74 E. R. 454.
 (b) *Hyman v. Rose* (1912) A. C. 623, *Yusuf Ali Khan v. Hira* (1898) 20 All. 469.
 (c) *Kedarnath Bose v. Govinda Chandra Dass* (1927) 32 C. W. N. 366.
 (d) *Krishnarao v. Babaji* (1960) 24 Bom. 31.
 (e) *Mon Mohini v. Raghoonath Misser* (1896) 23 Cal. 209.
 (f) *Kedar Nath v. Govinda Chandra Dass* (1927) 32 C. W. N. 366.

threatened, though it is not granted without positive evidence of title (g). The latter is a claim for compensation for injury done to the reversion, the true measure of damages being the diminution in value of the reversion less discount for immediate payment (h). An injunction will be granted against pulling down buildings at the end of the term and carrying away the materials (i), also against mischief and wilful waste (j), and this notwithstanding the fact that a liability is imposed by the covenant (k). A lessor is entitled to an injunction not only against the lessee but also against the under-lessee (l). A right of action for damages being in the nature of a tort, is not assignable (m). In equity no interference whatever would be made on the ground of permissive waste by a tenant for life. A tenant for life upon whom no express duty to repair was imposed by the will died, leaving the estate in a dilapidated condition. In the administration of her estate the remainderman's claim against the execution for compensation for damages for permissive waste was disallowed (n).

Clause (p).—The lessee must not erect on the property any permanent structure but he may do so in the following cases :—

- (i) with the lessor's consent,
- (ii) for agricultural purposes,
- (iii) if permitted by contract or local usage.

Agricultural leases.—Negative in form, the application of this clause to leases for agricultural purposes seems superfluous in view of such leases being excepted for the provisions of this chapter (o).

Section 108 (p).—The clause provides that in the absence of a contract or local usage to the contrary, the lessee must not, without the lessor's consent, erect on the property (leased) any permanent structure (except for agricultural purposes). By clause (h) the lessee may even after the date of the lease remove at any time while in possession all things which he has attached to the earth, and by clause (q) on the determination of the lease the lessee is bound to put the lessor into possession of the property and restore the property according to clause (m) in as good a condition as it was in at the time when he was put in possession. It will thus be seen that the prohibition in clause (p) against the construction of a permanent structure on the land (except for agricultural purposes) does not apply, when according to the contract of the parties, the land is let for the erection of a dwelling-house or shop thereon under clause (p). The maxim "*quicquid inædificatur solo solo cedit*" has no application to India and even in cases to which the English Law applied, the Indian Legislature, by Act XI of 1855, departed from the maxim in the cases specified in section 2 of that Act (corresponding to section 51 of the Transfer of Property Act). Even under the common law of India a tenant who erects a building on land let to him can only remove the building and not claim compensation for it on eviction by the landlord (p).

Clause (q).—The lessee is bound to put the lessor in possession on the determination of the lease.

(g) *Davies v. Leo* (1802) 6 Ves. 784, 31 E. R. 1307.

(h) *Whitham v. Kershaw* (1886) 16 Q. B. D. 613.

(i) *London Corporation v. Hedger* (1810) 18 Ves. 355, 34 E. R. 352.

(j) *Lathrope v. Marsh* (1800) 5 Ves. 259, 31 E. R. 576.

(k) *London City v. Pugh* (1727) 4 Bro. Parl. Cas. 395, 2 E. R. 268.

(l) *Farrand v. Lovel* (1750) 3 Atk. 723, 26 E. R. 1214.

(m) *Defries v. Milne* (1913) 1 Ch. 98.

(n) *In re Cartwright, Avis v. Newman* (1889) 41 Ch. D. 532.

(o) See sec. 117, Transfer of Property Act, IV of 1882.

(p) *Ismai Kani Rowthan v. Nazarali Sahib* (1904) 27 Mad. 211.

S. 108

Exception.—The clause does not apply when there is a contract or local usage to the contrary. A covenant for renewal would be a contract to the contrary.

Agricultural leases.—The clause does not apply to these leases (*q*).

To yield up the demised premises.—The tenant is under an obligation under this rule to deliver up possession of the demised premises to the landlord on the expiration of the term of the lease. There is an implied contract that the tenant shall not only go out of possession but restore the possession to the landlord, so that where the property is in possession of a sub-lessee or under-lessee the tenant must give possession of such portion as is in the occupation of such sub-lessee or under-lessee (*r*). Sub-section (*m*) enunciates the same rule and mentions the condition in which the property should be at the time of delivery. Until possession is delivered the tenant continues liable for the rent (*s*). The possession must be absolute (*t*) and complete, that is, vacant (*u*), including that of land encroached during tenancy by the tenant (*v*).

When is delivery ineffectual.—Possession as seen must be absolute and complete. A caretaker (*w*) or sub-tenant (*x*) refusing to vacate would render the tenant liable for rents, as in such a case he cannot be said to have got possession. The landlord may maintain an action against the tenant for possession and recover by way of damages the value and loss of rent for the time he is kept out of possession and for the trouble and expense of turning out the party in possession (*y*). The liability in such cases is for compensation for wrongful use and occupation for the actual number of days possession has been delayed after the tenancy has determined (*z*). The damages may be either in contract for a breach thereof to yield up possession or in tort for trespass (*a*). Mere locking the door and accidentally detaining the key entails no liability (*b*), but if some goods of the tenant are left behind he is liable (*c*). If one of two co-tenants holds over without the consent of the other the tenant who has quitted possession is not liable (*d*). A contrary rule has been laid in this country (*e*).

Prospective tenant.—When the tenant fails to quit possession according to notice and the landlord is unable to put the new tenant into possession the old tenant is liable in damages for holding over for ordinary damages paid to the prospective tenant in an action brought by the latter and also the costs of the action. Acceptance of rent during the period of holding over is no bar to such an action (*f*).

Forceful entry and breaking of locks.—A tenant having agreed to leave at the expiration of the lease afterwards refuses to do so, the landlord cannot put the tenant's wife and furniture out into the street but if the tenant vacates, leaving a lock on the door, the landlord may break it and take possession (*g*). No force in

(*q*) Sec. 117, Transfer of Property Act, IV of 1882.

(*r*) *Henderson v. Squire* (1869) 19 L. T. 601.

(*s*) *Harding v. Chethorn* (1793) 1 Esp. 60 N. P.

(*t*) *Harding v. Chethorn* (1793) 1 Esp. 60 N. P.; *Henderson v. Squire* (1869) 19 L. T. 601.

(*u*) *Ballaramgiri v. Vasudev* (1898) 22 Bom. 348.

(*v*) *Indu v. Atul, A. I. R.* (1925) Cal. 1114.

(*w*) *Henderson v. Squire* (1869) 19 L. T. 601, *Balaramgiri v. Vasudev* (1898) 22 Bom. 348.

(*x*) *Henderson v. Van Coolen* (1922) 67 So. Jo. 228.

(*y*) *Idbs v. Richardson* (1839) 8 L. J. Q. B. 126, 112 E. R. 1436; *Roe v. Wiggs* (1806) 2 Bos. & P. N. R. 330, 127 E. R. 654.

(*z*) *Idbs v. Richardson* (1839) 8 L. J. Q. B. 126,

112 E. R. 1436.

(*a*) *Sundermull v. Ladhuram* 50 Cal. 667 (1923) see per Parke, B., in *Robinson v. Learoyd* (1840) 7 M. W. 48; *Bramley v. Chesterton* (1857) 27 L. J. C. P. 23, 140 E. R. 58.

(*b*) *Gray v. Bompas* (1862) 5 L. T. 841, 142 E. R. 899.

(*c*) *Savage v. Dent* (1736) 2 Stra. 1064, 93 E. R. 1034.

(*d*) *Draper v. Crofts* (1846) 15 M. & W. 166, 153 E. R. 807.

(*e*) *Ramji v. Mahraj Vasudev, A. I. R.* (1936) Sind. 213.

(*f*) *Bramley v. Chesterton* (1857) 27 L. J. C. P. 23, 140 E. R. 548.

(*g*) *Hillary v. Gay* (1833) 6 C. & P. 284 N. P.

ejecting the tenant should be used (*h*), at any rate, no more than is necessary for the purpose (*i*), though the landlord may enter by using force (*j*).

When rent is received in service.—A servant being given premises to live as part of his services and the performance of his duties, refused to give up the cottage after leaving the service and notice to quit duly given. Thereupon, by orders of the defendants the servant and his furniture were removed by others, using no more force than was necessary. In an action by plaintiff for assault, battery and trespass, defendants were held not liable (*k*).

Ejectment proceedings.—On the determination of the lease in manner provided by section 111 of this Act, (*l*) or by operation of law (*m*) as under section 108 (*c*), tenant is bound to give vacant possession to the landlord. His failure to do so would entitle the landlord to sue in ejectment. Suit in ejectment is a suit for possession of specific immoveable property under section 8 of the Specific Relief Act (*n*), the recovery of which may be made in the manner provided by the Code of Civil Procedure (*o*). Section 8 of the first mentioned Act provides for recovery on the basis of title, while section 9 of the same Act gives a summary remedy for recovery without establishing title. The two sections give alternative reliefs and are mutually exclusive. As possession follows title, the landlord would come under section 8 of the Act (*p*). In a suit for ejectment a mere mis-statement of the area of the land sought to be recovered ought not to be regarded as anything more than a *falsa demonstratio*. If the space is properly defined by other description the statement of its measurement in square yards may be treated as surplusage and of no consequence (*q*).

Limitation.—A suit by a landlord to recover possession from a tenant is governed by article 139 of the Limitation Act (*r*) which prescribes 12 years from the date when the tenancy has determined.

Dispossession by landlord of tenant holding over.—A tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by the landlord. The tenant then brought a suit for possession against the landlord under section 9 of the Specific Relief Act. It was held that the tenant was not liable to be evicted by the landlord *proprio motu* and that he was entitled to a decree for possession. A suit under section 9 of the aforesaid Act must be brought within six months from the date dispossession occurs, under article 9 of the Limitation Act, 1908 (*s*).

Dispossession by a third party.—In such a case the actual ejector or the person under whose orders he acts should be sued by the tenant in possession. Hence when under a contract between A and B an exclusive occupation is given to A, he is the proper plaintiff in a suit for possession under section 9 of the Specific Relief Act. If B desires to sue immediately on the possessory right he should sue in A's name though for an injury to the reversion, B may properly sue in his own name (*t*). But where a landlord holding possession through a tenant is dispossessed by a third party, he may bring a suit to recover possession (*u*).

(*h*) *Newton v. Harland* (1840) 1 Man. & G. 644, 133 E. R. 490.

(*i*) *Hemmings v. Stoke Poges Golf Club* (1920) 1 K. B. 720.

(*j*) *Williams v. Tapperell* (1892) 8 T. L. R. 241.

(*k*) *Hemmings v. Stokes Poges Golf Club* (1920) 1 K. B. 720.

(*l*) *Balaramgiri v. Vasudev* (1898) 22 Bom. 348.

(*m*) *Siddick Haji Hoosein v. Bruel & Co.* (1911) 35 Bom. 333.

(*n*) 1 of 1877.

(*o*) Act V of 1908, O. 21, rr. 35 & 36.

(*p*) *Lachman v. Shambhu Narain* (1911) 33 All. 174.

(*q*) *Virjiwandas v. Mahomed Ali* (1881) 5 Bom. 208.

(*r*) IX of 1908.

(*s*) *Rudrappa v. Sankappa* (1905) 29 Bom. 213.

(*t*) *Virjiwandas v. Mahomed Ali* (1881) 5 Bom. 208.

(*u*) *Jagannatha v. Kama Rayer* (1905) 28 Mad. 238.

S. 109

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Agricultural leases.—These leases are excluded from the operation of the provisions of this section (v).

Assignment of the reversion.—This section enacts that on the lessor assigning the reversion wholly or in part the assignee shall possess all his rights and be also subject to all the liabilities of the lessor provided the lessee agrees thereto. By a mere assignment the lessor is not discharged from liabilities unless the lessee agrees to exonerate him and hold the assignee as the person liable. The transfer may be of the whole property or a part of it, or it may be part of the lessor's interest therein. The grant of a lease passes the reversion so that where a person has let his lands for 30 years and he lets to another for 40 years, this passes the reversionary interest (w). But there is no parting with the reversion if the transfer is to take effect on the determination of the lease (x). The section provides no penalty for failure to give notice to the lessee of the transfer (y). It does not prevent the transferee from receiving rents except such as may have been paid by the lessee for want of notice (z). A purchaser of property has constructive notice of the terms of the lease. Between the purchaser and the lessee there is a privity of estate only, but there is no privity of contract for the lessee continues to remain liable notwithstanding the assignment (a). Where a reversion, however, becomes

(v) Sec. 117, Transfer of Property Act, IV of 1882.

(w) *Wordsley Brewery Co. v. Halford* (1903) 90 L. T. 89.

(x) *Smith v. Day* (1837) 2 M. & W. 684, 150 E. R. 931.

(y) *Bhola Nath v. Supper*, A. I. R. (1923) Lah. 381.

(z) *Bhola Nath v. Supper*, A. I. R. (1923) Lah. 381.

(a) *Walker's Case* (1587) 3 Co. Rep. 22a, 76 E. R. 676.

severed, as on a devise to several tenants in common, any one of the latter can maintain an action to recover damages for wrongful act causing injury to the reversion for breach of covenant (b).

S. 109

Breach of covenant prior to the assignment.—The assignee of the reversion has no right in respect of a breach of covenant occurring before the assignment (c) and this was the settled law of England till the passing of Act 1 and 2 Geo. V, c. 37, whereby statutory validity was given to the opposite view. In this country an assignee of the reversion is entitled to enforce a breach of covenant prior to the transfer. A *mulgeni* lease provided that the lessee was not to alienate the property leased. The lessee committed a breach of the condition by sale of his rights under the lease to defendant No. 2 in 1908. In 1911, the plaintiff purchased the landlord's rights from the lessor who had not given the lessee notice of his intention to enforce the forfeiture before the transfer. The plaintiff having sued to recover possession of the property on breach of the condition, defendant No. 2 contended that the plaintiff could not take advantage of the breach of condition incurred before the assignment in his favour. Held, disallowing the contention, that the plaintiff was entitled to recover possession of the property from defendant No. 2 (d).

Apportionment of the rent.—On assignment of the reversion the lessor, the assignee and the lessee may determine what portion of the rent reserved by the lease shall be payable in respect of the part assigned, and in case they disagree it may be determined by the Court having jurisdiction to entertain a suit for possession of the property leased. Hence the covenant to pay rent is divisible and the rent can be apportioned, although the claim would be founded on a privity of contract (e). When the lessor recognizes the right of another in the premises demised, all the obligations of the lessee as to payment of rent and surrender of possession, must, if such obligations be severable and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit the lessor, the lessee and such other person will be necessary parties (f). Prior to the Act it was held that the sale of a share in a tenure let out to a tenant in its entirety, did not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but if a purchaser of the share desired to have such a severance, he was entitled to enforce it. If he took no steps for that purpose, then the tenant was justified in paying the entire rent to all the parties jointly entitled to it. But if the purchaser desired to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then if the parties cannot agree to the apportionment, the purchaser may sue the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit (g).

Rights of lessor after transfer.—Under the Act, on assignment of the reversion all the rights of the lessor pass to his assignee, and usufructuary mortgagee of the lessor's rights may enforce forfeiture (h).

(b) *Roberts v. Holland* (1893) 1 Q. B. 665.

(c) *Cohen v. Tannar* (1900) 2 Q. B. 609, *Hunt v. Bishop* (1853) 8 Exch. 675, 155 E. R. 1523.

(d) *Visheswar v. Mahableshwar* (1919) 43 Bom. 28.

(e) *Swansea Corporation v. Thomas* (1882) 10 Q. B. D. 48.

(f) *Sri Raja Simhadri Appa Rao v. Prattipati Ramayya* (1906) 29 Mad. 29.

(g) *Ishwar Chunder Dutt v. Ram Krishna Dass* (1878) 5 Cal. 902; *Ramnad Zemindar v. Ramamany* (1879) 2 Mad. 234.

(h) *Vamana Pai v. Venkata Naiku*, A. I. R. (1936) Mad. 116.

Ss. 109-110

Liabilities of the lessor.—The lessor who has assigned his reversion remains liable upon his express covenants running with the reversion (*i*) and so on his covenant for quiet enjoyment, he remains liable for any act of interruption by himself or any person whom he has expressly or impliedly employed to do the act (*j*).

Proviso.—Upon an assignment of the reversion the lessor and not the assignee is entitled to rents accrued due before the transfer. As to rents accruing after the transfer, if the lessee without having reason to believe that the transfer has been made, pays to the lessor, he shall not be liable to pay it over again to the assignee (*k*). The section provides no penalty for want of notice except the loss of rent paid by the lessee to the lessor (*l*). A lessee is liable for rent to the assignee of the reversion even if he surrenders the lease to the original lessor which surrender was made after the assignment (*m*).

Ejectment of tenant from a portion of the demised premises.—The question whether a lessor or his assignee of a part of the demised premises can evict a tenant during the continuance of the tenancy, was submitted to a Full Bench of the Madras High Court of which four out of five Judges held that a lessor was not entitled to eject a tenant from a part only of the holding but the assignee of the reversion in part of the demised premises was entitled to eject a tenant for due cause from such part on payment of the value of the improvement to that part (*n*).

110. Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

Agricultural leases.—The section has no application to these leases (*o*).

The term, its commencement, duration and termination.—This section deals with the period, its duration, beginning and end. Where a lease for a year dated, say, the 4th of August, is expressed to commence from the 4th day of August in a particular year, then the tenancy begins from the 5th, for the 4th is to be

(i) *Stuart v. Joy* (1904) 1 K. B. 362.

(j) *Williams v. Gabriels* (1906) 1 K. B. 155.

(k) Compare sec. 50 of the Transfer of Property Act, IV of 1882.

(l) *Bhola Nath v. Supper*, A. I. R. (1923) Lah. 389.

(m) *Ramchandra v. Shaikh Hussan* (1901) 3 Bom. L. R. 679.

(n) *Kannyan Baduvan v. Ali Kutti* (1919) 42 Mad. 603.

(o) Sec. 117, Transfer of Property Act, IV of 1882.

excluded (p). Where the lease does not state from what date the period is to commence, such period begins from the 4th of August, the date of making of the lease. Every lease must have a certain time of beginning and also of ending. As regards the latter, in case of a lease for a year or number of years, the section enacts that the lease shall last during the whole anniversary of the day from which such time commences, that is, in the instance cited above, the lease would last the whole of the 4th of August of the following year if it be for a year or number of years. An agreement to the contrary in paragraph 2 means an agreement as to the terms of holding over (q). Where no term is mentioned, the lease is void for uncertainty (r). A lease for a term of year or years lasts during the whole anniversary of the day from which it was granted (s). To exclude the operation of the second clause there must be an express agreement to the contrary. The fact that the tenancy expires on the 1st of a month whilst the rent is payable on the 7th of the succeeding month raises no such inference (t). When the *habendum* is at variance with the *reddendum* as to the duration of the term the former must prevail (u). It must, however, be observed that the *habendum* in a lease only marks the duration of the tenant's interest and its operation as a grant is merely prospective (v). The term of the lease may be made to depend upon a condition. If a lease be made for 100 years to A and B if they shall so long live, and one of them dies, the lease is determined. But if the lease is made for the lives of A and B it is not determined by the death of one of them.

Option to determine.—Seldom in a lease is option reserved to put an end to the term and if nothing is said as to who is entitled to terminate, the section enacts the lessee and not the lessor shall have such option. When a provision is made in a lease empowering the resumption for purposes specified, the landlord is not entitled to resume for a purpose not enumerated and the insertion therein of the word "otherwise" would be construed as being *ejusdem generis* (w). If a lease is merely for 7, 14 or 21 years, giving an option to somebody but not saying to whom, the option is with the lessee (x). It is a settled rule that a lease for 7 "or" 14 years means a lease for 14 years determinable by the lessee but not by the lessor at the end of 7 years (y).

Agreement to lease complete though time of commencement not specified.—The plaintiffs brought a suit for specific performance of an oral agreement to grant a permanent lease. It was held that notwithstanding absence of time of commencement of the lease the agreement was complete (z). An agreement for lease dated 1st April provided for a term of three years with an option to renew for another seven years and for possession to be given "within one month from this date." It was held that the commencement of the term could be collected from the agreement as a whole and that the day possession was given (a fact on which evidence was admitted) was the date from which lease was to commence (a).

(p) *Shekh Nuroo v. Seth Meghraj* (1937) Nag. 214.

(q) *Mali Lal v. Darjeeling Municipality* (1913) 17 C. L. J. 167.

(r) *Kairsley v. Duck* (1712) 2 Vern. 684, 23 E. R. 1044.

(s) *Ackland v. Lutley* (1839) 9 Ad. & El. 879, 112 E. R. 1446; *Benoy Krishna Das v. Salsiccioni* (1933) 60 Cal. 389, 59 I. A. 414.

(t) *Benoy Krishna Das v. Salsiccioni* (1933) 60 Cal. 389, 59 I. A. 414.

(u) *Burchell v. Clarke* (1876) 45 L. J. Q. B. 671.

(v) *Shaw v. Kay* (1847) 17 L. J. Ex. 17, 154 E. R. 175.

(w) *Johnson v. Edgware Etc. Rly. Co.* (1866) 35 Beav. 480.

(x) *Fowell v. Tranter* (1864) 34 L. J. Rx. 6, 159 E. R. 610.

(y) *Powell v. Smith* (1872) 41 L. J. Ch. 734

(z) *Kailash Chandra v. Bejoy Kanta* (1918) 23 C. W. N. 190.

(a) *In re Lander & Bagley's Contract* (1892) 3 Ch. 41.

S. 111

Determination of lease.

111. A lease of immoveable property determines—

- (a) by efflux of the time limited thereby :
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event :
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :
- (e) by express surrender : that is to say, in case the lessee yields up his interest under the lease, to the lessor by mutual agreement between them :
- (f) by implied surrender :
- (g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter . . .
. ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; or (3) the *lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event ; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease :*
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to Clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

Generally.—The section enumerates the various modes in which a lease of immoveable property is determined and the enumeration is exhaustive (b).

Section 117 excludes its application to agricultural leases, still the principles of this section are applied (c). By section 63 of Act XX of 1929 the amendments made do not operate retrospectively. In the first three clauses the lease comes to an end without any act on the part of the lessor or lessee. In clause (d) both the lessor and the lessee participate. In clauses (e) and (f) the lease is determined by the lessee and in (g) by the lessor. In (h) either party has a right to determine the lease. Death of tenant does not determine the lease though no term be fixed (d).

Clause (a).—By this clause a lease of immoveable property is determined by effluxion of time thereby limited.

Agricultural leases.—The provisions of this clause do not apply to these leases (e).

Efflux of time.—Where time is limited in a lease for its duration, the lease comes to an end on the expiration of such period. If a lease be, however, made, say, for a period of 20 years determinable at the end of 7 or 14 years and nothing is mentioned as to at whose option it is determinable, the lease is determined at the option of the lessee and not of the lessor. On the determination of the term limited no notice to quit is necessary. If the tenant holds over as provided in section 116 the rights and liabilities of the parties will in that event be regulated by section 106.

Clause (b).—Where a lease is made to expire on the happening of an event it comes to an end when such event happens.

Agricultural leases.—The provisions of this clause do not apply to these leases (f).

Service tenant.—When a tenant occupies premises of his landlord in consideration of rendering services, the tenancy determines when the service is no longer rendered (g).

Duration of lease limited conditionally.—Where the period of the lease is made to depend upon the happening of a condition the fulfilment of which is impossible, or is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy, the lease would fail (h). For other examples of transfers limited conditionally, reference may be made to sections 31, 32 and 33 of this Act.

Clause (c).—A lease of immoveable property determines on the happening of an event, on or to the happening of which (1) the interest of the lessor in the property terminates or (2) the power of the lessor to dispose of the same extends.

Agricultural leases.—These leases are excluded from the operation of the provisions of this clause (i).

Interest of the lessor.—A lease granted by a person with a limited interest such as a tenant for life, can subsist only during his life and, therefore, comes to an end on the death of the lessor.

(b) *Faqir Bakhsh v. Murli Dhar* (1931) 33 Bom. L. R. 495, 58 I. A. 75.

(c) *Krishna v. Gilbert* (1919) 42 Mad. 654; *Malappa v. Janardan* (1926) 50 Bom. 450.

(d) *Ralia v. Bodha Raj*, A. I. R. (1928) Lah. 937.

(e) Sec. 117, Transfer of Property Act, IV of 1882.

(f) Sec. 117, Transfer of Property Act, IV of 1882.

(g) *Ramanath v. Siba Sundari* (1917) 25 C. L. J. 332.

(h) Sec. 25, Transfer of Property Act, IV of 1882.

(i) Sec. 117, Transfer of Property Act, IV of 1882.

S. 111

Power of lessor to dispose of.—Where the power of the lessor to grant a lease is dependent on the volition of the other parties, the lease comes to an end when such other parties decide to determine the interest of the lessor. Such would be the case of under-leases on forfeitures.

Clause (d).—A lease of immoveable property determines when the interest of the lessor and the lessee (i) in the whole of the property, (ii) becomes vested (a) at the same time, (b) in one person, (c) in the same right.

Agricultural leases.—The clause does not apply to these leases (j). The principle, however, has been followed (k).

Merger.—Is coalescence of the reversion and the term in the same property in the same person at the same time and in the same right.

Doctrine of merger.—To attract the application of the doctrine of merger there must be coalescence of the lessor and lessee's interest in the same person at the same time and in the same right (l). When any one of these ingredients is lacking no merger can take place (m).

Tenure created before the Act.—To such cases the provisions of this clause do not apply by virtue of the interpretation of section 2, clause (c) of the same Act (n).

No merger by union.—In cases to which the Transfer of Property Act does not apply the union of a superior and subordinate interest does not constitute merger (o).

English Law.—The English doctrine of merger has never been applied to land tenures in India in its entirety (p).

Merger of one term in another.—A term for years in possession may merge in reversion for years, although the latter be of a shorter duration than the former (q), as, if a person seised in fee make a lease for 20 years and afterwards grants a reversion to a stranger for three years, it is clear that the 20 years will be determined by union with the reversion of three. Whether a prior term for years will merge in an immediate remainder for years, is not clear (r).

Intention.—The principle applicable to the merger of charges in equity applies also to leases (s). In the absence of an express intention the Court looks to the benefit of the person in whom the two estates become vested (t). If a tenant for life in remainder takes a beneficial lease or an agreement therefor, and subsequently becomes tenant for life in possession, the presumption is against merger in equity (u). Assuming that the principle of merger applied in the *mofussil* before the Transfer of Property Act, 1882, a *mokurari* lease granted in 1846 did not become merged in a *patni* lease granted in 1856, the evidence shewing that there was an intention

(j) Sec. 117, Transfer of Property Act, IV of 1882.

(k) *Kisan v. Manwar Sahib*, A. I. R. (1925) Nag. 406.

(l) *Ulfat Hossain v. Gayani Das* (1909) 36 Cal. 802. (*mokurari* interest merged in the superior landlord's interest); *Suraj Narain v. Nanda Lal* (1906) 33 Cal. 1212. (merger takes place when holder of a *shikmi* tenure purchases the *mokurari* interest); *Promotho Nath v. Kali Prasanna* (1901) 28 Cal. 744 (merger of *rutni* interest in zamindari who purchases it in execution sale).

(m) *Kallu v. Diwan* (1902) 24 All. 487 (mortgage by lessor to lessee); *Kashi v. Durga* (1911) 7 Nag. L. R. 154 (mortgage by lessor to lessee); *Amaloo v. Sheikh Muksud Ali* (1915) 19 C. W. N. 435; (*mokurari* lease to holder of *mulguzari* tenure); *Dynevor (Lord) v. Tennatt* (1888) 3 A. C. 279.

(n) *Rajah Bejoy Singh v. Tarini Charan* (1935) 39 C. W. N. 694.

(o) *Dulhin Lachmipati v. Bodnath Tewari* (1921) 48 I. A. 485; *Jibanti v. Gokool* (1892) 10 Cal. 760; *Rambishen v. Haripada* (1918) 23 C. W. N. 830.

(p) *Amaloo v. Sheikh Muksud Ali* (1915) 19 C. W. N. 435; *Raja Kishendatt v. Raja Mumtaj Ali* (1878) 5 Cal. 198.

(q) *Stephens v. Bridges* (1821) 6 Mad. 67, 56 E. R. 1015; *Burton v. Barclay* (1881) 7 Bing. 758, 131 E. R. 288.

(r) *Platt on Leases*, Vol. II, p. 515.

(s) *Capital & Counties Bank, Ltd. v. Rhodes* (1903) 1 Ch. 631.

(t) *In re Fletcher, Reading v. Fletcher* (1917) 1 Ch. 339; *Amaloo v. Sheikh Muksud Ali* (1915) 19 C. W. N. 435; *Thellusson v. Liddard* (1900) 2 Ch. 635.

(u) *Ingle v. Vaughan Jenkins* (1900) 2 Ch. 368.

to keep the *mokurari* lease in existence (*v*). But the conduct of the parties may indicate that they did not intend to keep the two interests distinct (*w*).

S. 111

In the same right.—There is no merger when the reversion is held in one capacity and the lease in another (*x*), the general rule being that when one of the interests is held *en autre droit* no merger takes place. Hence a term held by a person in his own right does not merge in the reversion held by the same person as an administrator (*y*).

In one person.—The two sets of title must meet in identity in one person. Where a co-proprietor having one anna share in the property purchased the interest of the lessee of the whole property, there was no merger (*z*). Nor is a lease of shops merged upon the lessee acquiring only a share in property which includes the shops (*a*). And if the lessor purchases the lessee's interest which he causes to be held in trust for him, the presumption is against merger (*b*). Similarly, where the lessee purchased the freehold reversion which was conveyed to a trustee subject to the term, in trust for the purchaser lessee, it was held that there was no merger (*c*). The two interests must be co-extensive (*d*). The fact that the two interests held by a joint family in the same land are in the names of different members of the family, is a material circumstance in considering whether the intention was to keep the interest distinct (*e*).

In the whole of the property.—The fusion of interest must be of the whole property and not of a part (*f*).

Clause (e).—Where by mutual agreement between parties the lessee yields up his interest under the lease to the lessor the transaction is known as express surrender.

Agricultural leases.—The clause does not apply to these leases (*g*).

Express surrender.—This is by act of parties. It is yielding up the residue of the term by the lessee to him who has the immediate estate in reversion or remainder. It must be by the termor, the person in whom the term is vested, to the reversioner, the person entitled to the reversion immediately expectant on the said term. It can be accomplished by mutual agreement only, for if a lease be for a definite term the reversion is on the determination of the term and not before. No question of express surrender can arise unless there is an unexpired residue of the term. The consideration for the surrender may be in money or the release of the lessee by the lessor of his obligation under the lease or the granting of a new lease. It is usually evidenced by a deed though a formal reconveyance is not necessary to prove surrender of *mokurari* lease (*h*) or other leasehold rights. Voluntary surrender of leasehold rights and taking from the landlord leasehold rights in other property is not an exchange. So that on surrender of the latter rights the former are not

(*v*) *Dulhin Lachmibati v. Bodnath Tewari* (1921) 48 I. A. 485.

(*w*) *Dulhin Lachmibati v. Bodnath* (1921) 48 I. A. 485; *Jibanti v. Gokool* (1892) 19, Cal. 760; *Rambishen v. Haripada* (1919) 23 C. W. N. 830.

(*x*) *Kallu v. Diwan* (1902) 24 All. 457.

(*y*) *Chambers v. Kingham* (1878) 10 Ch. D. 743.

(*z*) *Parameshwar Singh v. Mt. Sureba*, A. I. R. (1925) Pat. 530.

(*a*) *Faqir Bakhsh v. Murli Dhar* (1931) 33 Bom. L. R. 495, 58 I. A. 75.

(*b*) *Gunter v. Gunter* (1857) 23 Beav. 571, 53

E. R. 225.

(*c*) *Belaney v. Belaney* (1867) 2 Ch. App. 138.

(*d*) *Monmotha v. Mohendra Nath*, A. I. R. (1922) Cal. 284.

(*e*) *Dulhin Lachmibati v. Bodnath* (1921) 48 I. A. 485.

(*f*) *Faqir Bakhsh v. Murli Dhar* (1931) 33 Bom. L. R. 495, 58 I. A. 75; *Parameshwar v. Masummat Sureba*, A. I. R. (1925) Pat. 530.

(*g*) Sec. 117, Transfer of Property Act, IV of 1882.

(*h*) *Imambandi v. Kamlesterari* (1887) 14 Cal. 109.

S. 111

revived (i). The surrender may be evidenced by the lessee delivering the lease to the lessor. A surrender of a lease does not prejudice an under-lease previously granted by the lessee on terms and conditions substantially the same as the original lease (j). On a surrender if the lease contains a covenant for renewal, there must be a release thereof by the lessee to the reversioner. The lessor of a *mulgeni* (permanent) lease who has mortgaged the land and the right to recover the rents cannot accept surrender of the lease without the concurrence of the mortgagee. The lessee in such a case remains liable to pay rent to the mortgagee (k).

Mutual agreement.—Express surrender can only be by volition of the contracting parties. A lessee cannot, by merely informing his lessor that he is going to relinquish the land, get rid of his obligation, nor the silent receipt of the notice by the lessor, which the lessee had no legal right to give, be construed as his assenting to the relinquishment (l). Where a lease has been given, by an administrator on behalf of a minor with the sanction of the Court, a surrender cannot be accepted by him without a similar sanction. An *inter esse termini* is no impediment to a surrender though a remainder is; as if there be a lease for years, with remainder for years, the remainder will prevent a surrender by the lessee for years to the lessor (m).

Damages.—Acceptance of surrender does not preclude the lessor from suing the lessee for damages for breach of the contract. It does not destroy the existing cause of action (n).

Clause (f).—This clause deals with what is known as surrender by operation of law.

Agricultural leases.—The clause has no application to these leases (o).

Implied surrender.—The expression “surrender by operation of law” is applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which could not be valid if his particular estate had continued to exist. There the law treats the doing of such an act as amounting to a surrender. In such cases there can be no question of intention. The surrender is not the result of intention. It takes place independently and even in spite of intention (p). A surrender at law may be effected by various means. It will occur if a lessee for years or for life accepts an interest in the demised premises incompatible with the tenure under the lease, for example, accepting a second lease of the same land to commence during the continuance of the first (q), or by delivery of the lease to the lessor by the lessee, change of possession as by tenant quitting the premises, and the landlord by some unequivocal act taking possession (r). But a surrender of a small portion of the demised premises and proportionate reduction of the rent is not a surrender by operation of law (s). Acceptance of a second lease is a surrender of the first (t), unless the latter is void (u), for the surrender of the old lease implied from the acceptance of a new lease is subject to an implied condition that the new lease

(i) *Sarunam Narain v. Mahraj Kumar Gopal* (1902) 6 C. W. N. 905; *Doe d Rochester v. Bridges* (1831) 1 B. & Ad. 847, 109 E. R. 1001.
 (j) Sec. 115, Transfer of Property Act, IV of 1882.
 (k) *Havu v. Ganpati*, A. I. R. (1930) Bom. 329.
 (l) *Jadoonath v. Schone* (1882) 9 Cal. 671.
 (m) Platt on Leases, Vol. II, p. 504.
 (n) *Jogendra v. Kurpal*, A. I. R. (1923) Cal. 63.
 (o) Sec. 117, Transfer of Property Act, IV of 1882.

(p) *Lyon v. Reed* (1844) 13 M. & W. 285, 153 E. R. 118.
 (q) Platt on Leases, Vol. II, p. 505.
 (r) *Re Panther Lead & Co.* (1896) 1 Ch. 978; *Phene v. Popplewall* (1862) 12 C. B. N. S. 334, 142 E. R. 1171.
 (s) *Holme v. Brunskill* (1878) 3 Q. B. D. 495.
 (t) *Davison d Bromley v. Stanley* (1768) 4 Burr. 2210, 98 E. R. 152.
 (u) *Zonch d Abbot Hallet v. Parsons* (1765) 3 Burr. 1794, 97 E. R. 1103.

is valid (v). The rule of English Law as to implied surrender of an earlier lease by acceptance of a latter lease is based on the view that a lessor must give possession unless the prior lease had been surrendered, and that the lessee is estopped from disputing the landlord's title to grant the lease. But under the Indian Law, delivery of possession is not necessary for the validity of a lease. The English rule of implied surrender need not, therefore, be extended to India (w).

Non-payment of rent.—Mere non-payment of rent did not constitute an abandonment of the tenancy, for if once the relation of landlord and tenant was established it was for the tenant to prove the determination of the term by affirmative proof beyond failure to pay rent (x).

Grant of a new lease.—Grant of a new lease to a third person with the consent of the lessee constitutes a valid surrender by operation of law (y).

Cessation of the term.—For a valid surrender the term should immediately cease, and not at a future date (z). The agreement to surrender must be for consideration (a).

The whole and not part.—The surrender must be of the whole term and not anything less than the whole term; also it must be of the whole estate and not part of it (b).

Effect of surrender.—No rent becomes due after the surrender but the lessor may recover rent accrued due before the surrender. A surrender involves extinguishment of the interest surrendered and release of the tenant from the covenants contained in the lease (c), but the tenant nevertheless remains liable for past breaches (d).

Effect on under-lease.—The surrender of a lease does not destroy or defeat the interest of an under-lessee (e).

Forfeiture and surrender.—Where a lessor re-enters on a forfeiture the rights of under-lessees are gone, but where he accepts a surrender from a lessee the rights of under-lessees remain although the lessee was at the time liable to forfeiture (f).

Surrender of part of premises by assignee.—The liability of the lessee on the covenant is not extinguished by surrender of a part of the demised premises but he still remains liable thereon at any rate for the amount claimed (g).

Acceptance of surrender in ignorance of forfeiture incurred.—A lessee covenanted not to under-let without licence. The lease contained a proviso for re-entry on breach of covenant. The lessee under-let in breach of his covenant. Subsequently he surrendered his term to the lessor who accepted surrender in ignorance of the sub-letting and of the fact of the plaintiff's occupation. The lessor then re-let to the defendant who upon the plaintiff refusing to give up possession entered and turned out the plaintiff's cattle. The plaintiff had received no notice to quit. In an action to recover possession of the land, it was held that the plaintiff was

(v) *Knight v. Williams* (1901) 1. Ch 256; *Canterbury Corporation v. Cooper* (1909) 100 L. T. 597; *Zick v. London United Tramways, Ltd.* (1908) 2 K. B. 126.
 (w) *Manavadan Thirumalpal v. Parry & Co.* (1925) 48 Mad. 815.
 (x) *Prem Sukh v. Bhupia* (1880) 2 All. 517; *Obhaya Charan v. Koilash Chunder* (1887) 14 Cal. 751.
 (y) *Thomas v. Cook* (1818) 2 B. & Ald. 119, 106 E. R. 310.
 (z) *Wedall v. Capes* (1836) 1 M. & W. 50, 150 E. R. 341.

(a) *Wallace v. Patton* (1846) 12 Cl. & Fin. 491, 8 E. R. 1501.
 (b) *Burton v. Barclay* (1831) 7 Bing. 745, 131 E. R. 288.
 (c) *Re. Fussell, ex-parte Allen* (1882) 20 Ch. D. 341.
 (d) *Richmond v. Savill* (1926) 2 K. B. 530.
 (e) *Doe d Beadon v. Pyke* (1816) 5 M. & S. 146, 105 E. R. 1005; *Wilkes v. Spooner* (1911) 2 K. B. 473.
 (f) *Great Western Railway Co. v. Smith* (1876) 2 Ch. D. 235.
 (g) *Baynton v. Morgan* (1838) 22 Ch. D. 74.

S. 111 entitled to judgment on the ground, that assuming that the lessor was not precluded by the surrender from enforcing his right to forfeit the plaintiff's interest inasmuch as he had accepted the surrender without notice of that interest, the re-letting to a new tenant and entry by him did not operate as an entry by lessor so as to work a forfeiture, and that plaintiff's interest was subsisting (*h*).

Priority between equitable mortgagee and lessor accepting surrender without knowledge of mortgage.—A lessee deposited his lease by way of equitable mortgage and surrendered the term. The lessor asked the lessee to deliver up the lease and was falsely informed by the lessee that he had left it with a friend, but that he had neither assigned nor charged his interest, nor pledged the instrument of lease. The lessor had no actual notice that the lease had been deposited by way of mortgage. Held, the lessor not being under these circumstances guilty of gross or wilful negligence, was entitled as a holder of the legal estate to priority over the prior equitable mortgagee (*i*).

Clause (g).—A lease of immoveable property determines on forfeiture. Forfeiture is incurred when (i) lessee breaks an express condition in the lease providing for re-entry on breach thereof, (ii) lessee renounces his character as such (a) by setting up a title in a third person, or (b) by claiming title in himself, (iii) the lease contains a provision for re-entry on the lessee's insolvency and the lessee becomes insolvent. In each of the above cases it is necessary that the lessor should give notice in writing to the lessee of his intention to determine the lease.

Exclusion of certain leases.—Agricultural leases (*j*) and leases executed prior to 1st April 1930 (*k*) are excluded from the operation of the requirements as to giving of notice. Though section 111 (g), according to section 117, does not apply to agricultural leases, the principles guide the Courts in dealing with such matters (*l*). Though the provisions of section 111 (g) are not made applicable to Sind, the principle of the general rule which that section contains is applicable (*m*).

Alterations to the section.—Clause (g) has been amended by Act 20 of 1929. The amendments being (i) omission of the words "or the lease shall become void" from sub-clause (1), (ii) the introduction of sub-clause (3) and (iii) rendering notice in writing to the lessee necessary instead of doing an act shewing an intention to determine the lease.

Contract IX of 1872.—Section 74 of this Act does not apply and Courts have no power to relieve against forfeiture (*n*).

Forfeiture generally.—This clause deals with the subject known as forfeiture of leases. Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation (*o*). The lease being voidable, not void, is avoided by the lessor on giving notice in writing to the lessee of his intention to determine the lease in the following cases :—

- (1) When there is a covenant to re-enter on breach of an express condition and that condition is broken.
- (2) The lessee denies the landlord's title claiming to be the owner himself or setting up title of a third person.

(*h*) *Parker v. Jones* (1910) 2 K. B. 32.
 (*i*) *Brown v. Stedman* (1896) 40 So. Jo. 457.
 (*j*) Sec. 117 of the Transfer of Property Act, IV of 1882.
 (*k*) Sec. 63 of Act XX of 1929.

(*l*) *Ganesh v. Khaparde*, A. I. R. (1927) Nag. 50.
 (*m*) *Sidik v. Mohamed*, A. I. R. (1926) Sind 71.
 (*n*) *Krishna v. Gilbert* (1919) 42 Mad. 654.
 (*o*) *Amolak v. Dhondi* (1906) 30 Bom. 466.

- (3) The lessee becomes insolvent and the lease gives right to the lessor to re-enter on the happening of such event. S. 111

In connection with the last clause, reference may be made to section 12, whereby a condition making interest in immoveable property determinable on insolvency is void. That section excludes cases of conditions in a lease made for the benefit of the lessor or his transferee. No forfeiture is incurred by breach of an implied condition under the Transfer of Property Act.

Construction of forfeiture clause.—A clause for forfeiture must be strictly construed against the covenantor and the rule applies most strongly to a proviso for re-entry which contains a condition that destroys an estate (*p*).

Proviso for re-entry.—It is usual to provide a clause in a lease, that in default of payment of rent after it has become payable or for non-performance of the tenant's covenants or non-observance of conditions by him, the lessor may at any time thereafter re-enter upon the premises or any part thereof and upon such entry the lease shall determine. It also extends to cases of bankruptcy, waste, etc. It should be framed to extend to cases of commission as well as omission (*q*). This sub-clause deals with cases in which the lease contains a proviso for re-entry on the breach of express condition. Such a proviso does not apply to a breach of the covenant to repair. As the proviso destroys and defeats the estate created, it is construed most strongly against the covenantor. In the absence of a clause of re-entry for breach of a covenant no forfeiture is incurred by the tenant. The clause is treated as a covenant and not a condition and the lessor is entitled to damages (*r*). The right of re-entry is usually reserved to the lessor, his heirs and assigns where he is seised in fee, and to his heirs, executors, administrators and assigns where he is possessed for years (*s*). As a "usual covenant" it applies to re-entry on non-payment of rent and not to breaches of other covenants (*t*). An ejectment may be sustained though no lease has been executed where the tenant holds under an agreement for lease which specifies the covenants to be inserted with right of entry for breach (*u*). Where there is an alternative remedy provided for the breach it does not prevent the lessor from exercising the right of re-entry (*v*). The section does not give the lessee a right to throw up the lease because the lessor breaks the covenants of the lease. His only remedy would be a claim for compensation (*w*). Whether a clause amounts to a condition or a covenant is sometimes a question of great nicety. Sometimes the words are construed to amount to both a covenant and a condition. Thus where one leased for years, "provided always and it is covenanted and agreed that the lessee shall not alien," these words were held to amount to a condition by force of the proviso and a covenant by force of the other words. In all cases of forfeiture the burden of proof is thrown on the lessor (*x*).

Enforcing the proviso for re-entry.—By giving notice in writing to the lessee of his intention to determine the lease the lessor does not re-enter. In order to effect

- (*p*) *Venkatramana v. Krishna*, A. I. R. (1925) Mad. 57; *Doe d Ardy v. Stevens* (1832) 3 B. & Ad. 299, 110 E. R. 112.
 (*q*) Platt on Leases, Vol. II, p. 322.
 (*r*) *Parameshri v. Vittappa* (1903) 26 Mad. 157; *Udipi v. Seshamma* (1920) 43 Mad. 503; *Madar Saheb v. Sannabawa* (1897) 21 Bom. 195; *Narayan Dasappa v. Ali Saiba* (1894) 18 Bom. 603; *Nil Madhab v. Narattam* (1890) 17 Cal. 826; *Netrapal Singh v. Kalyan Das* (1906) 28 All. 400; *Akram Ali v. Durga* (1911) 14 C. L. J. 614; *Basrat*

- Ali Khan v. Manirulla* (1909) 36 Cal. 745; *Williams v. Earla* (1868) 3 Q. B. 739.
 (*s*) Platt on Leases, Vol. II, p. 317.
 (*t*) *Re. Anderton & Milner's Contract* (1890) 45 Ch. D. 476.
 (*u*) *Doe d Oldershaw v. Breach* (1807) 6 Esp 106 N. P.
 (*v*) *Weston v. Metropolitan Asylum District Managers* (1882) 9 Q. B. D. 404.
 (*w*) *Govindaswami v. Palaniappa*, A. I. R. (1925) Mad. 833.
 (*x*) Platt on Leases, Vol. II, p. 326, 327.

S. 111 re-entry the lessor must actually enter on the premises or do that which is equivalent to re-entry, institute an action for obtaining possession and for ejectment of the tenant (*y*). There must be an overt act to determine the lease (*z*). The lessor, including in that expression the person entitled to the reversion, can enforce this proviso. The word "void" in a proviso is construed as not to render the lease void on the breach of an express covenant but merely voidable at the option of the lessor (*a*). In an action to enforce a right of re-entry mesne profits are assessed from the date of the writ in the action and not from the date of the breach giving rise to the landlord's right to re-enter (*b*). Where a tenant covenants to pay rates and taxes and on his failure the lessor is entitled to take possession, it is not necessary that the rates should have been demanded or that notice of the assessment should have been served on the tenant before the landlord can resume possession (*c*). The power of re-entry does not entitle the lessor to re-enter for breach of a negative covenant (*d*) unless the words of the proviso are wide and appropriate enough to include a breach of a negative covenant (*e*). In a long series of decisions the forfeiture clause has been construed to mean that leases are voidable only at the option of the lessors (*f*).

Who can exercise the right of re-entry.—Besides the lessor it may be exercised by the assignee and the reversioner and the remainderman and even by a person who has no reversion (*g*) as well as by a usufructuary mortgagee (*h*). It cannot be in respect of acts committed prior to the assignment (*i*), nor can it be reserved in favour of a person who is a stranger to the estate (*j*).

Re-entry for non-payment of rent.—The power of re-entry for non-payment of rent cannot be exercised unless the demand is made, for the right of re-entry does not accrue until the rent is duly demanded (*k*).

Right to enforce forfeiture by transferee.—For breach of a condition prior to the transfer by lessor of his interest the transferee is not precluded from enforcing the forfeiture. A *mulgeni* lease provided that the lessee was not to alienate the property. The lessee committed a breach in 1908. In 1911 the lessor transferred his rights and had not given to the lessee any notice of his intention to forfeit. The transferee brought a suit to recover possession for breach of the condition. The lessee's contention that the transferee was not entitled to take advantage of the breach of condition incurred prior to the assignment was disallowed (*l*).

Lessee renounces his character.—In order to be effective, the repudiation by the tenant must amount to a distinct claim to hold possession inconsistent with the existence of the relationship of landlord and tenant (*m*). The disclaimer may be oral or in writing. It may be by setting a title in a third person or by claiming

(*y*) *Moore v. Ullcoal's Mining Co., Ltd.* (1908) 1 Ch. 575.
 (*z*) *L. A. Creet v. Firm Gangaraj Gulraj*, A. I. R. (1937) Cal. 129.
 (*a*) *Roberts v. Davey* (1833) 4 B. & Ad. 664, 110 E. R. 606.
 (*b*) *Elliott v. Boynton* (1924) 1 Ch. 236.
 (*c*) *Davis v. Burrell* (1851) 10 C. B. 821, 138 E. R. 325.
 (*d*) *Hyde v. Warden* (1877) 47 L. J. Q. B. 121; *Evans v. Davis* (1878) 10 Ch. D. 747; *West v. Dobb* (1870) 5 Q. B. 460.
 (*e*) *Harman v. Ainslie* (1904) 1 K. B. 698.
 (*f*) *Davenport v. R.* (1877) 3 A. C. 115; *Quesnel Works Gold Mining Co. v. Ward* (1920) A. C. 222.

(*g*) *Doe d Freeman v. Bateman* (1818) 2 B & Ald. 168, 106 E. R. 328.
 (*h*) *Vamana Pai v. Venkatu Naiku*, A. I. R. (1936) Mad. 116.
 (*i*) *Fern d Mathews Lewis v. Smart* (1810) 12 East 444, 104 E. R. 173.
 (*j*) *Doe d Barker v. Goldsmith* (1832) 1 L. J. Ex. 256, 149 E. R. 283.
 (*k*) *Hill v. Kempshall* (1849) 7 C. B. 975, 137 E. R. 386.
 (*l*) *Vishveshvar v. Mahableshvar* (1919) 43 Bom. 28; *Kristo Nath v. Brown* (1887) 14 Cal. 176.
 (*m*) *Doe d Gray v. Stanion* (1836) 1 M. & W. 695, 150 E. R. 614; *Soorayya v. Sooranna*, A. I. R. (1936) Mad. 252.

title in himself (*n*). The mere payment of the rent to a third person (*o*), putting the landlord to the proof of his alleged title by purchase or questioning his right to receive the entire rent (*p*), the plea of permanent lease (*q*), setting up a *mulgeni* right by a tenant (*r*), refusal to pay rent to a devisee in a will which is contested (*s*), retention of a sub-lease in which the landlord is spoken of as the *janmi* of the lands (*t*), do not amount to a disclaimer. Questioning landlord's right to enhance rent is not a disclaimer in India (*u*) though it is so in England (*v*), mere non-payment of rent (*w*), or mortgage of land as belonging to the tenant is not disclaimer (*x*). A refusal on the part of a tenant to pay rent to a person who claims to be his landlord until satisfied as to title does not amount to a disclaimer (*y*). Refusal to pay because of direction of a third party (*z*) is a disclaimer. That a denial of the landlord's title should work a forfeiture of the tenancy, three things are essential: (i) the tenant must set up title either in himself or in a third party, inconsistent with their mutual relationship, (ii) the denial must be direct and unequivocal (*a*) and not casual, and (iii) it must be made to the knowledge of the landlord.

A casual statement, uncommunicated to the landlord, made by a tenant in a sale deed executed by him in favour of a third party in respect of other properties, to the effect that the executant is the owner of the properties leased, does not amount to a disclaimer of the landlord's title (*b*), nor does the assertion by an annual tenant that his holding is permanent amount to a disclaimer (*c*). A tenant repudiating the title under which he has entered becomes liable to immediate eviction at the option of the landlord (*d*). To work a forfeiture the denial must be a matter of record before institution of the suit for forfeiture (*e*).

Disclaimer of a part.—The clause deals with repudiation of the whole and not a portion. Hence a denial by one of several joint lessees, does not entail forfeiture, nor where the tenant being unable to obtain possession of the whole area demised to him and failing to obtain satisfaction from his lessors, having taken a lease of the portion which they could not obtain possession of from a stranger, amount to a renunciation (*f*). A suit for ejectment does not lie for a portion which has been forfeited, or a breach of a condition relative thereto (*g*).

Forfeiture on insolvency.—Sub-clause (3) of clause (g) deals with the case of a lessee being adjudged insolvent. By itself insolvency is not a ground for forfeiture of the lease, as the clause provides that insolvency works as a forfeiture only when the lease provides for a re-entry by the lessor on the happening of such event. Hence in the absence of a power to re-enter the insolvency would not operate as

- | | |
|--|---|
| <p>(<i>n</i>) <i>Doe d Williams & Jaffery v. Cooper</i> (1840) 9 L. J. C. P. 229, 133 E. R. 278.</p> <p>(<i>o</i>) <i>Doe d Dillon v. Parker</i> (1820) Gow. 180.</p> <p>(<i>p</i>) <i>Srimati v. Makan Lal</i> (1905) 9 C. W. N. 928.</p> <p>(<i>q</i>) <i>Purshotam v. Dattatraya</i> (1886) 10 Bom. 669; <i>Vithu v. Dhondi</i> (1891) 15 Bom. 407; <i>Gol Daji v. Dod Laxman</i> (1920) 22 Bom. L. R. 648.</p> <p>(<i>r</i>) <i>Unhamma v. Vaikunta</i> (1894) 17 Mad. 218.</p> <p>(<i>s</i>) <i>Doe d Williams v. Pasquali</i> (1793) Peake. 259 N. P.</p> <p>(<i>t</i>) <i>Raman Nair v. Mariyomma</i> (1920) 43 Mad. 480.</p> <p>(<i>u</i>) <i>Lalu v. Bai Motan</i> (1893) 17 Bom. 631; <i>Vithu v. Dhondi</i> (1891) 15 Bom. 218; <i>Haidri v. Nathu</i> (1895) 17 All. 45; <i>Chinna Narayadu v. Harischandra</i> (1904) 27 Mad. 23; <i>Unhamma v. Vaikunta</i> (1894) 17 Mad. 218; <i>Kali Krishna v. Golam Ally</i> (1886) 13 Cal. 248.</p> <p>(<i>v</i>) <i>Vivian v. Moat</i> (1881) 16 Ch. D. 730.</p> <p>(<i>w</i>) <i>Prag Narain v. Kadir Baksh</i> (1913) 35 All. 145, <i>Mahdeo v. Jainarain</i> (1921) 17</p> | <p>Nag. L. R. 205.</p> <p>(<i>x</i>) <i>Prag Narain v. Kadir Baksh</i> (1913) 35 All. 145.</p> <p>(<i>y</i>) <i>Mallika v. Makhanlal</i> (1905) 9 Cal. W. N. 928; <i>Venkatachariar v. Rangaswami</i> (1919) 36 M. L. J. 532.</p> <p>(<i>z</i>) <i>Doe d Whitehead v. Pittman</i> (1833) 2 Nev. & M. K. B. 673.</p> <p>(<i>a</i>) <i>Prag Narain v. Kadir Baksh</i> (1913) 35 All. 145; <i>Raman Nair v. Mariyomma</i> (1920) 43 Mad. 480.</p> <p>(<i>b</i>) <i>Kizhakkekath Kemalooti v. Pulikkalakath Muhammed</i> (1918), 41 Mad. 629; <i>Ganesh v. Khaparde, A. I. R.</i> (1927) Nag. 50.</p> <p>(<i>c</i>) <i>Gol Daji v. Dod Laxman</i> (1920) 22 Bom. L. R. 648.</p> <p>(<i>d</i>) <i>Vishnu v. Balaji</i> (1888) 12 Bom. 352.</p> <p>(<i>e</i>) <i>Maharaja of Jeypore v. Rukmani</i> (1919) 21 Bom. L. R. 655, 46 I. A. 109.</p> <p>(<i>f</i>) <i>Srimati v. Sheikh Tasha</i> (1908) 12 C. W. N. 587.</p> <p>(<i>g</i>) <i>Motilal v. Chandra Kumar</i> (1920) 24 C. W. N. 1064.</p> |
|--|---|

S. 111

a forfeiture of the lease. Even where there is such a proviso on a mortgage of the property by the lessee which is enforced by the mortgagee who purchased the property in execution and thereafter the lessee was declared insolvent, it was held that the mortgagee had succeeded to the lessee's rights and the lessor could not forfeit as the mortgagees were not insolvent (*h*), nor does the proviso operate forfeiture when owing to a flaw the bankruptcy proceedings are set aside (*i*) or where the Court declares void a winding-up resolution (*j*).

Assignment for benefit of creditors.—A lease contained a clause for re-entry by the lessor, and that the lease shall be rendered void on assignment without licence of the lessor. In January 1825 lessee executed a deed of assignment for the benefit of creditors, and in April 1825 was declared a bankrupt. It was held that the deed of January 1825 being an act of bankruptcy and void, did not operate as a valid assignment of the tenant's interest in the lease and, therefore, there was no forfeiture (*k*). On executing a deed of assignment as aforesaid when no bankruptcy supervenes the lessee commits a breach of the covenant against assignment, and where there is a clause for re-entry forfeits the lease (*l*). A mere declaration of trust by a lessee, who makes assignment for the benefit of his creditors that he stands possessed of the leasehold upon trust for the trustee to assign and dispose of the same as the trustee should direct, is not an assignment of the lease, and does not constitute a breach of the covenant not to assign (*m*).

Lessee becoming bankrupt after assignment.—If after assignment of the lease with the consent of the lessor the lessee becomes insolvent no forfeiture is incurred, for the proviso relates to the insolvency of the person possessed of the term for the time being (*n*).

Notice.—A lessor's entry without giving the statutory notice as required by this clause is void as against the trustee in bankruptcy (*o*).

Disclaimer of leaseholds.—Under sections 62 and 63 of the Presidency Towns Insolvency Act, 1909, the Official Assignee may after adjudication disclaim the property.

Alienation by one of several co-sharers.—A sale of a portion by one of several co-sharers would not work a forfeiture of the whole tenure (*p*).

Lease in perpetuity.—A lease in perpetuity leaves some interest in the lessor (*q*), and such a lease though permanent is forfeitable (*r*).

Assignment of a lease.—Mere repudiation by the original lessee of the title of the lessor does not operate as forfeiture against the assignee of the lease (*s*). And a covenant against assignment does not forbid alienation for a part of the term or a portion of the premises so as to work forfeiture (*t*).

Co-lessor.—In England any joint tenant may put an end to his demise so far as it operates on his own share. In this country the relation created by contract with several joint landlords continues until there exists a new and complete volition to change it. Where, therefore, the relation of joint landlord continues, the tenancy

(*h*) *Hazarimull v. Sadasukh*, A. I. R. (1925) Cal. 750.
 (*i*) *Doe d Lloyd v. Ingleby* (1846) 15 M. & W. 465, 153 E. R. 933.
 (*j*) *L. A. Creet v. Firm Gangaraj Gulraj*, A. I. R. (1937) Cal. 129.
 (*k*) *Doe d Lloyd v. Powell* (1826) 5 B. & C. 308, 108 E. R. 115.
 (*l*) *Holland v. Cole* (1862) 31 L. J. Ex. 481.
 (*m*) *Gentle v. Faulkner* (1900) 2 Q. B. 267.
 (*n*) *Smith v. Gronow* (1891) 2 Q. B. 394.

(*o*) *Re. Riggs, ex-parte Loyell* (1901) 2 K. B. 16.
 (*p*) *Dassorathy v. Ram Krishna* (1882) 9 Cal. 526.
 (*q*) *Kally Dass v. Monmohini* (1897) 24 Cal. 440.
 (*r*) *Abhiram v. Shyama Charan* (1909) 36 Cal. 1003 P. C.
 (*s*) *Gopal v. Shrinivas* (1918) 42 Bom. 734.
 (*t*) *David v. Salvadora* (1927) 50 Mad. 331;
Chatterton v. Terrell (1923) A. C. 578;
Venkatramana v. Krishna, A. I. R. (1925) Mad. 57; *Grove v. Portel* (1902) 1 Ch. 727.

of the lessees cannot be put an end to except by all the lessors acting together (u), but one of several joint lessors who has become separately entitled to his share of the lands leased is entitled to enforce a forfeiture as regards his share of the lands.

Notice of intention to determine the lease.—By the amendment no forfeiture is operative unless written notice is given by the lessor to the lessee of his intention to determine the lease. Where disclaimer of title operates as a forfeiture the Act requires the lessor or transferee to give notice in writing to the lessee of his intention to determine the lease. The English Law, however, does not require notice in such cases. The notice must be reasonable and it need not necessarily determine the tenancy at the end of the year. The lessor is not relieved of this obligation because the denial is contained in the written statement for the first time (v). Without such notice none of the acts enunciated in the clause operates as a forfeiture. And as the accrual of the cause of action is based on denial of title, such denial must be antecedent to the suit in ejectment on the ground of forfeiture (w). In places where the Act does not apply, no act is necessary to maintain an ejectment suit (x). The clause does not say what the length of notice should be, presumably reasonable notice would be necessary. It is at the landlord's election whether to forfeit or not, and such election may be express or implied (y).

Relations of under-lessees "inter se."—A lessee under a covenant to pay the rent and to repair made one hundred under-lessees. The rent fell into arrears and the premises were out of repair; the original lease was avoided for non-payment of rent. Some of the under-lessees brought a bill to be relieved against forfeiture. The Court refused to apportion the rent, holding that the plaintiffs must pay the whole rent in arrear and repair all the houses and compel all the other under-lessees to contribute (z).

Contract for payment with conditions for rendering services when called upon.—Where services were of a subsidiary nature and of a ceremonial character, the refusal to render such was held not to be denial of title, the rent being held to be the principal matter (a).

A tenant cannot approbate and reprobate.—If in a suit for rent the tenant denies the relationship of landlord and tenant and the suit is dismissed, it is not open to him in a subsequent suit for ejectment to maintain that that relationship subsisted (b).

Limitation.—Suit for possession of immoveable property to which the plaintiff has become entitled by reason of forfeiture or by reason of breach of condition is governed by article 143 of the Indian Limitation Act, 1908.

Estoppe! of tenant.—By section 116 of the Evidence Act, I of 1872, the tenant is estopped from denying the title of the landlord to the property. It differs from disclaimer provided for in section 111, sub-section (g) which relates to the tenant

(u) *Gopal v. Dhakeswar* (1908) 35 Cal. 807;
Korapalu v. Narayana (1915) 38 Mad. 445.
 (v) *Pratap Narain v. Harihar* (1909) 36 Cal. 927;
Vithu v. Dhondi (1891) 15 Bom. 407;
Subba v. Nagappa (1889) 12 Mad. 353;
Mukat Singh v. Missa Paras Ram, A. I. R. (1924) All. 726; *Perria Karuppan v. Subramania* (1908) 31 Mad. 261; *Srimati v. Makhan Lal* (1905) 9 C. W. N. 928.
 (w) *Srimati v. Makhan Lal* (1905) 9 C. W. N. 928; *Prannath v. Madhu* (1886) 13 Cal. 96;
Maharaja of Jeypore v. Rukmini (1919)

42 Mad. 589 P. C.
 (x) *Venkatachariar v. Kangaswamy* (1919) 36 M. L. J. 532, 21 C. W. N. 117.
 (y) *Soorayya v. Sooranna*, A. I. R. (1936) Mad. 252.
 (z) *Webber v. Smith* (1689) 2 Vern. 103, 22 E. R. 676.
 (a) *Maharaja of Jeypore v. Rukmini* (1919) 42 Mad. 589 P. C.
 (b) *Khatir Mistri v. Sadruddi Khan* (1907) 34 Cal. 922; *Sheik Niadhar v. Rajani Khanta Ray* (1910) 14 C. W. N. 339.

Ss. 111-112 renouncing his character as tenant setting up a title to the property in a third person or claiming title in himself.

Decrees.—Relief against forfeiture cannot be granted in connection with decrees other than consent decrees (c).

Clause (h).—A lease of immoveable property is determined by notice given by one party to the other.

Agricultural leases.—These are excluded from the operation of the provisions of this section (d).

Notice.—The lease is determined on the expiration of a notice given by the one to the other (a) to determine the lease, or (b) to quit, or (c) of intention to quit. Hence a notice given by a tenant that he intends to quit is valid, provided it complies with the other requirements of the law.

112. A forfeiture under section 111, clause (g), is
 Waiver of forfeiture. waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor shewing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Agricultural leases.—The provisions of this section do not apply to these leases (e).

Waiver generally.—Though the lease is declared to be void for breach of a covenant, it is well settled, that on a true construction of the proviso to the lease, that, it shall be void at the option of the lessor, and consequently on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid ; if he elects that it shall end, the lease must be determined (f).

Waiver of forfeiture.—This section enacts that a forfeiture incurred under section 111 (g) could be waived in any of the following cases :—

- (1) By acceptance of rent accrued due after the forfeiture was incurred, but if it be accepted after institution of an ejectment suit against the lessee it is no waiver.
- (2) By distress for rent accrued due after the forfeiture was incurred.
- (3) By the lessor doing an act showing an intention to treat the lease as subsisting.

Provided that the lessor was aware of his rights that the forfeiture was incurred.

(c) *Girdharidoss Co. v. Para Appaduari*, A. I. R. (1928) Mad. 193.
 (d) Sec. 117 of Transfer of Property Act 1882.
 (e) Sec. 117, Transfer of Property Act, IV of

1882.
 (f) *Jones v. Carter* (1846) 15 M. & W. 718, 153 E. R. 1040.

Acceptance of rent.—A forfeiture incurred under section 111 (g) is waived by the lessor or his agent having a general authority to receive rent (g) accepting rent accrued due after the forfeiture has been incurred (h). But acceptance of rent after institution of a suit to eject the lessee on the ground of forfeiture is no waiver. The election to forfeit is complete and irrevocable once the suit for ejectment is instituted (i). The institution of the suit is simply a mode of manifesting the election (j). On re-admission after determination of the tenancy upon forfeiture the old tenancy is not revived. The lessee is bound to pay compensation for use and occupation (k). In *Clough v. London and North Western Railway Company* (l), dealing with the case of avoiding a transaction on the ground of fraud, Mr. Justice Mellor observed, "The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture." The claim for rent in the ejectment suit must be for rent due before and not subsequent to the forfeiture, for in the latter case it would amount to waiver. In order that there may be forfeiture, the demand of rent must be on the last day and not any day before or afterwards (m). So also acceptance of rent or insurance premia from the assignee without licence or entering into an agreement with him in respect of repairs operates as a waiver of the forfeiture (n). Payments of Government revenue are payments of rents due under the lease though they be paid into the collectorate as revenue (o). The same effect is given to a qualified acceptance whereby the lessor held the payment in suspense subject to payment by the lessees of "remaining amount" (p). The principle that acceptance of rent operates as a waiver is applicable even though the lease provides that no waiver shall be effective unless in writing (q). The rent, however, must be received with knowledge that forfeiture has been incurred (r). Acceptance of rent in arrears is no waiver, for according to the act acceptance to operate as forfeiture must be the rent which becomes due since the forfeiture. It would not operate as such where the breach is a continuing one (s), as in case of a breach of covenant to repair (t). In a subsequent case it was held that where a lessor with the knowledge of the breach waives the forfeiture by acceptance of rent due after forfeiture the waiver is not only for the past breach but extends to a licence to continue the breach in future (u). On a sale of the reversion "subject to and with the benefit of the lease" to a purchaser who had knowledge of the breach by the lessee, it was held that this was a waiver by the purchaser of the right to re-enter (v). A landlord could not, on receiving rent, stipulate that he received rent without prejudice to the breaches of covenant made upto that date (w). Where money is paid and received as rent under a lease a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt (x). And notwithstanding that the lessor expressly states that he accepts the money as compensation for use and occupation

- (g) *Doe d Thompson v. Davis* (1847) 10 L. T. O. S. 108.
 (h) *Raj Mohan De v. Mati Lal Saha Poddar*, (1915) 22 C. L. J. 546.
 (i) *Padmanabhaya v. Ranga* (1911) 34 Mad. 161.
 (j) *Serjeant v. Nash, Field & Company* (1903) 2 K. B. 304.
 (k) *Chengiah v. Damara Kumara* (1913) 24 M. L. J. 263.
 (l) (1871) 7 Ex. 26, 34.
 (m) *Kristo Nath v. Brown* (1887) 14 Cal. 176.
 (n) *Sarafali v. Subraya* (1896) 20 Bom. 439.
 (o) *Sadai Naik v. Serai Naik* (1901) 28 Cal. 532.
 (p) *Kali Krishna v. Fuzlee Ali* (1882) 9 Cal. 843.
 (q) *R. v. Paulson* (1921) 1 A. C. 271.

- (r) *Roe d Gregson v. Harrison* (1788) 2 Term Rep. 425.
 (s) *Doe d Baker v. Jones* (1850) 5 Ex. 498, 155 E. R. 218.
 (t) *New River Co. v. Crumpton* (1917) 1 K. B. 762.
 (u) *Griffin v. Tomkins* (1880) 42 L. T. 359; see sec. 20 & 21, Trustees and Mortgagees Powers Act (XXVIII of 1866).
 (v) *Davenport v. Smith* (1921) 2 Ch. 270.
 (w) *Strong v. Stringer* (1889) 61 L. T. 470.
 (x) *Davenport v. R.* (1877) 3 A. C. 115; *Kali Krishna v. Fuzle Ali* (1882) 9 Cal. 843.

S. 112 and not as rent and refuses to recognize the party paying as his tenant (y). Acceptance of rent from a person other than the lessee operates as waiver (z), though not where the rent is accepted by a person not entitled to receive (a). An assignor of a lease who by non-compliance with dilapidation notice served by the landlord has rendered the lease liable to forfeiture, cannot under an open contract make a marketable title although the assignee has tendered and the landlord has accepted rent subsequent to the date of the contract and before completion (b).

Demand of rent.—Mere demand of rent which became due subsequent to a forfeiture does not amount to a waiver, as the section enacts that there should be acceptance of the rent. Nor would the demand come under "any other act" for in order that such act may amount to waiver it must shew an intention to treat the lease as subsisting.

Lessee's insolvency.—A forfeiture of a lease accruing on the lessee's insolvency is waived by acceptance of rent by him after his discharge under the Insolvency Debtors Act and the non-payment of rent specified in his schedule to be due to the lessor is not a continuing insolvency to constitute a new forfeiture after such acceptance of rent (c). Here the question turned upon a proviso by which the lease was to be voidable, not void on the lessee's insolvency.

Rent accrued subsequent to re-entry.—Lessors' declaration operates as a final election to determine the term so that he cannot afterwards, although there has not been any judgment in the ejectment, sue for rent due or covenants broken. For once the declaration is made by the lessor, the lease not being in existence, no rent can be said to be due (d).

Any other act, etc.—Besides acceptance of rent due after forfeiture or distress for such rent waiver may be by any act of the lessor shewing an intention to treat the lease as existing. The act must be positive. Mere knowledge and acquiescence in an act contributing a forfeiture is no waiver; there must be some act affirming the tenancy (e). Standing by and seeing the lessee making alterations is not waiver (f). Encouraging the lessee to expend money with knowledge that forfeiture has not been incurred is waiver (g). In case of a covenant to repair where the lessor leads the lessee to believe that the strict legal rights will not be enforced the latter will be relieved against forfeiture (h). The lessor must have knowledge of the breach and have done something unequivocal which recognizes the continuance of the lease (i). The lease would be rendered invalid by some unequivocal act indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee (j).

Joint lessors.—One of several joint lessors who had become separately entitled to his share of the lands leased is entitled to enforce the forfeiture clause separately

(y) *B. N. Ry. Co., Ltd. v. Bal Mukunda*, A. I. R. (1923) Cal. 663; *Croft v. Lumley*, (1858) 27 L. J. Q. B. 321; *Davenport v. R.* (1877) 3 A. C. 115; *Rex v. Paulson* (1921) 1 A. C. 271; *Griffin v. Tomkins* (1880) 42 L. T. 359; *Hartell v. Blackder* (1920) 2 K. B. 161.
 (z) *Doe d Griffith v. Pritchard* (1833) 5 B. & Ad. 765, 110 E. R. 973.
 (a) *Pennant's case* (1596) 3 Co. Rep. 64a, 76 E. R. 775.
 (b) *Re. Martin, ex-parte Dixon (Trustee) v. Tucker* (1912) 106 L. T. 381.
 (c) *Doe d Gatehouse v. Rees* (1838) 7 L. J. C. P. 184, 132 E. R. 835.
 (d) *Jones v. Carter* (1846) 15 M. & W. 718,

153 E. R. 1040.
 (e) *Doe d Sheppard v. Allen* (1810) 3 Taunt. 78, 128 E. R. 32; *Swarnamayee v. Afraddi* (1933) 60 Cal. 47.
 (f) *Pary v. Davis* (1858) 3 C. B. N. S. 769, 140 E. R. 945.
 (g) *North Stafford Steel Iron & Coal Co. (Burslem) Ltd. v. Camoys (Lord)* (1865) 12 L. T. 780.
 (h) *Hughes v. Metropolitan Railway Company* (1877) 2 A. C. 439.
 (i) *Mathews v. Smallwood, Smallwood v. Mathews* (1910) 1 Ch. 777.
 (j) *Jones v. Carter* (1846) 15 M. & W. 718, 153 E. R. 1040.

as regards his share of the lands (*k*). The Calcutta High Court has held that the Ss. 112-113 tenancy can be put an end to by all the lessors acting together (*l*). The former view is in consonance with English Law.

Distress.—A forfeiture is waived by distress for rent due since the forfeiture (*m*). In case of a continuing forfeiture as for non-repair, there is no waiver after the time of the distress. Distress is regulated by the Presidency Small Causes Courts Act (*n*).

Effect of subsidiary covenant on waiver of forfeiture under the principal covenant.—A lease dated 20th September 1901 contained a covenant by the lessees to erect by a specified date certain structures as also to well and sufficiently repair, maintain and keep the said buildings. There was a proviso for re-entry for non-payment of rent or breach of any of the covenants. As no building was erected the first covenant was broken but a subsequent receipt of rent by the lessor was a waiver of that breach so far as re-entry was concerned. The lessors on 14th July 1913 served notice of the breaches of both the aforesaid covenants. The lessee denied the right of re-entry. It was held that there was a waiver of forfeiture for not building in accordance with the covenant to repair the said building if and when erected. It was also held that as there was an express covenant to build both as to time and mode of building no further covenant to build could be implied from a covenant to repair (*o*).

Estoppel as a bar to forfeiture.—On July 28, 1916, plaintiff gave notice to the defendant tenant demanding possession on the ground that in her written statement in the suit of 1913 she had disclaimed the lessor's title. The lessee having failed to reply, the lessor filed a suit in 1918 claiming (1) forfeiture by reason of disclaimer, and (2) alternatively that his notice of July 28, 1916, should be treated as a notice terminating the annual tenancy. Held there was no disclaimer, and that plaintiff was estopped from pleading that the tenancy had terminated by forfeiture, for his notice amounted to an assertion that the tenancy was still subsisting and, therefore, a waiver of the forfeiture (*p*).

Proviso.—No waiver is operative unless the lessor waives with knowledge that the forfeiture has been incurred (*q*). The onus would be on the lessee to prove knowledge of the lessor.

Exception.—The section provides also that acceptance of rent due after forfeiture has been incurred is not waiver, if it be accepted after institution of a suit in ejectment against the lessee.

Effect of waiver of forfeiture.—When forfeiture is waived by the lessor the usual practice is to execute a fresh instrument.

113. A notice given under section 111, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it shewing an intention to treat the lease as subsisting.

Waiver of notice to quit.

(*k*) *Korapalu v. Narayana* (1915) 38 Mad. 445; *Sri Raja Simhadri v. Prallipati* (1906) 29 Mad. 29.
(*l*) *Gopal Ram v. Dhakeswar* (1908) 35 Cal. 807.
(*m*) *Doe d Hemmings v. Dumford* (1832) 2 Cr. & J. 667, 149 E. R. 280; *Sri Raja Mohan De v. Mati Lal Saha Poddar* (1925) 22 C. L. J. 546.

(*n*) XV of 1882, Chapter VIII.
(*o*) *Stephens v. Junior Army and Navy Stores, Ltd.* (1914) 2 Ch. 516.
(*p*) *Rukmini v. Rayaji* (1924) 48 Bom. 541; *Doe dem Williams v. Cooper* (1840) 1 M. & Gr. 135; *Jones v. Mills* (1861) 10 C. B. N. S. 788.
(*q*) *Swarnamayee v. Afaraddi* (1933) 60 Cal. 47.

Ss. 113-114

Illustrations.

(a) A, the lessor, gives B, the lessee, notice to quit the property lease. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

Waiver of notice to quit.—Waiver of notice to quit does not, like waiver of forfeiture, depend upon the election of one party, but upon the consent of both.

Notice to quit determining the lease may be waived with the consent of the person to whom it is given and such consent may be express or implied, but the waiver must be by any act of the person giving it shewing an intention to treat the lease as subsisting such as acceptance of rent which has become due since the expiration of the notice or giving a second notice to quit after the first has expired. Though payment and acceptance of rent amount to a waiver, demand does not necessarily raise that inference (r). Once the notice is given there can be no subsequent withdrawal of it save by mutual consent (s). The Calcutta High Court, in the absence of a provision similar to that laid down in the second proviso to section 112, decided that where the rent was accepted after the notice to quit, whether before or after the suit had been filed, the landlord thereby shewed an intention to treat the lease as subsisting (t).

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order for relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

Agricultural leases.—These are exempted from the operation of the provisions of this Act (u).

Breach of covenant for payment of rent.—Till the introduction of section 114A this was the one and only covenant against the breach of which a forfeiture incurred could be relieved by a Court. In no other case had the Court power to relieve a lessee against forfeiture incurred, however disastrous the consequences were. In enacting this section the Indian Legislature has followed the principles of the English Court of Equity. With this difference, that there the lessee is allowed the same right to relief after judgment for recovery of the land as if the judgment had been given after trial, while under the Indian Law the relief from forfeiture cannot

(r) *Blyth v. Dennett* (1858) 13 C. B. 178, 138 E. R. 1165.

(s) *Tayleur v. Wilding* (1868) 37 L. J. Ex. 173.

(t) *Manicklal v. Kadambini*, A. I. R. (1926)

Cal. 763.

(u) Sec. 117, Transfer of Property Act, IV of 1882.

be claimed after the order for ejectment has been made (v). Where a clause in a lease provided for forfeiture for non-payment of rent it would be competent to the Court to grant relief and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the theory that the provisions for forfeiture of leases for non-payment of rent, are intended merely as a security for payment of rent (w). The lessor thereby received full compensation and was put in the same situation as if the rent had been paid to him when it was originally due (x). The same principle has been recognized by the Legislature in section 114 of the Transfer of Property Act. It is necessary that the rent should be demanded, for the right of re-entry does not accrue until such demand is made (y). Under the section the Court is given a discretion which it may or may not exercise (z). In equity, as at law the Court refuses to connect the right of the tenant to redeem under the statute for non-payment of rent with any extrinsic matter of waste, or breach of covenant, so as to make the tenant pay compensation for them as a condition connected with his relief (a). Relief will be granted against forfeiture for non-payment of rent, without prejudice to any remedies at law, or in equity to which the landlord may be entitled to resort to on other accounts. But if breaches of covenants for which the lessee might be ejected, and against which the Court could not relieve, be proved, it will not relieve against a breach for non-payment of rent (b). A forfeiture cannot be founded on an inaccurate or insufficient demand (c). It must be by the lessor or his duly authorized agent, made on the demised premises or a place appointed for payment on the day it is due and not earlier or later, and must be for the exact sum due from the occupier or under-lessee, unless the proviso expressly excludes the necessity for a formal demand of the rent. Clause 111 (g) requires notice in writing to be given by the lessor of his intention to determine the lease. In this section "lessor" includes his transferee (d).

Relief against forfeiture.—In order to invoke the equitable jurisdiction of the Court it is necessary that the rent in arrears must be paid by the lessee together with interest thereon and his full costs of the suit or he must furnish security as the Court thinks sufficient for making payment within 15 days. Relief against forfeiture for non-payment of rent is distinguishable from forfeiture incurred otherwise. The plaintiff landlord, relying on a provision in a lease, gave the defendants his tenants notice to quit. Within 7 days the defendants tendered rent, interest and costs but the plaintiff nevertheless filed a suit to eject the defendant. The defendants subsequently paid the full amount in Court. This being so, the defendants brought themselves within the terms of the section. Still after the tender the plaintiff proceeded with the suit at his own risk. In appeal each party was ordered to pay his own costs (e). The power to grant relief is not obligatory but discretionary (f). Just as the lessee is entitled to relief so are the mortgagee of a lease (g) and the trustee in bankruptcy of the lessee (h). A tenant is entitled

- (v) *The Dhurumtolla Properties, Ltd. v. Dhunbai* (1931) 58 Cal. 311.
- (w) *Megh Lal v. Rajkumar* (1907) 34 Cal. 358.
- (x) *The Dhurum Tolla Properties, Ltd. v. Dhunbai* (1931) 58 Cal. 311.
- (y) *Hill v. Kempshall* (1849) 7 C. B. 975, 137 E. R. 386.
- (z) *The Dhurumtolla Properties, Ltd. v. Dhunbai* (1931) 58 Cal. 311.
- (a) *Davis v. West* (1806) 12 Ves. 475.
- (b) *Platt on Leases*, Vol. II, p. 480.
- (c) *Jackson & Co. v. Northampton Street Tram-*

- ways Co.* (1886) 51 L. T. 91; *Phillips v. Bridge* (1873) 29 L. T. 692.
- (d) *Vamana Pai v. Venkatu Naiker*, A. I. R. (1936) Mad. 116.
- (e) *Krishnasami v. Natal Emigration Board* (1894) 17 Mad. 216.
- (f) *Scott v. Brown (Mathew) & Co. Ltd.* (1884) 51 L. T. 746.
- (g) *Doe d Whitfield v. Roe* (1811) 3 Taunt. 402, 128 E. R. 160.
- (h) *Howard v. Fanshawe* (1895) 2 Ch. 581.

S. 114 to relief against forfeiture even where the statutory rent fixed by the controller is paid to the controller (*i*). Also proceedings may be stayed after judgment if the lessee brings into Court rent in arrears, interest and full costs of the suit (*j*). But not after execution, executed in an action of ejectment, if there are other grounds of forfeiture besides non-payment of rent (*k*), though the Court of appeal may give relief even if no previous tender was made (*l*). The Court has power to grant relief against forfeiture for non-payment of rent though stipulation for payment is contained in a compromise decree and such power can be exercised by the Court in execution proceedings (*m*).

Rent barred by limitation.—Under the Limitation Act, 1908, the remedy and not the right is barred. Besides, the proviso for forfeiture is really a security for rent. Therefore, the landlord is entitled to recover arrears of 12 years' rent. In this case the arrears covered a period of 5 years and interest at the rate of 12 per cent. per annum was allowed (*n*). The words "rent in arrear" in section 114 mean rent accrued due down to the date when relief was granted and not only rent claimed in suit (*o*).

Forfeiture of land leased for agricultural purposes.—Section 111 of the Transfer of Property Act and the other sections of Chapter V do not, by virtue of section 117, apply to leases for agricultural purposes, and there is no other restriction against the Court exercising its equitable powers of relieving against forfeiture in a proper case. So where a tenant holding land for agricultural purposes under a *mulgeni* lease contravened a stipulation of the lease against alienation by effecting a mortgage to a third party, it was held that though the lease contained a proviso for re-entry, the Court had equitable power to relieve against forfeiture and that in the circumstances of the case the tenant should be given time in which to redeem the mortgage effected (*p*).

Leases excepted from the section.—It has been held by the High Court of Madras that if the lease prescribed a period of grace for payment of rent, such a lease is not governed by the Transfer of Property Act and no relief against forfeiture incurred for non-payment of rent within the further period of grace allowed can be given by the Court (*q*), and the same view is adopted by the Courts of the Central Provinces (*r*). But a different view was taken by the Bombay High Court. There the lessee who had been cultivating land for many years had made two defaults in payment and relief was granted to him under section 114 on payment of arrears of rent with interest and costs within 15 days (*s*).

Laches.—Relief under the section being founded on equitable principles, is lost or extinguished by laches, so that if a tenant applies for relief which was considerably delayed the Court will not assist (*t*). On similar grounds would the Court refuse relief where the lessor has incurred considerable expense or the nature of the property has altered by the landlord defraying expenses thereon or the rights of

(i) *Ahindra v. Twiss* (1922) 49 Cal. 150.
 (j) *Phillips v. Doelittle* (1725) 8 Mod. Rep. 345, 88 E. R. 247.
 (k) *Doe d Lambart v. Roe* (1835) 3 Dowl. 557.
 (l) *Vidyapurna v. Rengappaya* (1913) 25 M. L. J. 486.
 (m) *Krishnabai v. Hari Govind* (1907) 31 Bom. 15; *Nagappa v. Venkat Rao* (1901) 24 Mad. 265; *Doe d Lambert v. Roe* (1835) 3 Dowl. 557.

(n) *Vasudeva v. Krishna* (1921) 44 Mad. 629; *Vamana Pai v. Venkatu Naiker*, A. I. R. (1936) Mad. 116.
 (o) *The Dhurumtolla Properties, Ltd. v. Dhunbai* (1931) 58 Mad. 311.
 (p) *Mallappa v. Janardan* (1926) 50 Bom. 450.
 (q) *Narayana v. Vasudeva* (1905) 28 Mad. 389.
 (r) *Arjun v. Narayan* (1923) 19 Nag. L. R. 50.
 (s) *Krishnaji v. Sitaram* (1921) 45 Bom. 300.
 (t) *Stanhope v. Haworth* (1886) 3 T. L. R. 34.

third parties have intervened, nor would the lessee be entitled to compensation in respect of the interval during which the landlord has kept him out of possession (u).

Costs.—Lessor is entitled to the full costs of his suit but not the costs, as may have been increased by resistance to a relief (v).

Under-lessee.—An under-lessee may obtain the same relief as his lessor for non-payment of rent against ejectment by the head lessor by making the deposits as required by the Act (w), and where there are numerous under-tenants any one of them may make the deposits, obtain relief against forfeiture and seek contribution from the others (x).

114A. *Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—*

Relief against forfeiture in certain other cases.

- (a) *specifying the particular breach complained of; and*
- (b) *if the breach is capable of remedy, requiring the lessee to remedy the breach;*

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

Defects in the section.—The section seems to be defective for the marginal note refers to relief against forfeiture in certain other cases, that is, besides non-payment of rent dealt with in section 114, and the cases are enumerated. The section requires the lessor to give an opportunity to the lessee to remedy a particular breach complained of and on his failure to do so to file a suit for ejectment. All that it lays down is to enumerate certain conditions as a condition precedent to his filing a suit for ejectment. There is, however, no provision in the section authorizing the Court to give relief against a forfeiture once the ejectment suit is filed as is provided in the case of section 114 of the Act or in the case of section 14, sub-section (2) of the Conveyancing Act of 1881.

Agricultural leases.—The section would not apply to these leases (y).

(u) *Howard v. Fanshawe* (1895) 2 Ch. 581.

(v) *Howard v. Fanshawe* (1895) 2 Ch. 581.

(w) *Ahmad Husain v. Riaz Ahmad* (1914) 12

A. L. J. 1085.

(x) *Webber v. Smith* (1689) 2 Vern. 103.

(y) Sec. 117, Transfer of Property Act.

§. 114A-
115

Generally.—Introduced in the Act for the first time by the Transfer of Property Amendment Act, 20 of 1929, the section is based on section 14 of the English Conveyancing Act, 1881. Prior to the change, the only circumstance in which forfeiture could be relieved was for non-payment of rent. This amendment further restricts the lessor's rights of forfeiture for breaches of covenant in the defined cases by providing that where a lease determines by forfeiture for breach of express condition which provides re-entry an ejectment suit shall not lie unless the lessor has served a written notice on the lessee (i) specifying precisely what is alleged against him (z). The notice must not be general (a). It is not, however, vitiated because some of the alleged breaches have not occurred (b), but it would be so if it refers to a wrong covenant (c); (ii) requiring the lessee to remedy the breach if the same be capable of remedy, and (iii) allowing a reasonable interval to elapse after service of the notice to remedy the breach if it is capable of remedy and before action (d). In short, the notice is intended to give to the person whose interest it is sought to forfeit an opportunity of considering his position before an action is brought against him by the lessor (e). When relief is granted the old lease is restored as if it had never become forfeited and the effect on under-lease is that it remains in existence (f).

Refusal to carry out the order for relief.—Where a lessee performs certain conditions of the order granting relief and declines to perform the remainder, the Court having no power to compel performance of the conditions, the order for relief must be treated as abandoned (g).

Exceptions.—The section excludes certain covenants for which there is no relief, such as covenants not to assign, under-let or part with possession or dispose of the property leased (h), nor does it apply when there is an express condition relating to forfeiture for non-payment of the rent, so that if there is a clause relating to re-entry and forfeiture for non-payment of rent no relief will be granted. The section applies to leases either before or after the commencement of the Amending Act and shall have effect *notwithstanding any stipulation to the contrary*. In excluding assignments, etc., the Legislature has omitted the words "or part thereof," hence relief would not be available for breach of covenant against assignment which does not include the entire property.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

Effect of surrender
and forfeiture on under-
leases.

(z) *Davenport v. Smith* (1921) 2 Ch. 270.
(a) *Fletcher v. Nokes* (1897) 1 Ch. 271.
(b) *Pannell v. City of London Brewery Co.* (1900) 1 Ch. 496.
(c) *Jacob v. Down* (1900) 2 Ch. 156.
(d) *Horsey Estate, Ltd. v. Steiger* (1899) 2 O. B. 79.

(e) *Horsey Estate, Ltd. v. Steiger* (1899) 2 Q. B. 79, 81.
(f) *Dendy v. Evans* (1910) 1 K. B. 263.
(g) *Talbot v. Blindell* (1908) 2 K. B. 214.
(h) *Thakur Dayal Singh v. Rai Promotha Nath Mitra* (1936) 15 Pat. 673.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114. Ss. 115-116

Agricultural leases.—These are not affected by the section (i).

Effect of surrender on under-leases.—An under-lease or sub-lease of a property granted before surrender and on substantially the same terms and conditions as the original lease save as regards rent is not prejudiced, and privity will be established between the lessor and the under-lessee or sub-lessee unless the surrender was made for the purpose of obtaining a new lease. The rent shall be payable to the lessor who shall be entitled to enforce the contracts binding on the under-lessee or sub-lessee.

Effect of forfeiture on under-leases.—On forfeiture under-leases are annulled unless the forfeiture is procured by fraud of the lessor on the under-lessees or relief is granted under section 114 for non-payment of rent. A sale in execution does not affect a sub-lessee's interest in the land or put an end to the sub-lease (j).

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106. Effect of holding over.

Illustrations.

(a) A lets a house to B for five years. B under-lets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Agricultural leases.—The section does not apply to these leases (k).

Cases not coming under the Act.—These are governed by the rules in section 106 (l).

Generally.—Section 116 does not apply unless there is already a lease and that lease has been determined. The section applies only to a lease for fixed term and not to a lease for life (m).

Burden of proof as to relationship.—When the question is whether persons are landlord and tenant and it has been shewn that they have acted as such, the burden

(i) Sec. 117, Transfer of Property Act, IV of 1882.

(j) *Vishnu v. Anant* (1890) 14 Bom. 384.

(k) Sec. 117, Transfer of Property Act, IV of 1882.

(l) *Vadapalli v. Dronamrajee* (1908) 31 Mad. 163; *Sayaji v. Umaji* (1867) 3 Bom. H. C. 27.

(m) *Ram Rachhya v. Kamakhya Narain*, A. I. R. (1925) Pat. 216.

S. 116 of proving that they do not stand or have ceased to stand to each other in that relationship is on the person who affirms it (*n*).

What is a holding over.—A tenant whose original entry has been lawful is said to hold over after the determination of the lease if he remains in possession, and the lessor accepts rent or otherwise assents to the lessee continuing in possession. Mere holding over does not create a tenancy unless such holding is accompanied with payment of rent or other overt act on the part of the lessor indicating a recognition of the tenancy. In the circumstances mentioned in the section the law implies a tacit renovation of the contract (*o*). The expression "holding over" means the relation of lessor and lessee continued with the assent of both parties and the overt acts by which such relation might be continued are either the receipt of rents by the lessor or his assenting to the continuance of the tenancy by other acts or words (*p*).

Incidents of holding over after expiry of term.—In the absence of a contract to the contrary, the rule in section 106 of the Transfer of Property Act will apply, so that a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year (*q*) terminable on the part of either lessor or lessee by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month (*r*), terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy (*s*). In other respects, the parties are bound by the terms of the expired lease (*t*). The new tenancy is considered as having commenced on the expiration of the original tenancy. If a monthly tenant continues in possession with the assent of his landlord, but without giving a proper notice of his intention to quit on a particular date, then, however short be the continuation of his possession, he is liable to pay a full month's rent as well as rent for the prescribed period of notice to quit.

The assent referred to in the section is the assent of the lessor and not that of the lessee (*u*).

Acceptance of rent.—If the lessor accepts rent accrued due after the determination of the lease from the lessee, he must be considered to have acquiesced in the continuance of the tenancy on the same terms as the original lease including the same rent (*v*).

Is a tenant a trespasser.—The original entry being lawful, a tenant cannot by his landlord on continuing in possession after the determination of his tenancy be treated as a trespasser, but the landlord may convert his entry into such by giving him notice to go out of possession forthwith or a stipulated time, and on the expiration of the notice regard him as a trespasser (*w*). According to English Law, a person who continues in possession after a particular estate has ended without agreement is a tenant at sufferance. There is no relationship of landlord

(*n*) Sec. 109, Indian Evidence Act, 1 of 1872.

(*o*) *Right v. Darby* (1786) 1 T. R. 159.

(*p*) *Ratan Lal v. Farshi Bibi* (1907) 34 Cal. 396.

(*q*) *Administrator General of Bengal v. Asraf Ali* (1901) 28 Cal. 227; *Jacks & Co. v. Joosab Mahomed* (1924) 48 Bom. 38; *Stonevigg v. Kameshwar*, A. I. R. (1923) Pat. 340.

(*r*) *Meghji Vallabhdas v. Dayalji & Co.* (1924) 48 Bom. 341; *Trilokya v. Sarat Chandra* (1905) 32 Cal. 123; *Mati Lal v. Darjeeling Municipality* (1913) 17 C. L. J. 167; *Gajendra Nath v. Ashraf Hossain*, A. I. R. (1923) Cal. 130; *Gobinda v. Dwarka* (1914)

19 C. W. N. 489; *Durgi Nikarni v. Goverdhan* (1914) 19 C. W. N. 525.

(*s*) *Troilokya Nath Roy v. Sarat Chandra* (1905) 32 Cal. 123; *Mati Lal v. Darjeeling Municipality* (1913) 17 C. L. J. 167.

(*t*) *Krishna Charan v. Nitya Sundari*, A. I. R. (1926) Cal. 1239; *Kishore Lal v. The Administrator General of Bengal* (1905) 2 C. W. N. 303.

(*u*) *Meghji Vallabhdas v. Dayalji & Co.* (1924) 48 Bom. 341.

(*v*) *Ram Khelawun v. Mt. Soondra* (1867) 7 W. R. 152.

(*w*) *Mackintosh v. Gopee* (1865) 4 W. R. 24.

and tenant. He has possession without privity. He is only in by the laches of the landlord (x). Slight evidence will change his position to that of a tenant at will (y), the difference in the two being the possession of one is lawful as that of the other is wrongful. The tenant is, however, entitled to retain possession of his tenure until he resigns it or is ejected (z). A tenant continuing in possession after the expiration of the lease was by force dispossessed by the landlord. His claim under section 9 of the Specific Relief Act (a) was dismissed by the Subordinate Judge. He applied to the High Court under its extraordinary jurisdiction (b). In reversing the decree the Court held that he was not liable to be evicted by the landlord *proprio motu* and that he was not entitled to a decree for possession (c).

Otherwise assents.—The lessor must signify his consent (d) to the tenancy continuing in some other way if not by acceptance of rent. The use of the word assents signifies that there is some proposal or indication by overt act on the part of the lessee that he desires to continue his tenancy, for the effect of holding is to create a new tenancy and there must, therefore, be a new contract for which there must be a proposal and acceptance and the latter cannot be without a proposal from the tenant. Just as acceptance of rent signifies an implied contract, these words require an express contract. There must be evidence from which a fresh tenancy can be inferred in the strict sense of the term. A mere delay in the institution of the suit raises no presumption that the tenant was allowed to hold over (e).

Compensation not rent.—In the absence of relationship between landlord and tenant the liability of the latter is in compensation or damages and not as for rent (f). It would be for the number of days he remained in occupation at the same rate as the rent or the full market rate (g). The landlord cannot demand an excessive rent nor can it be arbitrary. Acceptance of rent is an essential ingredient in the continuance of a tenancy after it has determined. If the landlord does not assent to the tenant continuing, no rent is payable but the tenant is liable to pay compensation for wrongful use and occupation from day to day. Such compensation is usually computed at the same rate as the rent for the number of days such wrongful occupation continues. Whether both of two joint lessees are liable in an action for use and occupation for the holding over of the one without the assent of the other does not appear to be settled (h).

Limitation.—A suit by a landlord to recover possession from a tenant holding over is governed by article 139 of the Limitation Act and time begins to run against the landlord when the period fixed by the lease expires (i). Section 139 deals with the case of persons who have been in the relationship of landlord and tenant. A suit against a representative of a tenant on sufferance would be governed by article 144 (j).

- (x) *Pusa Mal v. Makdum Bakhsh* (1909) 31 All. 514; *Chandri v. Daji* (1900) 24 Bom. 504; *Vadapalli v. Dornamrajee* (1908) 31 Mad. 163; *Kumakya Narain Singh v. Kherlik Ahmad, A. I. R.* (1927) Pat. 305.
 (y) *Kanthappa v. Sheshappa* (1898) 22 Bom. 893.
 (z) *Ooma v. Nitly Chand* (1870) 14 W. R. 467; *Jumant Ali v. Chowdhry* (1871) 16 W. R. 185.
 (a) 1 of 1877.
 (b) Sec. 115, Civil Procedure Code, 1908.
 (c) *Rudrappa v. Narsingrao* (1905) 29 Bom. 213.
 (d) *Balaji v. Ramchandra* (1903) 27 Bom. 262; *Macintosh v. Gopee* (1865) 4 W. R. 24.; *Ram Chandra v. Bhikambar* (1910),

- 37 Cal. 674; *Solaiman v. Jatindra* (1929) 57 Cal. 538.
 (e) *Ratan Lal v. Farshi Bibi* (1907) 34 Cal. 396.
 (f) *Mackintosh v. Gopee* (1865) 4 W. R. 24.
 (g) *Baboo Gopail v. Budurooden* (1867) 7 W. R. 28.
 (h) Platt on Leases, Vol. II, p. 522.
 (i) *Ram Chandra v. Bhikambar* (1910) 37 Cal. 674; *Chandri v. Daji* (1900) 24 Bom. 504; *Pusa Mal v. Makdum Bakhsh* (1909) 31 All. 514; *Vadapalli v. Dornamrajee* (1908) 31 Mad. 163; *Seshamma v. Chickaya* (1902) 25 Mad. 507.
 (j) *Vadapalli v. Dornamrajee* (1908) 31 Mad. 163.

Ss. 116-117 **Co-tenants.**—The mere continuing in possession by one or more co-tenants without the consent of the others cannot render the person not so continuing in possession liable for use and occupation (*k*).

Under-lessee.—The section places the under-lessee in the same position as the lessee (*l*), and illustration (a) to the section shews that even after the determination of the lease an under-lessee can hold over.

Representatives, heirs and assigns.—A representative of a lessee by sufferance is a trespasser and cannot be converted into a tenant either monthly or yearly without his concurrence (*m*). As to the representative of a lessor the rule for renewal is the same as with the lessor. So also the heirs of a tenant, whose lease has determined, are trespassers. The section does not contemplate heirs and assigns of the original lessee (*n*). Only the original lessor is benefited (*o*).

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the local Government may, by notification, published in the local official *Gazette*, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Exclusion of the provisions of section 117.—This section expressly excepts all leases for agricultural purposes from the operation of the chapter, for fear of unnecessarily interfering with settled usages which it would be undesirable to disturb and which would be more appropriately regulated by local laws framed according to the peculiar conditions in the various provinces. Consequently a liberal interpretation should be given to the words of the section (*p*) and although such leases are exempted it has been nevertheless held that the analogy of the Transfer of Property Act should be applied to them (*q*). It is, however, to be noted that in section 106 the words "agricultural or manufacturing purposes" have been used so that notwithstanding the provisions of section 117 durations of agricultural leases are regulated by the provisions of that section. The Act nowhere defines "agricultural purposes" which do not include agricultural lands. Different definitions have been attempted at different time but so far none has met with general approval. It has been observed that a lease is not agricultural unless the primary object of the lease is cultivation or agriculture (*r*). Agriculture

(*k*) *Broja Lal v. Belchambers* (1905) 9 C. W. N. 340.

(*l*) *Kuppusami Pillai v. Mr. Karim*, A. I. R. (1926) Mad. 566.

(*m*) *Vadapalli v. Dronamrajee* (1908) 31 Mad. 163; *Ram Rachhya Singh v. Kumar Kamattya*, A. I. R. (1924) Pat. 313.

(*n*) *Charan Mahton v. Kumar Kamakhya*, A. I. R. (1925) Pat. 357.

(*o*) *Ram Rochhya v. Kamakhya Narain*, A. I. R. (1925) Pat. 216.

(*p*) *Brouche v. Chhatar Kumari*; A. I. R. (1925) Pat. 421.

(*q*) *Kemalooli v. Muhamad* (1918) 41 Mad. 629; see *Appayya Chetty v. Mahammad Beari* (1916) 39 Mad. 834.

(*r*) *Vallabh Das v. Murat Narain* (1926) 48 All. 385.

does not connote tilling the soil for raising food products alone but means cultivation of the soil for any useful purpose (*s*). The following have been held to be leases for agricultural purposes :—

- (i) for growing casuarina trees to be used for fuel (*t*),
- (ii) for growing betel-nut, grain, etc. (*u*),
- (iii) under the Madras District Municipalities Act, lands on which grain, vegetables, etc., are grown as well as pastoral lands (*v*).
- (iv) cultivation of indigo crops (*w*),
- (v) a *mulgeni* lease in South Kanara (*x*),
- (vi) lands used for growing grass (*y*).

A residential lease is not converted into agricultural by reason of a right to plant trees and to pluck fruits of trees (*z*), nor because surplus land is planted with fruit-bearing trees (*a*). The following are not leases for agricultural purposes—A *patni* lease in Bengal (*b*), the manufacture of indigo cakes from indigo plants (*c*), a village tank over which the landlord gives a right to fish and grow water nuts in the Central Provinces (*d*), a registered lease granted for building purposes and for establishing a coal depot in Bengal (*e*), a lease the object of which is to make arrangement for collecting rents (*f*).

Holding over.—When an agricultural tenant holds over, his tenancy is renewed from year to year (*g*).

Indigo factory on land let for agricultural purposes.—An occupancy tenant can, under section 23 of the Bengal Tenancy Act (VIII of 1885), “use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy.” In a suit for injunction to restrain the building of an indigo factory on land let for agricultural purposes generally, it was held that the question whether such a building conforms to the restrictions in section 23 must be considered with reference to the circumstances of each individual case, the size of the holding and of the area withdrawn from actual cultivation by the erection of the building, and the effect of such withdrawal upon the fitness of the holding as a whole, for profitable cultivation (*h*).

Underground rights.—When a zemindar created a permanent tenure in respect of agricultural land at a rental fixed in perpetuity, it was held that the tenureholder would possess all underground rights in the absence of a contract to the

- (s) *Pandai Pathan v. Ramasami Chetti* (1922) 45 Mad. 710; *Madhab Chandra v. Bejoy Chand* (1900) 4 C. W. N. 574.
- (t) *Pandai Pathan v. Ramasami Chetti* (1922) 45 Mad. 710.
- (u) *Murugesu v. Chinnathambi* (1901) 24 Mad. 421.
- (v) *King-Emperor v. Alexander* (1902) 25 Mad. 627.
- (w) *Surendra Narain v. Hari Mohan* (1904) 31 Cal. 174.
- (x) *Krishna Shetti v. Gilbert* (1919) 42 Mad. 654.
- (y) *Ambika Prasad v. Beni Madho*, A. I. R. (1929) Oudh 529.
- (z) *Gopal Chandra v. Bhutnath*, A. I. R. (1926) Cal. 312.
- (a) *Srimati Sasi Bala v. Srimati Amala* (1921)

- 25 C. W. N.
- (b) *Promotho Nath Miller v. Prasanna Chowdhry* (1901) 28 Cal. 744.
- (c) *Surendra Narain v. Hari Mohan* (1904) 31 Cal. 174.
- (d) *Hari v. Wanu* (1915) 11 Nag. L. R. 122; *Battoo v. Narainprasad* (1915) 11 Nag. L. R. 49.
- (e) *Raniganj Coal Association, Ltd. v. Judoonath* (1892) 19 Cal. 489.
- (f) *Lala Shiam v. Chooley Lal*, A.I.R. (1937) Oudh 151.
- (g) *Administrator General of Bengal v. Asraf Ali* (1901) 28 Cal. 227; see sec. 106 of the Act.
- (h) *Hari Mohan Misser v. Surendra Narayan Singh* (1907) 34 Cal. 718, 34 I. A. 133.

S. 117 contrary. The Transfer of Property Act would not apply to such a case, and the tenure-holder's use of it would not be limited to agriculture by reason of the fact that the land was agricultural. By the land law of the country the zemindar invests the tenure-holder with every right, short of destruction. The Common Law of England regarding the mining rights of lessees for a term, cannot be made applicable to the rural parts of Bengal (i).

Horticultural leases.—These are not excluded from the operation of the section. An horticulturist is an agriculturist.

Law before the passing of the Act.—Before the Transfer of Property Act, there was no distinction between agricultural and non-agricultural tenants (j). The Madras High Court in dealing with forfeiture of a lease held that the principles of the Courts of Equity embodied in section 111 (g) applied (k).

(i) *Sriram v. Hari Narayan* (1906) 33 Cal. 54;
 Megh Lal v. Rajkumar (1907) 34 Cal. 358.
(j) *Madhab Chandra v. Bejoy Chand* (1900)

4 C. W. N. 574.
(k) *Krishna Shetti v. Gilbert* (1919) 42 Mad.
 854.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange." S. 118

"Exchange" defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Two persons mutually transfer.—For an exchange it is necessary that there should be cross-transfers, neither side paying money only, unless the property be accompanied by money for the purpose of equalisation (*l*). It is the very essence of an exchange that the nature of the estates exchanged be equal (*m*) and the transaction must be between two parties only (*n*).

Ownership.—Exchange is a transfer of ownership, so that if the owner of the thing given has some interest in the thing taken such a transaction is not an exchange. One of the items exchanged or both may be moveable properties. Hence, in the usual type of family arrangement if any item of property which is admitted by all the parties to belong to one of them, is allotted to another there is no exchange or other transfer of ownership (*o*). A partition rests on similar grounds (*p*), nor is the setting-off of one decree against another an exchange as the essence of the transaction, namely, the mutual transfer of two things, would be wanting (*q*). The difference between an exchange and sale is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter (*r*). The provisions of the three sections indicate that the Legislature has put exchange on the same footing as a sale (*s*). A transfer by a husband of land or the right to use the land to the wife during her lifetime in lieu of future maintenance given up by her, is not an exchange. The husband does not transfer the land and the wife does not transfer the ownership of anything (*t*). The grant of an easement is not a transfer of ownership in land (*u*). Where plaintiff and defendants 4 and 6 were joint owners of a property at Rudrapur and plaintiff alone of another property at Rangun, plaintiff obtained Rudrapur in entirety and gave

- (*l*) *Fateh Singh v. Prithi Singh*, A. I. R. (1930) All. 426; *Ismail Shah v. Saleh Muhammad*, A. I. R. (1925) Lah. 326.
- (*m*) *Eton College (Provost) v. Winchester (Bishop of)* (1774) 3 Wils. 468, 95 E. R. 1161.
- (*n*) *Eton College (Provost) v. Winchester (Bishop of)* (1774) 3 Wils. 468, 95 E. R. 1161; *Samar Bahadur Singh v. Jit Lal* (1924) 46 All. 359.
- (*o*) *Ram Gopal v. Rulshi Ram* (1929) 51 All. 79; *Rani Mewa Kurwar v. Rani Hulas Kunwar* (1874), 1 I. A. 157; *Hiran Bibi v. Sohan Bibi* (1914) 18 C. W. N. 929 P. C.; *Khunni Lal v. Gobind Krishna* (1911) 33 All. 356,

- 38 I. A. 87.
- (*p*) *Gyannessa v. Mobarakannessa* (1897) 25 Cal. 210; *Satya Kumar v. Satya Kripal* (1909) 10 C. L. J. 503; *Raj Narain v. Khobdari* (1900) 5 C. W. N. 724.
- (*q*) *Dina Nath v. Matimala Dassya* (1906) 11 C. W. N. 342.
- (*r*) *Samratmal v. Govind* (1901) 25 Bom. 696.
- (*s*) *Kundan Lal v. Anund Sarup*, A. I. R. (1923) Lah. 456.
- (*t*) *Madan Pillai v. Badrakali Ammal* (1922) 45 Mad. 612, 618.
- (*u*) *Kondayya v. Veeranna*, A. I. R. (1926) Mad. 543.

S. 118

Rangun to defendants 4 and 6, the transaction was an exchange (v). A surrender by a lessee of certain leasehold property and obtaining from the lessor a lease of another property is not an exchange (w). Forbearance to take proceedings cannot be the subject of ownership, so that a transfer of land in consideration partly for a sum of money and partly for forbearance to take proceedings, is not an Exchange (x).

What may be exchanged.—To distinguish an exchange from sale, all that is required is that the consideration on one side should not be money only. A sale as defined in section 54 is also an exchange except that it is for a price paid or promised or part paid and part promised. Both may be moveables or immoveables or one of them may be moveables and the other immovable. It may be of lands of different tenures (y). The two estates may be of unequal value and the deficiency in the one made up by money value (z). It may be a reversion on one side and land in possession on the other (a). It may be money for money or bank-notes for money (b). It may be an intangible thing for a tangible thing.

Remedy for breach.—On the completion of the transaction, the remedy is for possession and not specific performance of the contract of exchange (c).

Completion of an exchange.—The section enacts that rules relating to sale apply to the completion of an exchange. Hence registration would be necessary when the value is over Rs. 100 and consequently an oral transfer in those cases would be invalid (d).

Doctrine of part performance.—In invoking the aid of this doctrine to transactions of exchanges, it must be noted that this doctrine requires certain formalities to be observed as specified in section 53A, the commentaries on which may be referred to.

Lunatic's property.—Exchange of property where a party is a lunatic would be governed by section 49 of the Indian Lunacy Act, IV of 1912.

Pre-emption.—In Mahomedan Law exchange gives rise to a right of pre-emption (e). The Allahabad High Court in a recent case took the contrary view (f), in uniformity with the other decisions of the same Court (g).

Form of conveyance.—A deed is necessary (h). There need not be two instruments (i). Each takes the form of an ordinary conveyance from the one to the other, the consideration being the transfer by the other of his property. It should be executed by both and registered, unless the value of both is below Rs. 100/-.

Vendor and purchaser summons.—Doubt was felt by an English Court as to its jurisdiction inasmuch as the question having arisen on a contract for single exchange (there being no money consideration) the Vendor and Purchasers' Act was not applicable notwithstanding that the contract contained a provision that the

(v) *Raj Narain v. Khobdari Rai* (1901) 5 C. W. N. 724.

(w) *Waliul Hassan v. Maharaj Kumar Gopal* (1902) 6 C. W. N. 905.

(x) *Zemindar of Polavaram v. Maharaja of Pittapuram* (1931) 54 Mad. 163.

(y) *Minet v. Leman* (1855) 24 L. J. Ch. 545, 44 E. R. 193.

(z) *Fateh Singh v. Prithi Singh*, A. I. R. (1930) All. 426; *Ismail Shah v. Saleh Muhammad* A. I. R. (1925) Lah. 326.

(a) *Boulton v. Bustard* (1802) Moore K. B. 665, 72 E. R. 826.

(b) See sec. 121 of the Act.

(c) *Gopi Ram v. Durjan*, A. I. R. (1929) All. 63; *Walsall Railway Co. v. L. & N. W. Railway Co.* (1873) 16 Eq. 433.

(d) *Chidambara v. Vaidilinga* (1915) 38 Mad. 519.

(e) *Bapu v. Maruti* (1907) 3 Nag. L. R. 138.

(f) *Samar Bahadur v. Jit Lal* (1924) 46 All. 359.

(g) *Niamat Ali v. Asmat Bibi* (1885) 7 All. 626; *Bhagwan Singh v. Kharag Singh* (1907) 4 A. L. J. 756; *Daryao Singh v. Jahan Singh* (1909) 31 All. 539.

(h) *Brown v. Patterson* (1899) 43 So. Jo. 298.

(i) *Gopi Ram v. Durjan*, A. I. R. (1929) All. 63.

Act would apply. It was ultimately arranged that the plaintiff should issue a writ instead of the summons (j).

Stamp duty.—On exchange, duty is payable on the value of the property of greatest value under article 31 of the Indian Stamp Act, enhanced in certain parts of the Bombay Presidency by the Bombay Finance Act, 2 of 1932, as amended by Act 6 of 1932.

119. *If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.*

The old section.—In the absence of a contract to the contrary, the party deprived of the thing or part thereof that he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Amendment.—This section has been amended by section 59 of the Amending Act, 20 of 1929, the principal changes being to give the party who suffers the right to demand the return of the thing transferred, provided it is still in the possession of the other party or his legal representative or transferee from him without consideration. It further extends the right originally restricted to the person deprived of the thing to those claiming through him or under him. The right is exercisable whether the deprivation be of the whole or a part.

Title on exchange.—Defect in title does not vitiate an exchange (k). On an exchange each warrants his title to the other as an implied covenant from the one to the other, similar to that in section 55 (2) as on a sale and purchase of immoveable property. Section 119 does not exclude the operation of section 43. A obtained a certain property in exchange from B who at the time of exchange had only a half share, the other half being subsequently acquired by purchase. Held the benefit accrued to A (l). Where the parties to an exchange of lands agreed that "should any objection arise with reference thereto equivalent land should be given back," held the agreement constituted a covenant and not a provision for re-entry on the happening of a condition subsequent (m). On an exchange of lands in the mofussil, there is an implied covenant for title the breach of which gives a cause of action for damages (n).

Eviction.—On eviction the remedy of a party is as provided in the covenants (o), but in the absence of such a contract a party to an exchange or any one claiming

(j) *Re. British Land Co. and Allen's Contract* (1900) 44 So. Jo. 593.

(k) *Gopi Ram v. Durjan*, A. I. R. (1929) All. 63.

(l) *Bhairab Chandra v. Jiban Krishna* (1921) 33 C. L. J. 184.

(m) *Veera Pillai v. Poornambala* (1899) 9 M.

L. J. 137.

(n) *Balusu Veeraraghavalu v. Boppana Manikam* (1916) 31 M. L. J. 380.

(o) *Bartram v. Whichcote* (1833) 6 Sim. 86, 58 E. R. 527.

Ss. 119-120 through or under him, who is deprived of the whole or part of the thing received in exchange, is entitled to damages, or at his option, he may repudiate the transaction altogether and demand the return of the thing transferred, provided the other party or his legal representative or a transferee from him without consideration, is in possession thereof and the remedy is the same whether the deprivation be of the whole or a part received in exchange.

Implied covenant included.—An express covenant excludes the implied covenant. The plaintiff and defendant executed an instrument of exchange and mutually transferred possession of their respective lands. There was no covenant for title or for quiet enjoyment or for re-entry on eviction. Subsequently they executed to each other "security bonds" of which the one executed by the defendant ran, "if any claim or dispute arises I hereby bind myself to settle it. If I do not so get the dispute settled I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Re. 1-4-0 per *kuli* of land for lands which go out of your possession. This security shall be sustainable for 12 years from this date." It was held that the express covenant excluded the covenant implied and arising under sections 119 and 120 on the maxim "*expressum facit cessare tacitum*" (p).

Hindu Law.—Exchange effected by manager of a Hindu family is valid if not challenged by the other members (q).

Limitation for suit on covenant.—Article 143 and not article 113 of the Limitation Act applies. This was held where a deed of exchange was executed in 1903 between plaintiff's father and some of the defendants containing a covenant as implied by section 119 and the plaintiff being dispossessed in 1908, sued in 1916 to recover the lands under the exchange (r).

120. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

Rights and liabilities.—An exchange implies an interchange of property with another, and, except in so far as the price may not be payable in money, the rights and obligations attaching to an exchange are analogous to those of a sale. Section 120 of the Transfer of Property Act lays down that, save as provided in Chapter VI of that Act, each party to an exchange has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of the buyer as to that which he takes. But those rights and liabilities are enforceable between the parties to the exchange *inter se*. Third persons cannot be substituted in the place of either of them, because they cannot give what does not belong to them (s). But the provisions of section 55 which create a charge in favour of vendor and purchaser, viz., 4 (b) and 6 (b), do not apply (t).

Saving.—This refers to the remedy provided in section 119.

(p) *Subramania v. Saminatha* (1898) 21 Mad. 69; *Aspdin v. Austin* (1844) 5 Q. B. N. S. 671, 114 E. R. 1402; *Pallikelagatha Marcar v. Sigg* (1880) 7 I. A. 83.
(q) *Gopi Ram v. Durhan*, A. I. R. (1929) All. 63.
(r) *Sreenivasa v. Johsua* (1919) 42 Mad. 690.
(s) *Samar Bahadur Singh v. Jit Lal* (1924) 46

All. 359; *Eton College (Provost) v. Winchester (Bishop of)* (1774) 3 Wils. 468, 95 E. R. 1161; see *Iranganda v. Ningappa*, A. I. R. (1924) Bom. 517.
(t) *Chidambara v. Vaidilinga* (1915) 38 Mad. 519.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him. S. 121

Exchange of money.

Currency note.—The change of Government currency note for money is not a sale but exchange (*u*). Money exchanged for money would be within this section.

Warranty of exchange of money.—Under this section each party warrants the genuineness of the money given by him.

(u) *Emperor v. Joggesur* (1878) 3 Cal. 379.

CHAPTER VII.

OF GIFTS.

S. 122

122. "Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift" defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

Acceptance when to be made.

If the donee dies before acceptance, the gift is void:

Requisites of a valid gift :—

Parties = Donor and Donee.

Property = Transfer of property, moveable or immovable, existing, not future, tangible, not intangible. Should be properly described.

Consideration = Spiritual benefit or natural love and affection.

Execution = Signed by the donor and attested by at least two witnesses.

Voluntarily = By free consent as defined in section 14 of the Indian Contract Act.

Acceptance = By donee or on his behalf must be made in lifetime and while he is capable of giving. If either donee or donor dies before acceptance, the gift is void.

Registration = Compulsory if property immovable irrespective of value. If property moveable, optional.

Delivery = Unnecessary in case of immovables. If moveables, necessary, unless there be a written instrument which would require registration.

The giving and taking are necessary part of the proposition that there has been a gift. They are not evidence but facts which in themselves constitute the proposition that there has been a gift (v).

Certain.—The property forming the subject of a gift must be specified with a description capable of identification, otherwise the gift would be invalid. See section 21 of the Indian Registration Act, 1908.

Existing.—A gift of future property is void (w). The property must be in existence at the date of the gift. As appears from section 124 it is used in contradistinction to future.

Property.—The subject-matter of the gift may be moveable or immovable property. The Act nowhere defines property. It has been held that the present chapter deals with gifts of tangible property and that the release of a debt is not

(v) *Cochrane v. Moore* (1890) 25 Q. B. D. 57. | (w) See sec. 124 of the Act.

a transfer of ownership and cannot be subject of a gift (x). But it has been held that a gift of a mortgage debt was not valid for want of registration as required by section 123 of this Act (y). The Privy Council has upheld the gift of a part of an immoveable property (z).

Voluntarily.—The gift must be made by free consent as defined in section 14 of the Indian Contract Act, 1872. The word aims at the mental capacity of the donor. The gift is valid if made without pressure or undue influence and the donor knew its effect. If the donee stands in the position of active confidence, the onus is on him to prove good faith (a). There is nothing to prevent an agent from being the bounty of his principal (b). The word “voluntarily,” according to the decision in *Sindha Shri Ganpatsingji v. Abraham alias Vajir* (c), would exclude anything done at the request of the promisor.

Onus.—Where a deed of gift is executed by an old woman which leaves her destitute, the onus is on the donee to prove that the document was explained to her and she understood it and appreciated the effect on her and the deed carried out her intentions. The other side may then shew that some substantial reason existed why the deed should be set aside (d). The absence of power of revocation is a material factor to be considered whether a deed of gift should be set aside or not (e). The onus in case of a *purdah* woman who transacts business and appears before strangers, does not apply (f). In equity the relationship of mother and young daughter raises a presumption of undue influence which may be displaced by the mother proving (1) that the daughter knew and understood what she was doing, and (2) that her disposition to do it was not produced by undue influence. This presumption is not necessarily terminated by the daughter marrying and then leaving the parental home. “Emancipation” is a question of fact to be determined on the evidence given in each case (g).

Consideration.—It is the essence of the gift that it should be without consideration as defined in section 2 (d) of the Indian Contract Act, 1872. Under that Act every contract must under section 10, be supported by lawful consideration within the meaning of section 23, except in cases coming within section 25, sub-section (1) which deals with a gift when the consideration is natural love and affection between parties standing in near relation to each other. Under section 6 (h) (2) of this Act no transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872. The usual practice in conveyancing is to state by way of consideration “natural love and affection” which the donor bears to donee. The word “consideration” as used in the section refers to valuable consideration. A gift without consideration may take the form of natural love and affection or spiritual or moral benefit (h). Mention of an imaginary consideration does not vitiate a gift (i). Source of purchase-money is not the only test of ownership, and when claimant paid the purchase-money and took the property in the name of the defendant, it was held a gift (j). Where

(x) *Mahim Chandra Dey v. Ram Dayal Dutta* (1925) 42 C. L. J. 582.
 (y) *Perumal Ammal v. Perumal Naicker* (1921) 44 Mad. 196.
 (z) *Kalyanasundaram Pillai v. Karuppa Mooppanar* (1926) 54 I. A. 89.
 (a) Sec. 111, Evidence Act, 1872.
 (b) *Phul Chand v. Lakkhu* (1903) 25 All. 358.
 (c) (1895) 20 Bom. 755.
 (d) *Rajaram v. Khandu Balu* (1912) 14 Bom. L. R. 340; *Constance v. Cunningham* (1851) 13 Beav. 363, 51 E. R. 140.

(e) *Rajaram v. Khandu* (1912) 14 Bom. L. R. 341.
 (f) *Sri Ram v. Nand Kishore*, A. I. R. (1925) Lah. 196.
 (g) *Lancashire Loans Limited v. Black* (1934) 150 L. T. 304.
 (h) *Debi Saran v. Nandalal*, A. I. R. (1929) Pat. 591.
 (i) *Ismail v. Hafiz Boo* (1906) 33 Cal. 773 P. C.
 (j) *Ram Narain v. Muhammad Hadi* (1899) 26 Cal. 227 P. C.

- S. 122 parties had lived for a number of years as man and wife without marriage, their Lordships of the Privy Council observed they would have to consider whether they could not be regarded as "standing in near relation to each other" under section 25 (1) of the Indian Contract Act (*k*). Parents of a Mahomedan wife have been regarded as such (*l*).

Donor.—The transferor in a deed of gift is called the donor. The rule of acceptance that the donor must be capable of giving indicates that a minor, lunatic or other person incompetent to contract cannot make a valid gift, and this is the law both under section 7 of this Act, as to which see commentaries thereon, and also under section 11 of the Indian Contract Act, 1872. It is necessary that the donor must be not only living but capable of giving at the time of acceptance.

Donee.—The transferee in a deed of gift is called the donee. The gift must be accepted by him or on his behalf. If he dies before acceptance the gift is void. His minority or lunacy is no bar either under section 7 of this Act or section 11 of the Indian Contract Act. Where he is disqualified to be a transferee an acceptance of an onerous gift is not binding on him under section 127. In case of two or more donees the rule in section 125 applies. Following the presumption of English Law that donees take as joint tenants and relying on illustration to section 93 (now section 106) of the Indian Succession Act, 1925, the Madras High Court held that where there were no words in the instrument of gift which indicate an intention to create tenancies in common, the presumption of English Law applies. The Court refused to apply the rule in section 45 of this Act to gifts (*m*). In India the presumption in Hindu Law is the other way, except in the case of a coparcenary between members of an undivided family (*n*). Delivery is one mode of indicating acceptance, though registration is not (*o*). A gift in favour of a minor is valid (*p*). Acceptance was inferred on a gift by a mother to her son and his wife, both being minors, though she retained the instrument of gift and paid taxes and there was no mutation of names (*q*). Delivery of deed has been held enough (*r*).

Acceptance.—This is the essence of the transaction. A gift not accepted is void. A gift is void (1) if the donor dies before acceptance, (2) if the donor is not capable of giving at the moment of acceptance, (3) if the donee dies before acceptance, (4) if there be no acceptance by the donee or on his behalf. At the moment of acceptance there must be on the part of the donor capacity to give and on the part of the donee capacity to receive. There is a valid acceptance where the father as donor and guardian of his minor son obtains mutation of names (*s*). Acceptance by a donee incapable of signifying his acceptance by reason of his age or of his being an impersonal being as deity, is valid if made on his behalf by somebody competent to act as an agent (*t*). Acceptance of a gift may be made by a minor

(*k*) *Maharaja Kumar Gopal Saran v. Sita Devi* (1931) 36 C. W. N. 392 P. C.

(*l*) *Nisar Ahmad v. Rehmat Begam*, A. I. R. (1927) Oudh 146.

(*m*) *Arakal v. Domingo* (1911) 34 Mad. 80; *Mankamna v. Balkishan Das* (1906) 28 All. 38.

(*n*) *Damodardas v. Dayabhai* (1898) 22 Bom. 833; *Jogeswar Narain v. Ram Chandra* (1896) 23 Cal. 670, 23 I. A. 37; *Gopi v. Mst. Jaldhara* (1913) 33 All. 41; *Kishori Dubain v. Mundra Dubain* (1913) 33 All. 665.

(*o*) *Deo Saran v. Deoki Bhonthi* (1924) 3 Pat. 842.

(*p*) *Sadiq Ali Khan v. Jai Kishore* (1928) 30

Bom. L. R. 1346, 1347 P. C.

(*q*) *Venkataramayya v. Nagamma*, A. I. R. (1932) Mad. 272.

(*r*) *Balmakund v. Bhagwan Das* (1892) 14 All. 185; *Man Bhari v. Naunidh* (1882) 4 All. 40; *Venkatasubba v. Subba Rama* (1928) 52 Bom. 913 P. C.; *Atmaram Sakharan v. Vaman Janardhan* (1924) 49 Bom. 388; *Kalyanasundaram v. Karuppa* (1927) 50 Mad. 193, 54 I. A. 89.

(*s*) *Krishnapal Singh v. Sir Raj Kuar*, A. I. R. (1927) Oudh 278.

(*t*) *Deo Saran v. Deoki Bharathi* (1924) 3 Pat. 842.

donee under section 122 without the intervention of a guardian (u). For acceptance of an onerous gift a separate and express acceptance is not necessary. If the donee received the deed of gift and never thought of doing anything contrary to its terms, there would be acceptance (v). In English Law assent by a donee is presumed until and unless he disclaims (w). It vests subject to repudiation (x), and the same principle is extended to onerous gifts (y). As the English rule does not apply to India, there is no presumption of acceptance operating immediately upon the gift, whether known or not known to the donee (z). Again, the terms of section 122 render the gift void, if the donee dies before acceptance. Acceptance in India may be express or implied, as in case of a gift by husband to wife of immoveable property, followed by mutation of names (a). In cases between husband and wife mutation means delivery of possession and acts of the husband after mutation are acts on behalf of his wife (b).

Unborn person.—Such a person cannot be a donee under the Act by reason of the rule in the section. Nor can it be made under Mahomedan Law (c). The Hindu Law which at one time prohibited transfers to an unborn person, has given legislative sanction to them (d).

Idol.—An idol is regarded as a juridical person capable of holding property (e). Yet a juristic person is not a living person for all purposes (f). The principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, does not apply to an idol. The idol is virtually treated as a visible symbol of the deity supposed or believed to exist from eternity (g). It need not be in existence at the date of the gift (h). Neither is the actual installation nor the construction of a temple necessary for validating such a gift (i). But in all these cases the deity should be named, otherwise the gift is void for uncertainty (j). Destruction of the image does not affect the endowment. The religious purpose survives the mutilation or destruction. A new image may be established and consecrated in order that it may be worshipped as intended by the original founder (k). A dedication of an idol and land for the building of a temple for the same is not a gift within section 122. The word "donee" in that section refers to an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused and has no application to an unascertained number of persons such as the public. The Trust Act is inapplicable to a religious endowment. A dedication to the public does not require registration under section 122 (l). The object of the bounty must be certain (m). A *math* like an

- (u) *Ganeshdas Bhiwraj a firm* (1917) 13 Nag. L. R. 18 (liable to be questioned); *Narayana Chetty v. Logalinga Chetty* (1910) 33 Mad. 312, 314.
- (v) *Sarba Mohan v. Manmohan Banerjee* (1932) 37 C. W. N. 149.
- (w) *Xenos v. Wickham* (1863) 2 H. L. 296; *London and County Banking Co. v. London & River Plate Bank* (1883) 21 Q. B. D. 535.
- (x) *Standing v. Bowring* (1885) 31 Ch. D. 282.
- (y) *Siggers v. Evans* (1865) 3 E. & B. 367; *Standing v. Bowring* (1885) 31 Ch. D. 282.
- (z) *Anandi Devi v. Mohan Lal* (1932) 54 All. 534.
- (a) *Anandi Devi v. Mohan Lal* (1932) 54 All. 534.
- (b) *Ma Mi v. Kallander Ammal* (1926) 25 A. L. J. 69.
- (c) *Mahomed Shah v. Official Trustee of Bengal* (1909) 36 Cal. 431; *Abdul Cader v. Turner* (1884) 9 Bom. 158.
- (d) See commentaries on sec. 13 of this Act.
- (e) *Jugundra Nath Roy v. Hemanla Kumari*

- Debi* (1905) 32 Cal. 129, 31 L. A. 203.
- (f) *Narasimha Swami v. Venkataalingam* (1927) 50 Mad. 687; *Pallayya v. Ramavadhanulu* (1903) 13 M. L. J. 364; *Ramalinga Chetty v. Sivachidambara Chetty* (1919) 42 Mad. 440; *Tammireddy v. Gangireddy* (1922) 45 Mad. 281.
- (g) *Bhupati Nath v. Ram Maitra* (1909) 37 Cal. 128; *Nogendra v. Benny Krishna* (1902) 30 Cal. 521 overruled.
- (h) *Chaturbhuj v. Chatarjit* (1911) 33 All. 253; *Mohan Singh v. Hal Singh* (1910) 32 All. 332.
- (i) *Sarat Sukh v. Ram Prasad* (1924) 46 All. 130.
- (j) *Phemdari Lal v. Arya Prithi Nidhi* (1911) 33 All. 793; *Chandi Charan v. Haritola* (1919) 46 Cal. 951.
- (k) *Bijoychand v. Kalipada* (1914) 41 Cal. 57.
- (l) *Pallayya v. Ramavadhamulu* (1903) 13 M. L. J. 364.
- (m) *Roberts v. Roberts* (1865) 13 L. T. 492.

S. 122 idol, is a juridical person capable of acquiring, holding and vindicating legal rights, through the medium of some human agency (n).

Mosque.—A mosque is a juristic person and a valid gift of immoveable property can be made to it (o).

“ Dharam.”—A bequest to *dharam* as also a gift is void, as being too vague and uncertain for the administration of them to be under any control (p). The law is the same in the mofussil (q). A gift to a society known as Dharam Samaj (for the spread of Sanskrit learning) prior to its registration was held void as there was no person at the date of the gift who could hold the property (r). And a bequest to Dharmath, *dharamsala* and Sanskrit education which had to be read disjunctively so that the trustees could apply the funds to any one of them and where one of three objects was invalid, the whole bequest became void owing to the co-relation of the invalid with the valid objects (s).

“ Dan.”—Literally means a gift and for all material purposes is governed by the Act (t).

Gift to God.—Such a gift is not a gift to a living person so as to require registration (u).

Fiduciary relation.—Where gifts are made to persons in fiduciary relation, the onus is on the person filling a fiduciary character to shew conclusively that he has acted honestly and *bona fide* and without influencing the donor who has acted independently of him (v). As to obligation upon persons taking benefits from *purdanashin* ladies see cases below (w). In a gift two points generally emerge, first, that the transaction is by a person who has understood its nature and effect, secondly, whether it is in favour of a person who by reason of his fiduciary position is under a special liability to establish good faith as defined by section 111 of the Indian Evidence Act (x).

Onus.—When a registered deed of gift is impugned as being a colourable transaction, the burden of proof is upon those who dispute the gift (y).

Barrister and client.—Gift by the former to the latter cannot be supported (z).

- (n) *Babajirao v. Laxmandas* (1904) 28 Bom. 215.
 (o) *Maula Bakhsh v. Hafizuddin*, A. I. R. (1926) Lah. 372.
 (p) *Ranchordas v. Parvatibai* (1899) 23 Bom. 725, 26 I. A. 71; *Morice v. Bishop of Durham* (1805) 10 Ves. 522; *Devshankar v. Motiram* (1894) 18 Bom. 136; *Cursondas v. Vandravandas* (1890) 14 Bom. 482.
 (q) *Devshankar v. Motiram* (1894) 18 Bom. 136.
 (r) *Mathura Kuar v. Dharam Samaj* (1916) 14 A. L. J. 1038.
 (s) *Brij Lal v. Narain Das* (1933) 14 Lah. 827; *Venkatanarasimha Rao v. Subba Rao* (1923) 46 Mad. 300; *Hoerston v. Burns* (1918) A. C. 337; *Blair v. Duncan* (1902) A. C. 37.
 (t) *Debi Saran v. Nandalal Chaubey*, A. I. R. (1929) Pat. 591.
 (u) *Narasimha Swami v. Venkatalingum* (1927) 50 Mad. 687.
 (v) *Wajid Khan v. Ewaj Ali Khan* (1891) 18 Cal. 545.
 (w) *Sunitabala Debi v. Dhara Sundari* (1920) 47 Cal. 175 P. C.; *Geresh Chunder v. Msl. Bhuggobully* (1870) 13 M. I. A. 419; *Ismail Mussajee v. Hafiz Boo* (1906) 33 Cal. 773; *Shambhaji Koer v. Jago Bibi* (1902) 29 Cal.

- 749; *Bholanath v. Mrityunjoy* (1934) 59 C. L. J. 532; *Ruhulla v. Hassanali* (1928) 32 C. W. N. 929; *Ashgar Ali v. Delroos Banoo* (1878) 3 Cal. 324 P. C.; *Sudisht Lal v. Mt. Sheobarat Koer* (1881) 7 Cal. 245, 8 I. A. 39; *Farid-un-nisse v. Mukhtar Ahmad* (1925) 47 All. 703, 52 I. A. 342; *Kali Bakhsh v. Ram Gopal* (1914) 36 All. 81, 41 I. A. 23; *Mt. Mushrafi Begum v. Kundan Lal*, A. I. R. (1933) Oudh 365; *Laxmi Narain v. Mohmdia Begam*, (1932) 7 Luck. 454; *Shaik Ismail v. Amirbibi* (1902) 4 Bom. L. R. 146; *Lala Kalyan Mal v. Ahmad Uddin Khan* (1934) 36 Bom. L. R. 981; *Deo Kuar v. Man Kuar* (1895) 17 All. 1, 21 I. A. 148; *Kamawati v. Digbijai* (1921) 43 All. 525, 48 I. A. 378.
 (x) *Benoy Krishna v. Santi Charan* (1935) 62 C. L. J. 99.
 (y) *Nawab Mirza v. Nawab Fakr Jahan* (1935) 62 C. L. J. 326.
 (z) *Brown v. Kennedy* (1864) 4 De. G. J. & Sm. 217, 46 E. R. 901; *Mostyn v. Mostyn* (1870) 5 Ch. App. 457; *R. v. Doutre* (1884) 9 A. C. 745; *Wells v. Wells* (1914) P. 157

Solicitor and client.—A gift by client to his solicitor is vitiated on the ground of public policy (a), owing to the crushing influence of an attorney over a man whose affairs are in his hands ; but the effect of that influence may be removed by evidence (b). Similarly, a gift without independent advice by a client to the solicitor's wife (c) or son (d) will not be sustained.

Incomplete gift.—In such cases the Court directs the donee to return the thing or pay its value. A gift of Government promissory notes not duly endorsed (e), incomplete voluntary assignment of turnpike shares and securities (f), delivery of title-deeds which could not be separated from the equitable mortgage created by its deposit (g), delivery of the mortgage deed by a mortgagee of a share in a certain sum of consols, intending to make a gift of the mortgage (h), an oral gift which is required by law to be in writing (i) would not be valid. In these cases the nature of the property precludes possession, in cases when possession is required by law and the Court regards that the donor has done all that he could to complete the gift (j). In the case of oral gift, the Courts of Calcutta (k) and Rangoon (l) have adopted a different view.

Imperfect gift not construed as trust.—An imperfect gift will not be construed as a declaration of trust. An intention to create a trust is essential to the creation of one, and when a man purports to make a gift, he cannot reasonably be supposed to have intended to declare himself a trustee—a character which assumes that he retains the property (m). The Courts will not erect a trust on the imperfect gift (n).

Gift followed by an equitable mortgage.—In taking an equitable mortgage care must be taken to ascertain that the mortgagor has not made a gift of his property to his minor child for in that case he would be able to produce the deeds as from his custody and thus throw the lender off his guard disarming suspicion by production.

Corporation.—According to section 5 of the Act, a corporation is included in the term "living person" and may transfer or acquire property. Being a statutory creature, it cannot go beyond the statute, and to say that it has all the rights of a living person would be to travel on a wrong line of thought (o). Hence its power to transfer is limited by the terms of its incorporation (p), unless it be in the shape of a gratuity being one of the recognized modes of its business (q).

- (a) *O'Brien v. Lewis* (1863) 32 L. J. Ch. 569.
- (b) *Re. Holmes Estate, Woodward v. Hempage* (1861) 3 Giff. 337, 66 E. R. 439.
- (c) *Liles v. Terry* (1895) 2 Q. B. 679; *Lloyd v. Coote & Ball* (1915) 1 K. B. 242.
- (d) *Willis v. Barron* (1902) A. C. 271.
- (e) *Merbai v. Perozbai* (1881) 5 Bom. 268; *Khursedji v. Pestonji* (1888) 12 Bom. 573.
- (f) *Searle v. Law* (1846) 15 Sim. 95.
- (g) *Shillito v. Hobson* (1885) 30 Ch. D. 396.
- (h) *Hancock v. Berrey* (1888) 36 W. R. 710.
- (i) *Kuverji v. Municipality of Lonavla* (1920) 45 Bom. 164; *Varada Pillai v. Jeevarathnammal* (1920) 43 Mad. 249 P. C.; *Hira Mani v. Annol* (1928) 26 A. L. J. 944; *Girija Prasad v. Purshottam* (1926) 28 Bom. L. R. 421; *Hiralal v. Gaurishankar* (1928) 30 Bom. L. R. 451; *Hira Mani Singh v. Annol Singh*, A. I. R. (1928) All. 689.
- (j) *Kalidas v. Kanhaya Lal* (1885) 11 Cal. 121, 11 L. A. 218; *Mahomed Baksh v. Hooseini Bibi* (1888) 15 Cal. 584, 15 L. A. 81.

- (k) *Pran Mohan v. Hari Mohan* (1925) 52 Cal. 425.
- (l) *M. P. L. M. P. Chetty v. Ma Ngwe Sin* (1923) 1 Rang. 665; *Ma Shin v. Maung Hman* (1923) 1 Rang. 651.
- (m) *Natha Gulab & Co. v. Shaller* (1923) 25 Bom. L. R. 599; *Milroy v. Lord* (1862) 4 De. G. F. & J. 264; *Richards v. Delbridge* (1874) 18 Eq. 11; *Sir Jamsetji Jijibhai v. Sonabai* (1865) 2 B. H. C. R. 133; *Ashabai v. Haji Tye* (1882) 9 Bom. 115, 122.
- (n) *Manchershaw v. Ardeskir* (1908) 10 Bom. L. R. 1209; *Janki Das v. East Indian Railway Co.* (1884) 6 All. 634.
- (o) *Wenlock (Baroness) v. River Dee Co.* (1883) 36 Ch. D. 675.
- (p) *Eastern Countries Rly. Co. v. Hawkes* (1855) 5 H. L. Cas. 331.
- (q) *Taunton v. Royal Insurance Co.* (1864) 33 L. J. Ch. 406, 71 E. R. 413; *Warren v. Lambeth Waterworks* (1905) 21 T. L. R. 685.

S. 122

Shares in limited company.—A gift of shares transferable only by entry in the books of the company and not so transferred, is imperfect. Mere execution of transfer deed and delivery of possession to the donee are not enough (r).

Fraudulent transfer.—Gifts which come within the operation of clause (1) or clause (2) of section 53 of this Act are voidable and those within section 55 of the Presidency Towns Insolvency Act or section 53 of the Provincial Insolvency Act are void.

Specific performance.—An agreement to make a gift is not capable of specific performance (s).

Part performance.—This doctrine does not apply to an agreement to make a gift though coupled with actual transfer of possession (t). It has no application to gifts (u).

Hindu Law.—The Hindu Law of gift has been expressly abrogated by section 129 of the Act (v). In construing the intentions of a Hindu donor it has to be regarded that notions present to the mind of a Hindu donor are often different from those of an English donor, even though much the same form of words are used by both (w). Under Hindu Law the essential ingredients which constitute a gift, whether of moveable or immovable property, are the *Sankals* and *Samarpan* whereby property is completely given away and the owner completely divests himself of the ownership in the property (x).

Prior to the Amending Act, 20 of 1929, section 123 of this chapter alone was made applicable to Hindu gifts, but since the Amending Act, 20 of 1929, the whole chapter has been extended to them. The rule that the donee must be in existence differs in Hindu Law, where a gift to an unborn person has received legislative sanction (y). Under the Mitakshara Law, a manager of a joint Hindu family cannot alienate, except for family necessity or with the consent of adult co-parceners. But an unauthorized alienation is only voidable at the option of the other co-parceners and this applies equally to "gifts" of joint family property, as to sales and mortgages (z). In Hindu Law a father cannot make a gift of any portion of the joint family immovable property to the daughter (a), nor can he make a gift of property purchased out of income of ancestral property after a son has been conceived (b). A gift of the entire estate by the widow with the consent of the next reversioner is valid as being a surrender to the reversioner and a gift by the latter (c). A deposit by a Hindu of money in a bank in the joint names of himself and wife is not a gift to the wife, but there is a resulting trust in favour of the husband, for in India there is no presumption of an intended advancement in favour of a wife (d) or mistress (e). In India "the criterion in these cases is to consider

(r) *Amarendra v. Monimunjary Debi* (1921) 48 Cal. 986; *Milroy v. Lord* (1862) 4 De. G. F. & J. 264; *Richards v. Delbridge* (1874) L. R. 18 Eq. 11.

(s) *Hiralal v. Gaurishankar* (1928) 30 Bom. L. R. 451; see sec. 21 (d) of the Specific Relief Act, 1877.

(t) *Hiralal v. Gaurishankar* (1928) 30 Bom. L. R. 451.

(u) *Maung Hla Maung v. Maung Po. Htai*, A. I. R. (1929) Rang. 316; *Hiralal v. Gaurishankar* (1928) 30 Bom. L. R. 451; but see *Pran Mohan Das v. Hari Mohan Das* (1925) 52 Cal. 425.

(v) *Debi Saran v. Nandalal Chaubey*, A. I. R. (1929) Pat. 591.

(w) *Kandarpamohan v. Akshaychandra* (1934) 61 Cal. 106.

(x) *Deo Saran v. Deoki Bharthi* (1924) 3 Pat.

842.

(y) Hindu Disposition of Property Act, XV of 1916.

(z) *Riasat Ali v. Iqbal Rai* (1935) 16 Lah. 659.

(a) *Jinnappa v. Chimmava* (1935) 59 Bom. 459.

(b) *Ramanna v. Venkata* (1838) 11 Mad. 246; *Deo Narain v. Ganga Singh* (1915) 37 All. 162.

(c) *Yeshwanta v. Antu* (1934) 58 Bom. 521.

(d) *Guran Ditta v. Ram Ditta* (1928) 55 Cal. 944; 55 I. A. 235; *Gopeekrist v. Gunapersaud* (1854) 6 M. I. A. 53; *Kerwick v. Kerwick* (1920) 48 Cal. 260, 47 I. A. 275; *Moulvies Sayyad v. Mst. Bebee Ultaj Fatima* (1869) 13 M. I. A. 232; *Lakshmiah Chetty v. Kothandarama* (1925) 48 Mad. 605, 52 I. A. 286.

(e) *Bilas Kumwar v. Desraj Ranjit Singh* (1915) 37 All. 557, 42 I. A. 202.

from what source the money comes with which the purchase-money is paid" (f). A similar rule was applied where the deposit was in the name of "Mr. & Mrs. Hope payable to either or survivor" the deposit certificates and bank receipts remaining with Mr. Hope (g). A transfer without consideration stated to be *banazar parwarish* is a gift. The words *banazar parwarish* indicate motive and not consideration (h). A gift of a moiety of a taluka by a Hindu to his daughter-in-law "for support and maintenance" declaring her *malik mustaquil*, was held to confer upon her an absolute estate (i). So also the words "for your maintenance" parcel of the words of gift, were likewise construed (j). A similar construction was placed on the word "malik" where there was nothing definite to the contrary to qualify the meaning of the expression as conferring an absolute estate (k). Where the words *malik makhalikar* (owner in possession) were used in a will, as well as the word "*uttara-dhikari*," but no power of absolute disposition was given to the widow but only a power to sell for payment of debts of testator, it was held that she took only a widow's estate. It is well established that if an estate be given to a man simply, without words of inheritance, it would, in the absence of conflicting context, carry by Hindu Law an estate of inheritance and this principle would also apply if the donee was a woman (l). Gift of income was held to carry the whole estate, in a case where the settlor in consideration of natural love and affection to his children and grandchildren conveyed certain immoveable property to the trustees, upon trust to pay the income to him for life, and on his death to his daughter during life, and on her death in trust for her male heirs, on the ground that the gift in favour of the daughter's heirs was a valid gift under Hindu Law inasmuch as they did not take by inheritance and it was by virtue of a wholly independent gift that they were beneficiaries under the deed of gift though in form a gift of income carried the whole estate (m). When the donor has handed over to the donee the deed of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke prior to the registration of the instrument (n).

"Sankalap."—A gift of immoveable property by a Hindu by way of *sankalap* would not be a valid gift. It cannot divest the donor of the proprietary rights or clothe the donee with title without a registered instrument. The provision of the statute is both mandatory and imperative (o).

"Nibandha."—A release to the defendant for payment to plaintiff of assessment of certain lands is not a sale but a gift. Being *nibandha*, under Hindu Law it is immoveable property. If not registered it would be inoperative (p).

Mahomedan Law.—The incidents of a gift between two Mahomedans are governed by the Mahomedan Law and not by the Transfer of Property Act, 1882 (q). The special features of that law are untouched by the provisions of this chapter (r). Under Mahomedan Law a gift requires declaration, acceptance and delivery.

(f) *Dhurn Das Panday v. Shama Soondri Dibiah* (1843) 3 M. I. A. 229.
 (g) *Paul v. Nathaniel* (1931) 29 A. L. J. 417.
 (h) *Ram Pragash v. Mt. Bhikna*, A. I. R. (1925) Pat. 151.
 (i) *Bishnath v. Chandika* (1933) 55 All. 61 P. C.
 (j) *Jogeswar Narain v. Ram Chandra* (1896) 23 Cal. 670, 23 I. A. 37.
 (k) *Surajmani v. Kabi Nath* (1907) 30 All. 84, 35 I. A. 17.
 (l) *Basant Kumar Basu v. Ramshankar Ray*

(1932) 59 Cal. 859.
 (m) *Madavrao v. Balabhai* (1928) 30 Bom. L. R. 282 P. C.
 (n) *Venkat Subba v. Subba Rama* (1928) 30 Bom. L. R. 827.
 (o) *Hira Mani Singh v. Anmol Singh*, A. I. R. (1928) All. 689.
 (p) *Madhavrao v. Kashibai* (1910) 34 Bom. 287.
 (q) *Babu Lal v. Ghansham Das* (1922) 44 All. 633.
 (r) See sec. 129 of the Act.

S. 122 Writing is not essential. If evidenced by writing, such writing does not require registration or attestation (*s*). To validate a gift actual possession is essential (*t*), unless both the donor and donee reside in the property which is the subject of the gift, or the land is occupied by tenants and a request is made to them to attorn to the donee (*u*), or the donee is a minor (*v*), or in the case of a gift by a father or guardian of the donee of property in possession of the donor (*w*), or between husband and wife when the deed of gift recites and declares that possession has been delivered followed by delivery of the deed (*x*), or the donor and donee are in the position of *loco parentis* (*y*). The fact that the donor has been maintaining the donee and his father and living with them would not be sufficient to dispense with delivery of possession (*z*). Property in the possession of a tenant, mortgagee or wrong-doer can be the subject-matter of a valid gift under the Mahomedan Law and *khas* possession in such a case is not necessary. Where the donor or his heirs did not appear to challenge the gift and the donor placed the documents of title and documentary evidence in the possession of the donee and put in his powers the means to establish title and recover possession from the alleged tenants in possession and had expressly asked to give up possession to the donee, held, that such acts on the part of the donor amounted to such delivery of possession as the subject-matter of the gift was capable of (*a*).

A gift of an undivided share in a property, the donee being admitted into possession with the donor, is valid under Mahomedan Law though such property is capable of partition (*b*). Mahomedan Law does not recognize a gift of future property (*c*) nor does it recognize life estates and contingent interests. An absolute gift by will restraining alienation and limiting devolution is valid without such restraint or limitation (*d*). Later decisions have adopted a different view (*e*). It has been observed that Government promissory notes being securities bearing interest, cannot be the subject of dedication to God and there can be no *wakf*. On this point, there is a conflict in India. The Chief Court of Oudh overruled this

- | | |
|---|---|
| <p>(s) <i>Nasib Ali v. Wajid Ali</i>, A. I. R. (1927) Cal. 197; <i>Kamarunissa Bibi v. Hussaini Bibi</i> (1880) 3 All. 266; <i>Karam Ilahi v. Sharfuddin</i> (1910) 38 All. 212; <i>Abdul Rahman v. Gaya Prasad</i>, A. I. R. (1929) Oudh 435; <i>Tabera v. Ajodhya</i>, A. I. R. (1929) Pat. 417; <i>Nasib Ali v. Munshi Wajid Ali</i> (1926) 44 C. L. J. 490; <i>Qamar-ud-din v. Mst. Hassan Jan</i> (1935) 16 Lah. 629.</p> <p>(t) <i>Shaik Ibrahim v. Shaik Suleman</i> (1885) 9 Bom. 146; <i>Bibi Khaver Sultan v. Bibi Rukhia Sultan</i> (1905) 28 Bom. 468; <i>Khajooroonissa v. Rowshan Jehan</i> (1876) 2 Cal. 184; <i>Gani Miya v. Wajid Ali</i> (1935) 39 C. W. N. 882; <i>Qamar-ud-din v. Mst. Hassan Jan</i> (1935) 16 Lah. 629.</p> <p>(u) <i>Shaik Ibrahim v. Shaik Suleman</i> (1885) 9 Bom. 146 (tenant); <i>Emnabai v. Hajra Bai</i> (1889) 13 Bom. 352 (husband to wife); <i>Humera Bibi v. Najmun-nissa</i> (1906) 28 All. 147 (uncle to nephew); <i>Kandath Veetil v. Musaliam</i> (1907) 30 Mad. 305 (mother to daughter); <i>Rahmat Ali v. Mt. Daulat Bibi</i>, A. I. R. (1925) Lah. 501 (donor and donee lived together); <i>Ajagar Hazar v. Annammah</i>, A. I. R. (1927) Mad. 572; <i>Allah Rakha v. Ali Muhammad</i>, A. I. R. (1929) Lah. 45 (minor donee); <i>Jhumman v. Hussain</i>, A. I. R. (1931) Oudh 7 (donor declared possession given); <i>Muhammad Hassan v. Lafdar Mirza</i>, A. I. R. (1933) Lah. 601 (father to minor son); <i>Qamaruddin v. Mt. Hassan Jan</i>, A. I. R. (1935) Lah. 795 (donor and donee living together).</p> | <p>(v) <i>Sugrabai v. Mahomadalli</i> (1934) 36 Bom. L. R. 1151; <i>Ameeroonissa Khatoon v. Abdeonissa Khatoon</i> (1875) 15 Beng. L. R. 67, 2 I. A. 87; <i>Mirza Ladik Husain v. Nawab Saiyed Hashim</i> (1916) 18 Bom. L. R. 103, 43 I. A. 212; <i>Mohammad Sadiq v. Fakhr Jahan Begam</i> (1932) 6 Luck. 556, 59 I. A. 1.</p> <p>(w) <i>Gani Miya v. Wajid Ali</i> (1935) 39 C. W. N. 882.</p> <p>(x) <i>Nawab Mirza v. Nawab Fakr Jahan</i> (1935) 62 C. L. J. 326.</p> <p>(y) <i>Nawab Mirza v. Nawab Fakr Jahan</i> (1935) 62 C. L. J. 326.</p> <p>(z) <i>Musa Miya v. Kadar Bux</i> (1928) 52 Bom. 316, 55 I. A. 171; <i>Gani Miya v. Wajid Ali</i> (1935) 39 C. W. N. 882 (donee grandson).</p> <p>(a) <i>Gani Mia v. Wajid Ali</i> (1935) 39 C. W. N. 882; <i>Tara Prasanna v. Shandi Bibi</i> (1922) 49 Cal. 68; <i>Mehdi Hasan v. Muhamma Hasan</i> (1906) 28 All. 439, 33 I. A. 68; <i>Khajooroonissa v. Rowshan Jehan</i> (1876) 2 Cal. 184, 3 I. A. 291.</p> <p>(b) <i>Ala Baksa v. Mahabhat Ali</i> (1935) 39 C. W. N. 882.</p> <p>(c) <i>Amtul Nissa v. Mir Nurudin</i> (1898) 22 Bom. 489.</p> <p>(d) <i>Abdul Karim v. Abdul Qayum</i> (1906) 28 All. 342 (will); <i>Nizamudin v. Abdul Gopan</i> (1889) 13 Bom. 264 (<i>wakf</i>).</p> <p>(e) <i>Saroubai v. Hussein Somji</i> (1937) Bom. 18; <i>Amjad Khan v. Ashraf Khan</i> (1929) 31 Bom. L. R. 809, 56 I. A. 213; <i>Rasoolbibi v. Usuf Ajam</i> (1933) 57 Bom. 737.</p> |
|---|---|

contention in view of modern ideas (*f*). A gift of *mushaa* is not void but only Ss. 122-123 invalid. If a gift is invalid on the ground of *mushaa*, possession given and taken under it transfers the property to the donee (*g*).

Limitation.—Suit to set aside a gift on the ground of undue influence is governed by article 91 and three years run from the date when the plaintiff discovered the true nature of the deed and not from the date when he escaped from the influence by which he alleges he was dominated (*h*).

Buddhist Law.—It is not competent to a Burman Buddhist to make a gift disposing of his property contrary to the law of inheritance (*i*). To validate a gift actual delivery of possession is necessary unless it be to a grandchild. The necessity for delivery has been abrogated by the amendment of section 129 (*j*). A gift by a monk is invalid (*k*) unless of a *poggalika* (*l*). It has been doubted whether a woman can make a gift to her sister without her husband joining (*m*). So a husband cannot make a valid gift without his wife's consent of joint property of the marriage (*n*). It is not competent for a Burman Buddhist to make a death-bed gift (*o*). Husband and wife are not joint tenants. Each is entitled to alienate his interest by way of gift or otherwise (*p*).

Parties not lawfully married.—A grant of an annuity by a Hindu Brahmin in favour of a divorced Australian wife who had been converted to Hinduism and married under the Arya Samaj rites, was held not to be a contract but a gift not dependant on the validity of the marriage (*q*).

Part of immoveable property.—Such a gift has been sustained by the Privy Council though the question before their Lordships was different (*r*). A gift of an undivided share by a father to his infant son has been upheld (*s*).

Restraint on alienation.—A grant with a restraint on alienation is repugnant to a gift (*t*).

Donor's liabilities.—The principle of law is that you cannot look a gift horse in the mouth. If damage is suffered by the donee, the donor is not liable unless he knew the evil character of the gift and failed to warn the donee (*u*).

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

(*f*) *Nawab Mirza Mohammad v. Nawab Fakar Jahan* (1935) 62 C. L. J. 326, 339 P. C.

(*g*) *Mofezuddin v. Abed Ali* (1935) 62 C. L. J. 424.

(*h*) *Someshwar v. Tirbhawan* (1934) 9 Luck. 178, 61 I. A. 224.

(*i*) *Ma Thin Myaung v. Maung Gyi* (1923) 1 Rang. 351.

(*j*) *U. Pandarvan v. U. Sandima* (1924) 2 Rang. 131.

(*k*) *U. Meda v. U. Sandima* (1923) 1 Rang. 494.

(*l*) *Pandarvan v. U. Sandima* (1924) 2 Rang. 131.

(*m*) *Ma Pwa Sein v. Maung Ba Saw*, A. I. R. (1929) Rang. 243.

(*n*) *U. Po O v. Ma Tok Gyi* (1929) 7 Rang. 374.

(*o*) *Ma Pwa Seni v. Maung Ba Saw*, A. I. R.

(1929) Rang. 243; *U. Tezauunta v. Maung Saw Pe* (1932) 10 Rang. 224.

(*p*) *U. Pe. v. U. Maung Maung Kha* (1932) 10 Rang. 261, 59 I. A. 216.

(*q*) *Maharaja Kumar Gopal Saran v. Sita Devi* (1931) 36 C. W. N. 392; see *James v. Holmes* (1862) 4 De. G. & J. 470, 45 E. R. 1266; *Soar v. Foster* (1858) 4 K. & J. 152, 70 E. R. 64.

(*r*) *Kalyanasundaram v. Karuppa* (1927) 50 Mad. 193, 54 I. A. 89.

(*s*) *Joitaram v. Ramkrishna* (1903) 27 Bom. 31.

(*t*) *Padmanund v. Hayes* (1901) 28 Cal. 720; see commentaries on sec. 10 of this Act.

(*u*) *Lowery v. Walker* (1910) 1 K. B. 173; *Jones v. Egerton* (1867) 2 C. P. 371.

S. 123

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Formalities.—A gift of immoveable property must be effected

- (1) by a registered instrument,
- (2) signed by or on behalf of the donor, and
- (3) attested by at least two witnesses.

In case of moveable property either

- (1) as aforesaid in (1) and (2) or
- (2) by delivery as goods sold under section 33 of the Sale of Goods Act, III of 1930. Here attestation is not required (v).

A gift which includes both moveable and immoveable properties, invalid as to the latter, will nevertheless be valid as to moveables, provided the rules in respect thereof are complied with (w). Where, however, the point arose in respect of a transfer by way of gift under an unregistered instrument of certain mortgage debts, book debts and promissory notes and the gift of mortgage debts was held invalid, the gift of the other items was upheld, not under Chapter VII but under Chapter VIII (x). The section is mandatory, and its requirements must be strictly complied with, although plea may not be definitely taken under it (y).

Delivery.—This is one of the two ways of effecting a gift of moveables. It is one of the recognized modes of acceptance which is necessary even in case of gifts of moveables. It is made in the same way as goods sold under section 33 of the Sale of Goods Act (corresponding to section 90 of the Indian Contract Act repealed) (z). An oral gift may be established by satisfactory oral evidence (a). Registration is not delivery (b). Although a verbal declaration by a Hindu may be effective in spite of section 123, the dedication must be real whereby the property is completely given away and the owner completely divests himself of his ownership (c). Possession must be transferred from the donor to the donee and the cases of gifts of moveables by delivery must be distinguished, where the subject-matter is such that something more is required to be done. Then mere delivery will not validate a gift of moveables, for instance, negotiable instruments, Government promissory notes and Post Office Cash Certificate nor could valuables deposited in a Safe Deposit Vault be gifted by mere delivery of the key. These are cases which fall within section 130 of the Act, by the amendment of which the line is drawn.

Registered.—See commentaries on section 59.

On registration the title of donee under section 47 of the Registration Act, 1908, becomes absolute dating from the date of execution. The subsequent birth

(v) Compare sec. 59 para 2.

(w) *Perumal Ammal v. Perumal Naicker* (1921) 44 Mad. 196.

(x) *Perumal Ammal v. Perumal Naicker* (1921) 44 Mad. 196.

(y) *Balbhadr Singh v. Lukshmi Bai*, A.I.R. (1930) All. 669; *Hira Mani Singh v. Anmol Singh*, A. I. R. (1928) All. 699.

(z) *Rameshwar Narain v. Riknath Koeri*, A. I. R. (1923) Pat. 165.

(a) *Rameshwar Narain v. Riknath Koeri*, A. I. R. (1923) Pat. 657.

(b) *Deo Saran v. Devki*, A. I. R. (1924) Pat. 657.

(c) *Birendra Keshri v. Baburia* (1934) 13 Pat. 356; *Harihar Prasad v. Sir Guruganth*, A. I. R. (1930) Pat. 610.

or adoption of a child or death of the donor before registration is not destructive of the gift (*d*). The donee's title is not incomplete for want of registration (*e*). Upon delivery of the instrument of gift duly executed and attested, and acceptance of the gift, the donor has no power to revoke the gift prior to registration (*f*). The Full Bench decision of the Bombay High Court has been approved by the Privy Council (*g*).

Registration is a nullity under section 28 of the Registration Act, 1908, when the deed of gift is registered in the office of a Sub-Registrar within whose sub-district neither the whole nor some portion of the property is situate (*h*). For want of a registered document, an alleged gift of immoveable property fails (*i*). A dedication of properties to charities must be registered under the Transfer of Property Act, section 123 (*j*). A gift of immoveable property by a Hindu by way of *sankalap* cannot operate as a valid gift (*k*) unless registered. The provision of the statute is mandatory and imperative (*l*). A gift by a Hindu widow before the passing of the Act was held compulsorily registrable. It might have been otherwise if there had been delivery of possession (*m*). Registration does not depend upon donor's consent; neither his death nor expression of revocation by the donor operates as a ground for refusing registration, where the other conditions are complied with (*n*). The donor's consent to registration is not a part of the gift. A document need not even be presented for registration by the executant (*o*). In the same case a Division Bench of the Allahabad High Court has differed as to whether a gift is valid, the registration of which has been procured against the wishes of the donor. A deed of gift is, however, not invalid because registration took place after the death of the donor (*p*).

Registration—effect of.—An executant cannot take advantage of incompleteness, due to want of registration and if the instrument is otherwise complete the executant is to be regarded as having done everything that was in his power to complete and make it effective (*q*). Section 123 does not affect the ingredients in section 122. It only provides a further safeguard by requiring a gift of immoveable properties to be effected by a registered instrument (*r*). By a deed of gift a claim to an annuity secured by a charge on immoveable property was registered in Book IV and not in Book I. Held deed validly registered. Error of the registry office fell under section 87 of the Registration Act and did not affect the validity of the registration (*s*).

Signed.—See commentaries on section 59.

Attested.—See commentaries on section 59.

- (*d*) *Kalianasundaram v. Karuppa* (1927) 50 Mad. 193, 54 I. A. 89; *Venkati Rama v. Pillati Rama* (1917) 40 Mad. 204; *Atmaram Sakham v. Vaman Janardhan* (1924) 49 Bom. 388.
- (*e*) *Nand Kishore v. Suraj Prasad* (1898) 20 All. 392; *Hardee v. Ram Lal* (1889) 11 All. 319; *Meiyyalu v. Anjalay* (1902) 25 Mad. 672; *Kashaba v. Chandrabhagabai* (1908) 32 Bom. 441.
- (*f*) *Atmaram Sakham v. Vaman Janardhan* (1925) 49 Bom. 388; *Subha Rama v. Benkalasubba* (1924) 48 Bom. 435 overruled.
- (*g*) *Kalyanasundaram v. Karuppa* (1927) 30 Mad. 193 (1926) 54 I. A. 89; *Venkalasubba v. Subba Rama* (1928) 52 Bom. 313.
- (*h*) *Mt. Sarja v. Mt. Tulsi*, A. I. R. (1926) Nag. 93.
- (*i*) *Lim Charlie v. Official Receiver* (1934) 36 Bom. L. R. 235.

- (*j*) *Kalyanasundaram Pillai v. Krishnaswami Aiyar*, A. I. R. (1921) Mad. 90.
- (*k*) *Hira Mani Singh v. Anmol Singh*, A. I. R. (1928) All. 699; *Deo Saran v. Deoki*, A. I. R. (1924) Pat. 657.
- (*l*) *Deo Saran v. Deoki*, A. I. R. (1924) Pat. 657.
- (*m*) *Jagannath Marwari v. Mt. Chandni Bibi* (1921) 34 C. L. J. 432.
- (*n*) *Venkat Subba v. Subba Rama* (1928) 30 Bom. L. R. 827.
- (*o*) *Parbati v. Baijnath* (1912) 9 A. L. J. 300.
- (*p*) *Khasaba v. Chandrabhagabai* (1908) 32 Bom. 441; *Nand Kishore v. Suraj Prasad* (1893) 20 All. 392.
- (*q*) *Nabadweepchandra Das v. Lokenath Ray* (1932) 59 Cal. 1176.
- (*r*) *Deo Saran v. Deoki Bharthi* (1924) 3 Pat. 842.
- (*s*) *Sateendranath v. Jateendranath* (1936) 63 Cal. 1, P. C.

Ss. 123-125 Possession.—This is not necessary under section 123 even though the donor be in possession and remain as such (*t*), neither under Hindu Law since the Amending Act, 20 of 1929, and the amendment of section 129 (*u*), nor Buddhist Law (*v*) both of which require possession.

Rule in section 43.—It has been held that a person whose title rests on possession and who executes a registered deed of gift is subject to the rule that he cannot derogate from his own grant (*w*). The Amending Act 27 of 1926 cannot operate retrospectively on a deed executed prior to 16th September 1926 (*x*).

124. A gift comprising both existing and future property is void as to the latter.

Gift of existing and future property.

Future property.—The chapter on gifts insists on the subject-matter being an existing one. A transfer of future property that is one not in existence is not absolutely void in all cases. Such transactions (*y*), apart from gifts, have been upheld, such as in the case of sales and mortgages.

This section is supplemental to section 122 which requires the subject of gift to be in existence. Though a gift of future property is void, the section saves a transaction where the gift is both of existing and future property by declaring that the gift shall fail only as to the latter. Neither the Hindu (*y*) nor the Mahomedan Law recognizes a gift of future property (*z*).

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several, of whom one does not accept.

Several donees.—Where the objects of the donor's bounty are several and any one or more cannot or do not accept, the gift is void as to the interest of the latter. If the gifts are separable, those void revert to the donor. If they are joint the other donee or donees would be entitled thereto. Where a donor could make a gift to a daughter or daughter's son only and executed a gift to a daughter and her husband jointly, held daughter took the whole and that a gift to two jointly, failing as to one, operated entirely for the benefit of the other on the principle laid down in *Humphrey v. Tayleur* (*a*), which not depending on any peculiarity of English Law, was applicable here (*b*).

(*t*) *Dhanamal v. Parmeshari Das*, A. I. R. (1928) Lah. 9; *Debi Singh v. Pandit Bansidhar*, A. I. R. (1922) All. 44.
 (*u*) *Ma Thin Myaing v. Maung Gyi* (1923) 1 Rang. 351; *Lallu Singh v. Gur Narain* (1923) 45 All. 115; *Pahlwan Singh v. Ram Bharose* (1905) 27 All. 169; *Phul Chand v. Lakkhu* (1903) 25 All. 358; *Madhab Rav v. Kashibai* (1910) 34 Bom. 287; *Bai Ramabai v. Bai Mani* (1899) 23 Bom. 234; *Alabai Koya v. Mussa Koya* (1901) 24 Mad. 513, 522; *Babhadra v. Bhowani* (1907) 34 Cal. 859; *Kali Das v. Kanhaiyalal* (1884) 11 Cal. 121; *Dharmodas v. Nistarni* (1887) 14 Cal. 446; *Bhagwan Prasad v.*

Hari Singh (1926) 22 Nag. L. R. 124.
 (*v*) *U. Pandawan v. U. Sandina* (1924) 2 Rang. 131; *Ma Thin Myaing v. Maung Gyi* (1923) 1 Rang. 351; *Mi Hla Zan v. Pa Pa Ye*, A. I. R. (1924) Rang. 352.
 (*w*) *Pahlwan Singh v. Ram Bharose* (1905) 27 All. 169.
 (*x*) *Balbhadar Singh v. Lakshmi Bai*, A. I. R. (1930) All. 669.
 (*y*) See sec. 5 of the Transfer of Property Act.
 (*z*) *Amtul Nissa v. Mir Nurudin* (1896) 22 Bom. 489.
 (*a*) (1751) Ambler 136.
 (*b*) *Nandi Singh v. Sita Ram* (1889) 16 Cal. 677, 16 I. A. 44.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be. S. 126

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to A.

Analysis of the section.—The donor and donee may agree—

- (1) That on the happening of an event,
- (2) which does not depend on the will of the donor,
- (3) a gift shall be suspended or revoked.

But if they agree

- (1) That a gift shall be revocable,
- (2) wholly or in part,
- (3) at the mere will of the donor,

the gift is void wholly or in part as the case may be.

A gift is also revocable in cases where, if it were a contract it might be rescinded (save want or failure of consideration).

Exceptions :—

- (a) Save as aforesaid, a gift is irrevocable.
- (b) The section shall not prejudice the rights of transferees for value without notice.

Revocation.—The distinction made in paragraph 1 is aptly illustrated by the two illustrations to the section. In both instances the donee assents to a revocation, save that where revocation is dependent on the pleasure of the donor, the gift to that extent is void. This may be compared with the provision of sections 31 and 32 of the Act. Subject to two limitations, provisions for defeasance on the occurrence

S. 126

of an uncertain event are legal and enforceable (c). Where a deed of gift is duly registered and executed, it is not suspended or made revocable on the happening of any specific event or in any of the cases (save want or failure of consideration) in which if it were a contract, it might be rescinded as provided in section 126. It cannot be maintained that the property continued to form part of the estate of the donor (d). Attachment of a subsequent revocation to a completed deed of gift cannot have a valid effect (e). The Privy Council observed, assuming that such a condition could be afterwards imported, and that condition an immoral one, it would not invalidate the gift; the condition would be void and the gift valid. Nor can it be revoked before its registration on the ground that the gift is not completed until the deed is registered (f). Possession though not necessary must not be lost sight of in determining whether the power of revocation for non-payment of debts, had been contemplated (g). The right of revocation is personal to the donor. It is not transferable (h). But it may be exercised by his heirs on death (i). The donee of a deed of gift executed a registered deed of even date agreeing not to make a gift or transfer, sell or mortgage the property without the knowledge, consent and permission of the donor and that if he did so, he would return the property to the donor. The two documents were treated as one transaction. Held further, that the case fell within the provisions of section 126 and that the agreement did not contravene the provisions of section 10, inasmuch as there was promise to the donor personally and it was only the donor in his lifetime who could revoke the gift (j). A gift voidable at the option of the donor can be avoided after his death by his heirs (k). A completed gift cannot be revoked by a subsequent will (l). A deed of gift registered after the death of the donor against his wishes who had gifted away the property to another, is ineffective (m). As regards Hindu Law, the same rules apply (n). The rules of Mahomedan Law which give larger powers of revocation, are not abrogated by the Act.

Other cases.—Besides those mentioned in paragraph 1, the section enacts that gifts are revocable in cases where rescission would be permitted if the transactions were contracts. Such cases are to be met with in the Contract Act (o).

Limitations.—The two limitations placed on the rule in the section are :

- (1) In cases other than those mentioned above, a gift cannot be revoked (p), and
- (2) The right of transferees for value without notice should be safeguarded (q).

Suspension.—The distinction as to revocation which is indicated by the subdivision of the first paragraph does not seem to prevail as regards suspension, so that a gift could at the will of the donor be suspended wholly or in part.

Conditional gifts.—A gift with a condition is valid where, if it were a conditional transfer under section 25 of the present Act, it would be supported. Such condition

(c) *Venkatarama Aiyar v. Aiyasami Aiyar* (1922) 43 M. L. J. 340.
 (d) *Behari Lal v. Sindhubala* (1918) 45 Cal. 434.
 (e) *Lucy Moss v. Mah Nyein Mat*, A. I. R. (1933) Rang. 418 (2); *Ram Sarup v. Bela* (1884) 6 All. 313, 11 I. A. 44.
 (f) *V. S. Shrinivas Hedge v. S. Rama Hedge* (1928) 52 Bom. 313.
 (g) *Balbhadar Singh v. Lakshmi Bai*, A. I. R. (1930) All. 669.
 (h) *Mst. Azisunnisa v. Siraj Hussain*, A. I. R. (1934) All. 507.
 (i) *Baijnath Singh v. Mt. Biraj Kuer* (1923) 2 Pat. 52.
 (j) *Ma Yin Hu v. Ma Chit May* (1929) 7 Rang. 306; *Mukund Prasad v. Rajrup Singh*

(1907) 4 A. L. J. 708.
 (k) *Ghumna v. Ramchandra Rao* (1925) 47 All. 619.
 (l) *Rajaram v. Ganesh* (1899) 23 Bom. 131.
 (m) *Dasi Svarnam v. Deivanayagam* (1915) 28 M. L. J. 378; *Ramamirtam v. Gopala* (1896) 19 Mad. 433.
 (n) *Rajaram v. Ganesh* (1899) 23 Bom. 131; *Ganga Baksh v. Jagat Bahadur* (1896) 23 Cal. 15, 22 I. A. 153.
 (o) See sections 14 to 20, 23, 25 to 27 and 56.
 (p) *Villers v. Beaumont* (1882) 1 Vern. 100, 23 E. R. 342.
 (q) *Venkatarama Aiyar v. Aiyasami Aiyar* (1922) 43 M. L. J. 340.

may be express (r) or implied (s). Where an engagement ring is given by a man to a woman, and the engagement is broken off, he is entitled to the return of the ring (t). It has been seen that to a gift divesting the donor of all his interest in the property a condition cannot afterwards be attached (u). Where consideration for the transfer by way of gift was future illicit intercourse between donor and donee, the gift was held voidable *ab initio* (v). There is a distinction between immoral consideration for a gift and an immoral condition which is subsequently attached to a gift. In the former case the gift fails whilst in the latter case the gift takes effect, the condition being void (w). In the Madras case referred to, it was contended that the plaintiff being *in pari delicto*, could not set aside a voluntary gift. It was held that a voluntary gift could not in such circumstances be set aside but when the transfer was intended for consideration, it could be impeached if the consideration was immoral (x). The rule of construction in case of a deed is the same as in a will (y). The fulfilment of the condition is necessary to entitle the donee to the gift (z). On failure of condition there is a resulting trust in favour of the donor. A subscription for the sick and wounded in the Balkan War entitled the subscribers rateably to the balance at the close of the war (a). But where there was a general charitable intention for sick and wounded Welshmen, the Court applied the fund *cy pres* (b). Where, however, the subsequent condition attached is repugnant or is as described in section 25 of the Act, the gift takes effect (c). Further, a recommendatory condition is not enforceable at law, the gift is absolute and the alienation valid (d). And where the donor mistakenly believed that the donee could perform his funeral rites, it did not render the gift invalid (e).

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract, and accepting property burdened by any obligation is not bound by his acceptance. But if after becoming competent to contract and

Onerous gift to disqualified person.

(r) *Yates v. University College, London* (1875) 45 L. J. Ch. 137.

(s) *Jeffreys v. Luck* (1922) 153 L. T. 139.

(t) *Jacobs v. Davis* (1917) 2 K. B. 532.

(u) *Ram Sarup v. Bala* (1884) 6 All. 313, 11 I. A. 44.

(v) *Ghumna v. Ram Chandra* (1925) 23 A. L. J. 376; *Thasi Muthukannu v. Shunmugavelu* (1905) 28 Mad. 413.

(w) *Ghumna v. Ram Chandra* (1925) 23 A. L. J. 376.

(x) *Thasi Muthu Kannu v. Shunmugavelu* (1905)

28 Mad. 413.

(y) *Re. Hewett, Eldridge v. Iles* (1918) 1 Ch. 458; see sec. 25 of the Act.

(z) *Shenstone v. Brock* (1887) 36 Ch. D. 541.

(a) *British Red Cross Society v. Johnson* (1914) 2 Ch. 419.

(b) *Thomas v. Attorney-General* (1921) 1 Ch. 655.

(c) See section 32 of the Act.

(d) *Rukminibai v. Lamibai* (1920) 44 Bom. 304.

(e) *Abhachari v. Ramachendrayya* (1863) 1 M.H. C. R. 393.

Ss. 127-128 being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by his refusal forfeit the money.

Rules of acceptance in case of an onerous gift are :—

- A. Where the transfer is single, the donee can take nothing unless he accepts the gift fully.
- B. Where the transfers are separate and independent, the donee may accept one and reject the other.
- C. A disqualified donee is not bound by his acceptance but if he retains the property after becoming competent to contract he becomes so bound.

A gift to children on condition they agreed to allow the father enjoyment of the usufruct until his death, is valid (f). For acceptance of an onerous gift, acceptance of the onerous condition also at the same time is not necessary, specially where the onerous condition is of a trifling character (g).

Alternative and independent gifts.—Dealing with the will of a Hindu, the Privy Council has held that restrictions contrary to law imposed upon valid dispositions if separable from the latter, need not be held to invalidate them (h). Repudiation by an infant cannot be during minority so that if the infant dies a minor, the donor cannot claim against the minor's representatives (i).

Book debts.—Where secured, an immoveable property can be the subject of a valid gift. The definition of actionable claim added to section 3 and section 130 does not prevent a debt secured upon immoveable property from being transferred apart from the security (j).

Third paragraph.—It is difficult to understand how a donee not competent to contract can accept a gift burdened with an obligation in view of the words "on behalf of the donee" in section 122.

128. Subject to the provisions of section 127, where
 Universal donee. a gift consists of the donor's whole property, the donee is personally liable for all the debts due by *and liabilities* of the donor at the time of the gift to the extent of the property comprised therein.

(f) *M. Shin v. Ma Thin Kyi*, A. I. R. (1934) Rang. 129.

(g) *Sarba Mohan Banerjee v. Manmohan Banerjee* (1933) 37 C. W. N. 149.

(h) *Raikishori v. Debendranath* (1888) 15 Cal.

409, 15 I. A. 37.

(i) *Subramnia v. Sitka Lakshmi* (1897) 20 Mad. 147.

(j) *Imperial Bank of India v. Bengal National Bank* (1931) 35 C. W. N. 1034, 58 I. A. 323.

Savings.—The provisions of section 128 are subject to those of section 127. Where a gift is burdened with an obligation, the combined effect of these two sections is likely to raise a conflict which may be thus illustrated. A owes B Rs. 5,000/-. C Rs. 5,000/-. and D Rs. 5,000/-. and is possessed of property of the value of Rs. 10,000/-. Can A by a gift under section 127 burdening it with debts due to B and C deprive D when he has no other property of his own and defeat the provisions of section 128. It is submitted that such a gift would be impeachable under section 53.

Amendment.—The section has been amended by Act 20 of 1929 by the insertion of the words “and liabilities of.” The result has been to include obligations of the donor besides debts.

The section.—The provisions of the section are analogous to those of section 132 of the Act. If the intention of the Legislature in enacting the section be to prevent fraud on creditors, it is submitted the attempt has not been successful, for it is competent to a donor to retain a small fraction of his property and thus to circumvent its provisions. To constitute a universal donee, the gift must consist of “the donor’s whole property.” If any portion is excluded from the operation of the gift or the endowment the creditor is not entitled to the benefit of the section (*k*), even though one of the properties forming the subject of gift be mortgaged but not foreclosed (*l*). The onus is on the plaintiff to shew that the transaction was one of gift (*m*). K. conveyed property to plaintiff who undertook to pay his debts. On K.’s death plaintiff sued for redemption of property mortgaged to defendant. Defendant claimed to tack a single contract debt to the mortgage debt. Defendant was the only unpaid creditor and the property was more than sufficient to pay the debt. Held deed did not create a trust for creditors, and due effect could not be given to the whole of the instrument unless construed as a conveyance to the plaintiff charged as between himself and K. with the payment of K.’s debts (*n*).

Liabilities.—These would include obligations incurred by the donor as surety.

Extent of liability.—A universal donee’s liability is restricted to the value of the property, received by him under the gift, and not duly applied in discharge of debts (*o*).

Universal donee.—A universal donee is one who obtains the entire property of the donor in spite of the fact that the donor holds some land for which he pays rent to the donee (*p*). A Hindu cannot make a gift of undivided property to his sons which would deprive the wife of maintenance. The wife is entitled to follow the property notwithstanding a release by her to the husband. Her right is merely inchoate to a partition which right she cannot assign (*q*). The section does not apply to a deed by a Mahomedan husband transferring absolute proprietary title in the immoveable property to his wife in part payment of her deferred dower (*r*).

Reversioners.—Certain interests, which had devolved on the daughters, were relinquished by a family arrangement in favour of the reversioners by a deed, and the latter orally undertook to discharge the liabilities. They were held liable to discharge them (*s*).

(*k*) *Syam Behari Mal v. Maha Prasad*, A. I. R. (1930) All. 180; *Anrudh Kumar v. Lachmi Chand* (1928) 50 All. 818.

(*l*) *Brij Raj Kuar v. Ram Dayal* (1932) 7 Luck. 411.

(*m*) *Anrudh Kumar v. Lachmi Chand* (1928) 50 All. 818.

(*n*) *Ragho Govind v. Balvant Amrit* (1883) 7 Bom. 101.

(*o*) *Shahzad Singh v. Madan Gopal*, A. I. R. (1933) All. 146.

(*p*) *Shahzad Singh v. Madan Gopal*, A. I. R. (1933) All. 146.

(*q*) *Narbadabai v. Mahadeo* (1881) 5 Bom. 99.

(*r*) *Ramcharan v. Mt. Abida Begum*, A. I. R. (1927) Oudh 176.

(*s*) *Sudhamoyee v. Bhujendra Nath*, A. I. R. (1937) Cal. 226.

S. 129

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law. . . .

Saving of donations *mortis causa* and Muhammadan Law.

Savings.—Chapter VII does not affect (a) *donatio mortis causa* and (b) any rule of Muhammadan Law.

Amendment.—By Act 20 of 1929 the last words of the section “or save as provided by section 123 any rule of Hindu or Buddhist law” were omitted.

For an effective *donatio mortis causa* four essentials are necessary (t) :

- (1) the gift or donation must be in contemplation of death,
- (2) there must be delivery of the subject-matter to the donee,
- (3) the gift must revert to the donor on his recovery,
- (4) the subject-matter must be moveable.

“*Lex situs.*”—A *donatio mortis causa* made by a person of foreign domicile in England is regulated by the Law of England and not by the *lex domicilii* (u).

Condition.—According to the English authorities, the validity of a *donatio mortis causa* is not affected by attaching a condition (v). There is no necessity for probate (w) or of the executor’s assent (x).

Various instruments.—A promissory note (y), a cheque (z), stock certificate (a), are not good *donationes mortis causa*. Delivery of mortgage deeds does not cancel the debt but a delivery of the deeds and a bond has been considered a valid *donatio mortis causa* (b).

Mahomedan Law.—The provisions of this chapter do not apply to Mahomedan gifts (c).

Section 123 requires registration. Section 129 exempts rules of Mahomedan Law. By section 1 the local Government of Lower Burma may by notification extend “the Act or any part of it” to Lower Burma. In 1904 various sections, including 123 but not 129, were extended to the Pegu District. The rule of possession to validate a gift in Mahomedan Law is well established and that rule is preserved by section 129. In 1914 a Mahomedan conveyed immoveable property in the Pegu District to his wife by a registered deed. He effected mutation in her name but continued to manage. Held local Government was not authorized by section 1 to extend section 123 apart from section 129, and the above rule of Mahomedan Law applied to Pegu, that the acts of the husband were on behalf of the wife, that there had been delivery of possession, and the gift was valid (d).

(t) *Cain v. Moon* (1896) 2 Q. B. 283.

(u) *Re. Korvine’s Trust, Levashoff v. Block* (1921) 1 Ch. 343.

(v) *Hills v. Hills* (1841) 8 M. & W. 401, 151 E. R. 1095; *Blornt v. Bunow* (1792) 4 Bro. C. C. 72, 29 E. R. 784.

(w) *Tate v. Hilbert* (1793) 2 Ves. 111, 30 E. R. 548.

(x) *Hill v. Chapman* (1789) 2 Bro. C. C. 612, 29 E. R. 337.

(y) *Tate v. Hilbert* (1793) 2 Ves. 111, 30 E. R. 548; *Holliday v. Atkinson* (1826) 5 B. & C. 501, 108 E. R. 187.

(z) *Hewitt v. Kayi* (1868) 6 Eq. 198; *Auston v.*

Mead (1880) 43 L. T. 117; *Tate v. Hilbert* (1793) 2 Ves. 111, 30 E. R. 548.

(a) *Moore v. Moore* (1874) 18 Eq. 474.

(b) *Duffield v. Eleves* (1827) 1 Bl. N. S. 497, 4 E. R. 959.

(c) *Bishun Prasad Sheoratan v. Mahomed Nayin* (1933) 14 Pat. L. T. 599; *Musa Miya v. Kadar Bux* (1928) 52 Bom. 316, 55 I. A. 109.

(d) *Ma Mi v. Kallander Ammal* (1927) 5 Rang. 7 P. C.; *Amina Bi Bi v. Khatija Bi Bi* (1864) 1 Bom. H. C. 157; *Emnabai v. Hajirabai* (188) 13 Bom. 352.

There is no provision under section 129 for the proposition that a Mahomedan donee is not governed by the provisions of section 128 (e).

S. 129

Non-applicability.—The rules in Chapter VII do not apply to the following cases :—

- (1) Mahomedan Law.
- (2) Easements.
- (3) Partitions.
- (4) Joint deposits by husband and wife.
- (5) Bonus or gratuity payable to a railway servant.
- (6) Future or non-existing properties.
- (7) Where the donor reserves a power of revocation.
- (8) Moveables forming the subject of a *donatio mortis causa*.
- (9) Where the property is not specified.
- (10) Possession withheld by donor.

(e) *Abid Husain v. Ram Nidh*, A. I. R. (1930) Oudh 268.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

S. 130

130. (1) The transfer of an actionable claim *whether with or without consideration* shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, . . . shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Transfer of actionable claim.

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an insurance company and assigns it to a bank for securing the payment of an existing or future debt. If A dies, the bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

Chapter VIII.—This chapter was by the Transfer of Property Act, 1900 (2 of 1900) substituted for the original Chapter VIII.

Original Chapter VIII.—Prior to its amendment by Act 2 of 1900 it was as follows :— S. 130

130. A claim which the Civil Courts recognize as affording ground for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.

131. No transfer of any debt or beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer, and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer with the debt or property, shall be void as against such transfer.

Illustration.

A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is not valid, and C cannot sue A for the debt.

132. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

133. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale with interest on the price from the day that the buyer paid it.

Nothing in the former part of the section applies :—

- (a) Where the sale is made to the co-heirs to, or co-proprietor of, the claim sold ;
- (b) where it is made to a creditor in payment of what is due to him ;
- (c) where it is made to the possessor of a property subject to the actionable claim ;
- (d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

136. No Judge, pleader, *muktear*, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim, falling under the jurisdiction of the Court in which he exercises his functions.

137. The person to whom a debt or charge is transferred, shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Illustration.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of fraud. The debenture is invalid in the hands of B.

S. 130

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer and the residue, if any, belongs to the transferor.

139. Nothing in this chapter applies to negotiable instruments.

Analysis of present section 130.—The transfer of an actionable claim :

1. Shall be effected only
 - (a) by the execution of an instrument in writing,
 - (b) signed by the transferor or his duly authorized agent.
2. Shall be complete and effectual
 - (a) upon the execution of such instrument and
3. Thereupon the rights and remedies of the transferor
 - (i) whether by way of damages or otherwise
 - (a) shall vest in the transferee,
 - (b) whether notice of transfer be given or not.

Provided

- (a) that every dealing with the debt or other actionable claim
- (b) by the debtor or other person from or against whom the transferor would but for such instrument of transfer as aforesaid have been entitled to recover or enforce such debt or other actionable claim (save when he is a party to the transfer or has received express notice thereof)
- (c) be valid as against such transfer.

Proceedings.—

- (1) The transferee may sue
- (2) in his own name
- (3) without the transferor's consent and without making him a party thereto.

Excepted policies.—Fire and marine policies are excluded from the operation of the section.

Changes in the section.—By the Amending Act, 20 of 1929, the words "whether with or without consideration" have been added and the words "and notwithstanding anything contained in section 123" occurring after the word "agent" have been omitted, as they lent themselves in a Bombay case to the contention that a gift of an actionable claim by a Mahomedan was exempted from the operation of the present rule which required writing, it not being the intention of the Legislature that such transactions by Mahomedans should escape the consequences of this chapter.

Section not exhaustive.—Section 130 could not be said to exhaust all other ways and means by which the interest of one person may be transferred to another (f). The application of the definition in section 5 of the "transfer of property" to the present section has been doubted (g).

Form of assignment.—The composite parts of an assignment, besides the date and parties, are (1) recital of the bond, (2) the amount due thereunder, (3) the agreement to assign debt and interest, (4) the operative part, in consideration of

(f) *Mulibai v. Shewaram Menghraj*, A. I. R. (1926) Sind 78.

(g) *Bhopatrao v. Shri Ramchandra*, A. I. R. (1926) Nag. 469.

the sum paid by the assignee, the assignor assigns the bond with the principal sum and interest due and thenceforth to become due and the full benefit and advantage of the premises, (5) *habendum* to the assignee absolutely, (6) a covenant that the debt is owing and in full force and valid, (7) the witnessing clause, and (8) signature of the assignor (*h*). It should be stamped unless executed by the Official Assignee. It does not require to be attested or registered under section 109 of the Indian Companies Act. No assignment is necessary of the interest of a co-sharer in actionable claim when retiring from the joint Mitakshara family business, and his legal representative is not a necessary party to a suit based on such actionable claim (*i*).

Effect of transfer.—On a completed transfer the rights and remedies of the transferor, whether by way of damages or otherwise, vest in the transferee.

Transfer when complete.—On the assignment being executed by the transferor the transfer is complete. Transfer, whether outright or by way of security, is governed by this section (*j*). The mere delivery of a document of title does not constitute a transfer of the right to immoveable property (*k*).

Proviso.—This protects the debtor, by enacting that unless the debtor was a party to the transfer or had received express notice thereof, any dealing by him with the debt shall not prejudicially affect such dealing. Should the debtor in ignorance pay the debt to the assignor the latter would be liable to the assignee, both on a failure of consideration and as having defeated his own assignment. Where a vendor in spite of the sale realizes a debt the purchaser must be allowed credit (*l*). It is enacted for the benefit of the debtor and has nothing to do with the title of the transferee or with priority of claims (*m*).

Transferee's remedies.—The right to adopt proceedings upon execution of the assignment are vested in the transferee (*n*). The suit to enforce his rights may be in his own name and without making the transferor a party. The transferor may maintain an action for the benefit of the transferee (*o*). If the assignment is void a suit by the assignee would fall within the provisions of Order 1, rule 10 of the Civil Procedure Code and the mistake could be rectified by the name of the assignor being substituted (*p*).

Life policy.—This may be assigned by endorsement or separate deed (*q*). It has been admitted that right to moneys due under a policy is an actionable claim (*r*). The definition of actionable claim includes the transfer of an ordinary as well as an endowment policy which is conditional on the assignee surviving the assured (*s*).

Marine or fire policy.—These policies are excepted from the rule enunciated in the section for the assignments of which a different rule prevails (*t*). The usual form adopted is by endorsement on the back of the policy as follows:—I hereby

(*h*) Encyclopædia of Forms, 1st Ed., Vol. 3, p. 541.

(*i*) *Brijmohan v. Mahabeer* (1936) 63 Cal. 194; *Palani Ammal v. Muthuvenkatachala* (1924) 48 Mad. 254.

(*j*) *S. R. A. S. Sidambaram v. D. R. Moganlal Bros.* (1929) 7 Rang. 365.

(*k*) *Kheltra Mohan Das v. Biswanath Bera* (1924) 51 Cal. 972.

(*l*) *Ram Das v. Dwarka Das*, A. I. R. (1930) All. 875.

(*m*) *Subramania Iyer v. Ramasubha Iyer*, A. I. R. (1935) Mad. 1003.

(*n*) *Mulhukrishna v. Veeraraghava* (1915) 38

Mad. 297; *Arunachalam v. Madaswami* (1920) 27 M. L. T. 269.

(*o*) *Chandrasekaralingam v. Nagabhushanam* (1937) 53 M. L. J. 342.

(*p*) *Silla Bakhsh v. Mahabir Prasad* (1937) 12 Luck 150.

(*q*) *Shamdas v. Savitribai*, A. I. R. (1937) Sind 181.

(*r*) *Mulraj Khatau v. Vishwanath* (1913) 37 Bom. 198; see, *Dinbai v. Bamansha* (1934) 58 Bom. 518.

(*s*) *Shamdas v. Savitribai*, A. I. R. (1937) Sind 181.

(*t*) See sec. 135.

S. 130 assign my right, title and interest in the within policy to A.B. for valuable consideration. The endorsement should be dated and signed. Attestation is not necessary though in practice it is attested. No stamp is required.

Transfers by operation of law.—These are excepted by section 2, clause (d) of the Act. For commentaries, reference may be made thereto.

Indian Companies Act.—In dealing with assignments of a company's assets care must be taken to comply with the provisions of section 109, otherwise it would be void against the liquidator and any creditor of the company (*u*).

"Havala" transaction.—Closely analogous, though entirely different from transactions forming the subject of this chapter, are what are known in India as *havala* transactions. M. was indebted to L. S. & Co. to the extent of Rs. 10,400, to J. J. to the extent of Rs. 3,491, and to G. & Co. to the extent of Rs. 27,500. G. & Co. also held with them 212 bales of cotton belonging to M. as security. By an arrangement to which all of them were parties, the bales of cotton were transferred to J.J. who in turn took over the liability to all the creditors. In a suit by L. S. & Co. against M. and J.J., held, that the transaction was in fact a "novation" and not the transfer of an actionable claim, that no writing was necessary to evidence the transaction and that the beneficial interest in the bales passed to J.J. and the other creditors of M. had no right over the same (*v*). These transactions are usually effected by entries in the books of accounts which though expressed in the past tense, operate as a present transfer within section 130 which does not require the transfer to be in any particular form (*w*).

Deity.—An actionable claim dedicated to a deity is not subject to this rule (*x*).

Gifts.—Gifts of actionable claims such as book debts are governed by section 130 and section 123 (*y*). An actionable claim may be transferred without consideration, as the section expressly states, but in those cases the formalities of Chapter VII cannot be overlooked. It may be here observed that the special rules of Mahomedan Law as to gifts are saved from the operation of Chapter VII only.

Mortgage debt and charge.—The present section has no application to the assignment of a mortgage debt (*z*). A debt is, however, distinct from the security. It exists as moveable property and can be transferred without the security (*a*). The definition of "actionable claim" added to section 3 of the Transfer of Property Act, 1882, by Act V of 1900, and section 130 with the subsequent sections thereby substituted for the corresponding sections of the Act of 1882 do not prevent a debt secured upon immoveable property from being transferred apart from the security; the disability was not expressed, was inconsistent with section 6 and would give rise to anomalies (*b*). Arrears of annuity charged on immoveable property but not secured by a mortgage is an actionable claim and the debt together with the security may be transferred, as in section 130 provided (*c*). A charge or lien on

(u) *Ramjit Ray v. D. A. David* (1935) 62 Cal. 1.
Sanderson & Co. v. Clark (1913) 29 T. L. R. 579.

(v) *Jivraj Joharmal v. Lalchand Shreekison & Co.* (1932) 56 Bom. 462.

(w) *Jivraj Joharmal v. Lalchand Shreekison & Co.* (1932) 56 Bom. 462.

(x) *Bhopatrao v. Shri Ramchandra Sansthan Kund Sarjapur By Punch Khushal*, A. I. R. (1926) Nag. 469.

(y) *Perumal Ammal v. Perumal Nayaker* (1921) 44 Mad. 196.

(z) *Official Assignee v. Fakirji Cowasji*, A. I. R.

(1930) Sind 77; *Mulumedi Jagannadhiah v. Narasimhan Setty*, A. I. R. (1928) Mad. 1133.

(a) *The Imperial Bank of India v. The Bengal National Bank, Limited* (1931) 59 Cal. 377, 58 I. A. 323.

(b) *Imperial Bank of India v. Bengal National Bank Ltd.*, (1932) 59 Cal. 377, 58 I. A. 323 (1931) 58 Cal. 136 reversed; *Gopinath v. Mst. Bekali*, A. I. R. (1935) All. 837.

(c) *Rai Satindra Nath v. Rai Jalindra Nath* (1935) 39 C. W. N. 1191 P. C.

an actionable claim can only be created by a written assignment under the provisions of section 130 (d).

S. 131

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Notice to be in writing,
signed.

Amendments.—See original Chapter VIII, *ante*.

Notice of transfer :—

1. Shall be in writing.
2. Signed
 - (a) by the transferor or his agent duly authorized in this behalf, or
 - (b) by the transferee or his agent where the transferor refuses to sign.
3. Shall state the name and address of the transferee.

Contents of notice.—The notice must be in writing, signed by the party giving it. It is usual to state in a notice the fact of assignment, the date thereof, the consideration, the name and address of the transferee and a warning that the debtor would be held liable by dealing with the debt or claim in any manner other than as stated in the notice. It need not be free from any condition or qualification (e). A notice which did not specify the address of the transferee was held insufficient (f). Section 130 mentions the cases when notice may be dispensed with. It has been said that an individual litigant may waive the positive provisions of a statute but not if it be enacted from reasons of public policy. The provisions of section 131 fall within the latter category (g).

Dearle v. Hall (h).—The rule laid down in this case and followed in subsequent cases (i), was that where there were series of assignments the maxim "*qui prior est tempore potior est jure*" applied and the assignee giving the first notice was entitled to priority though his assignment be of a posterior date. The rule in *Dearle v. Hall (j)* is not law in this country, as section 130 renders the assignment complete on due execution irrespective of notice.

Necessity for notice.—The Act does not render an assignment of an actionable claim ineffective for want of notice. In fact, section 130 dispenses with notice where the debtor is a party to the transfer. It is mainly intended for the protection of the transferee against a prejudicial dealing therewith by the debtor.

To whom notice should be given.—The section is silent but the proviso to section 130 speaks of notice to the debtor. Until he receives notice his dealings with the original debtor are protected. It need not be free from any condition or qualification (k).

(d) *S. R. A. S. Sidambaram Nadar v. Mohan Lal Brothers* (1929) 7 Rang. 365.
(e) *Gopalakrishna v. Gopalakrishna* (1910) 33 Mad. 123; *William Brandits, Son & Co. v. Dunlop Rubber Co.* (1905) A. C. 454.
(f) *Sadasook Ramprotap v. Hoare Miller* (1923) 27 C. W. N. 733; *Hunsraj v. Nathoo* (1907) 9 Bom. L. R. 838.
(g) *Sadasook Ramprotap v. Hoare Miller & Co.* (1923) 27 C. W. N. 733.

(h) (1828) 3 Russ. 1, 38 E. R. 475.
(i) *Ipswich Permanent Money Club v. Arthy* (1920) 2 Ch. 257; *Lloyds Bank v. Cavendish* (1903) 1 K. B. 151; *Montefiore v. Guedalla* (1903) 2 Ch. 26; *Green v. Stephens* (1895) 2 Ch. 148.
(j) (1828) 3 Russ. 1, 38 E. R. 475.
(k) *Gopalakrishna v. Gopalakrishna* (1910) 33 Mad. 123.

Ss. 131-132 **Service of notice.**—The notice may be delivered by or on behalf of either the transferor or the transferee. It must be served on the debtor or other person from whom the transferor but for such transfer would have been entitled to recover or enforce such debt or actionable claim.

Fund in Court.—On assignment of such a fund the assignee should obtain a stop order (*l*) or prohibitive order (*m*).

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set-off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

Amendments.—See original Chapter VIII, *ante*.

Liabilities and equities.—Section 130 deals with the rights and remedies of the transferee, the present section with the liabilities and equities to which the transferor was subject at the date of the transfer. The transferee of a chose in action stands in no better position than the transferor (*n*). The rule does not apply to a chose in action assignable at law (*o*). Where the transfer is vitiated by the imposition of a fraud the rule would not apply (*p*). A set-off was not allowed in a suit for arrears of profits assigned in a conveyance of a village share, as a right to such profits was not an actionable claim but a benefit arising out of land (*q*). The rule extends to an assignee who has purchased at a Court sale (*r*). A transferee from a Mahomedan widow in possession of property in lieu of her dower debt takes the security subject to the state of account (*s*).

Illustration.—Of the illustrative cases appended, the first deals with the case of a transferee taking subject to liabilities. Order 8, rule 6 of the Code of Civil Procedure, 1908, deals with the subject of set-off. Although the section does not state so, it follows from the provisions of section 130 and Order 8, rule 6, that the claim to a set-off must be of an ascertained sum of money legally recoverable. The second deals with the case of a transferee taking subject to equities similar to that provided in section 49 of the Code of Civil Procedure. The present

(*l*) *Mutual Life Assurance Society v. Langley* (1886) 32 Ch. D. 460.
 (*m*) Code of Civil Procedure, 1908, O. 21, r. 46.
 (*n*) *Partridge v. Rhodesia Goldfields Ltd.* (1910) 1 Ch. 239; *Rolt v. White* (1862) 31 Beav. 520, 54 E. R. 1240.
 (*o*) *Taylor v. Blakelock* (1886) 32 Ch. D. 560.
 (*p*) *Ashwin v. Burton* (1862) 32 L. J. Ch. 196; see, however, illustration (ii) to the section.

(*q*) *Kamal Narayan v. Shyam Lal, A. I. R.* (1936) Nag. 217; *Reeves v. Pope* (1914) 2 K. B. 284.
 (*r*) *Ram Bhaj v. Ram Das* (1922) 3 Lah. 414; *Arunchellam v. Subramaniam* (1906) 30 Mad. 235.
 (*s*) *Mt. Bibi Mahbulunnissa v. Mt. Bibi Umtunnissa* (1922) 2 Pat. 84.

illustrations, taken from the English cases, are in substitution of the former Ss. 132-134 illustrations which were open to criticism.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

Indemnity.—On an assignment of a debt a transferee is entitled to a two-fold indemnity from the transferor. First, that the debtor is solvent at the date of the transfer, and, secondly, that he will well and truly discharge the debt to the extent of the consideration paid. When a creditor purports to create a lien or charge on the debt due to him in favour of another, the words “lien” or “charge” have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what, in English Law, is called a chose in action, transfers it to another (t).

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

Amendments.—See original Chapter VIII, *ante*.

Mortgaged debt.—The section refers to the distribution of the proceeds of a debt transferred for securing an existing or future debt. The word “mortgage” has been used in the Act where immoveable property has been transferred as security. A mortgage debt has been said to exist as moveable property and can be transferred without the security (u). Such a transaction, it is submitted, would be a charge.

The residue.—According to section 134, the assignment is not absolute, but by way of security only and, therefore, the surplus belongs to the transferor, who is the debtor of the transferee. Being moveable property, no deed of reassignment is necessary, nor is it necessary to execute a release of the charge. A similar provision is enacted in section 69, sub-section 4. There is a contradiction between the provisions of section 130 and section 134. The words “residue belongs to the transferor” should have been that the residue, if any, shall be transferred by

(t) *Ardesir Bejonji v. Sirdar Ali Khan* (1909) 33 Bom. 610.

(u) *Imperial Bank of India v. Bengal National Bank, Ltd.* (1931) 59 Cal. 377, 58 I. A. 323.

Ss. 134-136 the original transferee to the original transferor (*v*). The rule applies to an assignment by way of security of a book debt of a company (*w*). Under the same rule, it was held that debentures, though not registered, would, nevertheless, include debts secured upon immoveable property, so as to entitle the lender to the benefit of all sums received in reduction of the debts, whether from the realisation of the security or otherwise (*x*). But an assignment of a company not registered as required by section 109, Indian Companies Act, is inoperative and of no effect against the liquidator and creditors of the company (*y*). In disposing of the claim of rival creditors to a policy of life insurance, one of whom relied on a deposit without writing, and the other on an assignment in writing, the Privy Council held that the title of the latter was absolute (*z*). A mortgage debt can be validly transferred only in accordance with section 54 of the Transfer of Property Act. Section 134 has no application (*a*).

135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Assignment of rights under marine or fire policy of insurance.

The section.—The section was added to this chapter by Act 2 of 1900, by re-enacting the repealed provisions of the Policies of Insurance (Marine and Fire) Assignment Act, 1866, the only amendment being the substitution of the word “other writing” in place of the word “otherwise.”

Policies.—Marine and fire policies are exempted from the provisions of section 130. Their assignment is merely by endorsement and delivery of the policies to the assignees, in whom the property covered by insurance is vested. On a carriage of goods by sea it is one of the shipping documents under a c.i.f. contract. See commentaries on section 49 of the Act.

Endorsement.—The usual endorsement on a policy is—“I transfer all my right, title, interest, claim and demand in the within policy to X.Y.Z., his heirs, executors, administrators and assigns for valuable consideration.” Then follow the date, place of execution and signature of the assignor. It is usual to give notice of the transfer to the insurance company which is generally effected by sending the policy for registration in the company’s books in the name of the endorsee.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce,

Incapacity of officers connected with Courts of Justice.

(*v*) *Ranjit Roy Singh v. D. A. David* (1934) 38 C. W. N. 1190.

(*w*) *Ranjit Roy Singh v. D. A. David* (1934) 38 C. W. N. 1190; *Sanderson & Co. v. Clarke* (1913) 29 T. L. R. 579.

(*x*) *Imperial Bank of India v. Bengal National Bank* (1931) 59 Cal. 377, 58 I. A. 323.

(*y*) *Ranjit Roy v. D. A. David and Others* (1934) 38 C. W. N. 1190.

(*z*) *Mulraj Khatau v. Vishwanath Prabhuram Vaidya* (1913) 37 Bom. 198, 40 I. A. 24.

(*a*) *Official Receiver, Trichinopoly v. Lakshman Aiyar* (1921) 41 M. L. J. 453.

at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid. S. 136

The section.—The section prohibits the persons named from dealing in actionable claims. It is enacted to save from the crushing influence of those connected with Courts of Justice, litigants whose affairs get into their hands (b). The section is controlled by section 137 and also by section 2 (d) of the Act. It saves a purchase by a pleader in execution of a decree (c); a transfer of a decree to a pleader is not invalid (d).

Amendment.—This section, which was originally section 140, was amended by Act 2 of 1900. As a result of the amendment, the prohibition which was originally restricted to "the Court in which he exercises his functions" has been made absolute. The result of the amendment is to render obsolete the undernoted cases (e).

Judge.—The term is defined in the undernoted Acts (f).

Legal practitioner.—Defined by section 3 of the Legal Practitioners Act XVIII of 1879.

Court of Justice.—Defined by section 20 of the Indian Penal Code.

Assignments of actionable claims.—An assignment in favour of a Special Magistrate and an Honorary Assistant Collector is void (g). The right to recover arrears of rent is an actionable claim and, therefore, a transfer of such claim by a Magistrate to a *mukhtar* is barred by section 136 (h). If the assignee be a legal practitioner, he would be precluded from enforcing his right (i). A transfer of an unpaid dower debt to a legal practitioner is void (j). A pleader is guilty of misconduct under section 13 of the Legal Practitioners Act, if he purchases an actionable claim prohibited by section 136. It is gross misconduct if the purchase be speculative, just when the claim is ripe for judgment (k); nor can he retain property purchased by him in the name of his clerk (l).

The Punjab.—Section 136 is not in force in the Punjab (m).

Traffic in.—This phrase means dealing in or trading. It may in certain circumstances include the transaction of sale. It connotes something more than a sale (n). The word "traffics" occurs in sections 371 and 489B of the Indian Penal Code.

Death of one of the assignors.—On the death of one of the assignors of a bond in favour of a person prohibited from being an assignee under this section, the other, who becomes the sole owner of the bond, has a right to maintain a suit on the basis of it (o).

(b) *Kerakoose v. Serle* (1846) 3 M. I. A. 329, 346.

(c) *National Insurance Co. v. Haridas Bose* (1927) 46 C. L. J. 225.

(d) *Govindarajulu v. Ranga Rao* (1921) 40 M. L. J. 124.

(e) *Rallnasami v. Subramanya* (1888) 11 Mad. 56; *Singarachalu v. Sivabai* (1888) 11 Mad. 498.

(f) Sec. 19 Indian Penal Code, 1860; sec. 3, Legal Practitioners Act, 1879; sec. 2(8), Code of Civil Procedure, 1908.

(g) *Silla Bux v. Mahabir Prasad* (1937) 12 Luck. 150.

(h) *Sheo Gobind Singh v. Gouri Prasad* (1925) 4 Pat. 43.

(i) *Bhupati Mohan Das v. Phanindra Chandra Chakravarty*, A. I. R. (1935) Cal. 756.

(j) *Amir Hasan v. Mahomed Nazir* (1932) 54 All. 499.

(k) *Mussi Reddi v. Venkata Row* (1914) 37 Mad. 238; see *Subbarayudu v. Kolayya* (1892) 15 Mad. 389.

(l) *Aghore Nath Chuckerbutty v. Ram Churn Chuckerbutty* (1896) 23 Cal. 805.

(m) *Akhtar Beg v. Haq Nawaz*, A. I. R. (1924) Lah. 709.

(n) *Hirday Narain v. Jugal Prasad*, A. I. R. (1927) Pat. 2.

(o) *Silla Bakhsh v. Mahabir Prasad* (1937) 12 Luck. 150.

S. 137

137. Nothing in the foregoing sections of this chapter applies to stocks, shares or debentures, or to instruments which are for the time being by law or custom, negotiable, or to any mercantile document of title to goods.

Saving of negotiable instruments, etc.

Explanation.—The expression “mercantile document of title to goods” includes a bill of lading, dock-warrant, warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Savings.—Instruments enumerated in section 137 are exempted from the operation of Chapter VIII. Section 130 includes negotiable instruments transferred by means of written instruments. Section 137 merely excludes negotiable instruments from the operation of section 130. There is nothing in section 137 which prohibits the transfer of negotiable instruments by means of separate written instruments (*p*).

Explanation.—This is repeated in section 2 (4) of the Indian Sale of Goods Act, 1930, without the word “mercantile,” which has been dropped.

Negotiable instruments.—Transfers of these are governed by Chapter IV of the Negotiable Instruments Act and the present section saves them from the operation of the rules in Chapter VIII but the saving does not preclude parties having recourse to these rules in the case of negotiable instruments. It gives an extended privilege to mercantile documents and is in no way restrictive. There is nothing to prevent the transfer of a promissory note by deed without endorsement (*q*). A hand-note has been similarly regarded (*r*). Neither a deposit of cheques (*s*), nor an acknowledgment of payment signed by one of alternative payees (*t*), nor an order for payment of money (*u*) is an assignment. An endorsement on a pro-note, “pay to S. or order as per copy of accounts attached herewith without recourse” was construed as an assignment of the negotiable instrument only and not an assignment of the debt (*v*), while a direction in writing to pay the amount due on the instrument endorsed thereon, coupled with delivery thereof, was construed as an assignment (*w*). A mortgage in writing of a promissory note

(*p*) *Ghanshyam Das v. Ragho Sahu*, A. I. R. (1937) Pat. 100.

(*q*) *Venkatarama Auvar v. Krishnaswami Chettiar* (1932) M. W. N. 653; *Perumal Ammal v. Perumal Nayaker* (1921) 40 M. L. J. 25; *Venkatadri v. Lakshminarasimha* (1911) 21 M. L. J. 80; *Suratchandra v. Narayanchandra* (1934) 61 Cal. 425; *Ghanesay Yam v. Ragho Sahu* (1937) 16 Pat. 74.; *Peari Pasi v. Gauri Lal* (1934) 13 Pat. 655, overruled *quo ad hoc*.

(*r*) *Suratchandra v. Narayanchandra* (1934) 61 Cal. 425.

(*s*) *D. B. Ballabh Das v. Seth Narayan Prasad*, A. I. R. (1926) Nag. 206.

(*t*) *K. P. Kunki Kiranath Chandu v. A. T. Ramunni*, A. I. R. (1921) Mad. 122.

(*u*) *Kisen Gopal v. Bavin*, A. I. R. (1926) Cal. 447.

(*v*) *Ram Jas v. Shahabuddin*, A. I. R. (1927) Lah. 89.

(*w*) *Kisen Gopal v. Bavin*, A. I. R. (1926) Cal. 447.

executed in favour of the mortgagor by a third party for a debt, creates an assignment of the promissory note in favour of the mortgagee even without an endorsement, and as the right of the promisee to sue on the note becomes vested in the mortgagee, the mortgagee alone is entitled to sue on the note (x). The only difference between a transfer by endorsement and a transfer by assignment of a negotiable instrument is that in the latter case, the transfer is subject to all equities, whereas in the former it is not (y).

Mercantile document of title to goods.—Section 137 contains an enumeration of a variety of documents which this phrase includes. They are not in the strict sense negotiable instruments. They are usually issued in sets of two or more, both as proof of possession or control of the goods and as authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented. A railway receipt is one of the documents mentioned. By custom they may be negotiable but are not so by law, nor does section 137 render them negotiable (z). The Bombay High Court (a) held that it was not a document of title to goods, but the Privy Council has held that it is a mercantile document of title fulfilling one or other of the conditions in section 137 (b). After delivery of goods the railway receipt ceases to be a symbol of goods and ceases to be negotiable. Hence an innocent endorsee for value of the railway receipt, after delivery to such a person, has no cause of action for damages against the railway company. A railway company is not under any duty to the public to insist upon the return of the receipt (c).

Further, delivery of goods by a railway to a person holding an unendorsed receipt does not prevent the company from pleading that he was the agent and as such entitled to receive the goods. But an unendorsed railway receipt is not a document of title or proof of possession or control of goods. Even if it be so, it does not justify another person in regarding the holder as a duly authorized agent (d).

A delivery order is a document of title under section 108 of the Contract Act and section 137, Transfer of Property Act, and under it the transferee acquires a title to the goods to which it relates. By the usage of the jute trade in Calcutta, *pucca* delivery orders are issued only on cash payment, are passed from hand to hand by endorsement, and are sold and dealt with in the market as absolutely representing the goods to which they relate (e).

The defendants, warehouseman and wharfingers, held 600 quarters of maize belonging to A who sold 200 qrs. to W. who sold them to plaintiff, giving the latter a delivery note which they lodged with defendants. Defendants neither acknowledged it nor objected to it, but some days later, no weighing out or appropriation of the 200 qrs. having taken place, A stopped delivery; held that the plaintiffs had no claim to the maize. Held further that the delivery note handed to plaintiffs by W. was not a document of title to goods within the meaning of the Sale of Goods Act, 1893, and that consequently the transaction did not come within the protection

(x) *Muthukrishnier v. Veeraraghava Iyer* (1915) 38 Mad. 297.

(y) *Suratchandra v. Narayanchandar* (1934) 61 Cal. 425; *Kamalakant Gopalji v. Madhavji Vaghji* (1935) 59 Bom. 573; *Mahammad Khumbar Ali v. Ranga Rao* (1901) 24 Mad. 654; *Muthar Sahib v. Kadir Sahib* (1905) 28 Mad. 544; *Akhoy Kumar v. Haridas* (1913) 18 C. W. N. 494.

(z) *Arunchellam Chetty Firm v. Ko. Po. Yan, A. I. R.* (1923) Rang. 1.

(a) *Great Indian Peninsula Railway Co. v.*

Hanmandas (1889) 14 Bom. 57; *Bombay Steam Navigation Co. v. Ramdas* (1912) 14 Bom. L. R. 532.

(b) *Ramdas Vithaldas v. Amarchand & Co.* (1916) 40 Bom. 630, 43 I. A. 164.

(c) *Madras and Southern Mahratta Railway Co., Ltd. v. Haridas* (1918) 41 Mad. 871.

(d) *Secretary of State for India in Council v. Rishi Ram* (1928) 50 All. 227.

(e) *Anglo India Jute Mills Co. v. Omademull* (1911) 38 Cal. 127.

- S. 137 afforded by sections 25 and 47 of that Act to *bona fide* transferees of documents of title to goods (f).

To the phrase "document of title to goods" the same meaning is attached as in section 53 (1) and section 27 of the Sale of Goods Act, 1930, and section 178 of the Indian Contract Act (g). Unlike a Bill of Lading, which on endorsement and delivery transfers ownership in the goods, the other documents do not transfer ownership, though they transfer the right to receive the goods. The section merely deals with the manner in which the documents to which they relate can be transferred, but it does not affect the result of the transfer when made.

In *Lickbarrow v. Mason*, it was held that wherever one of two persons must suffer by the act of a third, he who has enabled the third to occasion the loss must sustain it. Such a situation arose in the undermentioned case where a consignment of groundnuts was sent by rail and on the railway receipts the merchants obtained an advance by depositing them. They then obtained possession thereof for clearing the goods and storing them in the banks premises. Instead they deposited them with the Bank for getting an advance. The Privy Council refused to apply the above decision, saying that there must be some breach of duty. Here the first bank was guilty of no breach of duty inasmuch as there was no false representation by them that the holders had an implied authority or right to dispose of the goods and the claim of the second bank was disallowed (h).

(f) *Laurie and Morewood v. John Dudin* (1925)
2 K. B. 383; *Whitehouse v. Frost* (1810)
12 East. 614, not followed.
(g) *Ramdas Vithaldas v. Amerchand & Co.* (1916)

40 Bom. 630, 43 I. A. 164.
(h) *Mercantile Bank of India v. Central Bank of India*, (1938) 1 All. Eng. Repts. 52.

THE SCHEDULE.

*Transfer of Property.**(The Schedule.)*

| Year and Chapter. | Subject. | Extent of repeal. |
|---|---|--|
| <i>(a) Statutes.</i> | | |
| 27 Hen. VIII, c. 10 | Uses | The whole. |
| 13 Eliz., c. 5 | Fraudulent conveyances .. | The whole. |
| 27 Eliz., c. 4 | Fraudulent conveyances .. | The whole. |
| 4 Wm. and Mary, c. 16.. | Clandestine mortgages .. | The whole. |
| <i>(b) Acts of the Governor General in Council.</i> | | |
| IX of 1842 | Lease and release | The whole. |
| XXXI of 1854 | Modes of conveying land .. | Section 17. |
| XI of 1855 | Mesne profits and improve- ments | Section 1 ; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and." |
| XXVII of 1866 | Indian Trustee Act | Section 31. |
| IV of 1872 | Punjab Laws Act | So far as it relates to Bengal Regulations I of 1798 and XVII of 1806. |
| XX of 1875 | Central Provinces Laws Act. | So far as it relates to Bengal Regulations I of 1798 and XVII of 1806. |
| XVIII of 1876 | Oudh Laws Act | So far as it relates to Bengal Regulation, XVII of 1806. |
| I of 1877 | Specific Relief | In sections 35 and 36 the words "in writing." |
| <i>(c) Regulations.</i> | | |
| Bengal Regulation I of 1798 | Conditional sales | The whole Regulation. |
| Bengal Regulation XVII of 1806 | Redemption | The whole Regulation. |
| Bombay Regulation V of 1827 | Acknowledgment of debts ; interest ; mortgagees in possession | Section 15. |

APPENDIX.

Besides those referred to in the context the following requisitions arising on investigation of title with hints and suggestions are mentioned for general reference :—

1. The stipulated root of title is bad as it begins:—

- (a) with a will from which it does not appear that the testator had a power of disposal
- (b) a conveyance in favour of the vendor less than 12 years old
- (c) a deed of gift in favour of the vendor less than 12 years old.
- (d) with a mortgage
- (e) with an under-lease instead of a lease.

2. Missing deeds is no ground for rejecting title if their absence can be satisfactorily proved. Long uninterrupted enjoyment and possession by the vendor can be proved by evidence of other persons whose affidavits may be taken by the purchaser.

3. Acceleration of estate and subsequent settlement.—A testator has given his widow a life estate and his children an absolute estate. The widow desires to protect the children after her death. The children consenting the widow could by a release terminate her estate and cause the children to make a settlement for her for life with power of appointment to her to settle on the children in such proportions as she may desire and in default of exercise of power to the children for their respective lives and thereafter to the survivor or the children of such children as the case may be. This may be modified to suit the requirements of the parties.

4. If the conditions preclude requisition or identity the purchaser is nevertheless entitled to make them where the property described is different from that agreed to be purchased.

5. The mortgagor, a Sunni Mahomedan, has a life interest; it is open to him to have it declared that he is absolutely entitled. Although the decision in (1937) Bom. 18 is to the contrary the mortgagee cannot

be advised to lend in view of this conflict.

6. Is the property subject to any attachment?

7. If the land is redeemed a certificate of the Collector must be produced.

8. The title was defective as land was held by A under a lease for 100 years renewable every 100 years in perpetuity. A leased to B for 100 years without the renewal clauses and B mortgaged to C. C in exercise of his power of sale agreed to sell to D who objected to the title as not being a perpetual leasehold as stipulated.

9. The title commencing from over 60 years has one flaw, that a conveyance of less than 12 years is missing and the loss not satisfactorily accounted for, the purchaser having objected to the title the vendor should take out an originating summons. A lost deed is no objection to title unless its non-production creates a reasonable doubt.

10. The deed of conveyance dated was executed by a power-of-attorney. A notarially certified copy thereof must be produced and handed over. The purchaser must be satisfied that at the time of execution the donor of the power was (1) alive, (2) of sound mind, (3) had not revoked the power, and (4) had not become insolvent. Where there are several deeds so executed and the original powers not produced nor the other points satisfactorily answered the purchaser may reject the title.

11. A purchaser cannot refuse a conveyance tendered by the vendor and executed by his agent unless the vendor is in the same place. It is always advisable to provide against this in the agreement for sale. In this connection reference may be made to sections 201, etc. of the Indian Contract Act, 1872.

12. The vendor being a receiver, has he completed his security? Adduce evidence.

13. Is there any *masjid* or mosque established in any part of the house? If so the purchaser will decline to complete the sale.

14. Is there any Hindu idol, installed in any part of the building? If so the purchaser will decline to complete.

15. On investigation it appears a larger portion and consequently more valuable part does not belong to the vendor; the purchaser is called upon to complete the sale of the smaller portion, the purchaser agreeing to relinquish his claim to further performance and compensation for deficiency or for loss or damage.

16. The deed of (state date) appears to have been an exhibit in suit (give number and names of parties). An explanation should be given for what purpose it was exhibited.

17. The vendor's executorship having terminated unless the consent in writing of the beneficiaries is obtained by joining them and thus executing the conveyance, the purchaser cannot be advised to complete the sale.

18. The vendor being a trustee and there being a prohibition against sale in the settlement, the order of the Court to sell the property is of no effect.

19. A, the testatrix, having been married prior to 1866 had no right to will away her property. How does the vendor propose to remedy this defect in title.

20. The deed of (date) has an endorsement of the owner standing surety. Adduce evidence that he was discharged as such.

21. The purchaser relied upon the vendor's representation that the property realized a certain amount of rent. On inquiries it has been ascertained that the lease is not binding on the lessees. What has the vendor to say to this?

22. The area of the plot agreed to be sold is deficient by..... sq. yards. Is the vendor prepared to make compensation or cancel the sale?

23. Amongst the title-deeds is a registered equitable mortgage without a release? How is it proposed to cure this defect?

24. There is a wall between the vendor's property and the adjoining property. To whom does the wall belong and what are the relative rights of parties?

25. The Bank's Articles of Association authorise investment in immovable properties for its officers only. The property stipulated for sale was purchased by the Bank as mortgagee and not used as such, the purchaser contends that the Bank's purchase was unauthorised and therefore the title is not marketable.

26. The settlement provides for minimum number of trustees to be three, the vendors being only two trustees cannot execute a conveyance unless a third is regularly appointed.

27. The property being a leasehold:—

- (a) the vendor must produce receipt for the last payment of rent,
- (b) satisfy that there are no breaches of covenant or if they be any, they have been condoned,
- (c) the vendor must obtain the licence of the lessor to convey,
- (d) the vendor must hand over the original lease to the purchaser.

28. A vendor agreeing to sell a lease cannot offer an under-lease.

29. Is there any deed with the neighbouring owner restricting the acquisition of easements?

30. Is the property subject to right of pre-emption?

31. The property having been held by a Hindu testator, is there any person who has a right to maintenance or residence?

32. The vendors being executors of a Mahomedan owner, is the property subject to a lien for dower? Is such a dower a charge on the property?

33. Who are in possession of the property as tenants:—

- (a) What rent do they pay?
- (b) Who is collecting the rents?
- (c) Are the tenants monthly?

34. Are any persons occupying the property other than the tenants or do they hold under leases Please give particulars.

35. Under what right will the vendor/mortgagor be executing the deed?

36. Is any room or portion of the property dedicated orally or in writing to religious or charitable uses or used as a place of worship by the members of the family or the public?

37. Is any order necessary empowering the executors to sign the deed?

38. Does inspection of the negative list disclose any attachments on the property?

39. What is the cadastral number and division of the property?

40. Produce latest Municipal and Collector's bills for inspection.

41. Is there any person residing in this property free of rent?

42. Is there any charge or encumbrance on this property? If so, disclose the same. The mortgagor/vendor must clear the same before executing the mortgage/conveyance.

43. Has any person got a charge for residence in this property under any deed or writing whatever?

44. Has any person a charge for maintenance on this property by virtue of any deed or writing?

45. Is there a charge under section 55 (6) (c)?

46. Has any notice been received/given for acquisition of the land by the Improvement Trust, Collector or Public body?

47. Has any notice been given by the Municipality for repairs?

48. Has any notice been given under the Epidemic Diseases Act or any other Act in this property?

49. Is the property subject to *lis pendens*?

50. Are there any rights of way or other easements over, out of or affecting any part of the property under sale? If so what are they? State the particulars.

51. Is there any impediment against increasing the height of the building?

52. Has any of the persons now or formerly entitled to the said property to the knowledge of the vendor/mortgagor been insolvent or taken the benefit of the Insolvent Debtors Act? If so, when?

53. Is the vendor/mortgagor or his solicitors aware of any charge, lien, writ of execution or any deed or encumbrance or other prejudicial circumstances affecting the property? If so state the nature of such defect and the mode in which it is proposed to cure it.

54. Give particulars of all adverse claims, if any, to or previous litigation if any, relating to or affecting the property.

55. Give particulars of insurance of the property now subsisting.

56. In whose name the property at present stands in the Collector's and Municipal records?

57. Is there any part of the property in the regular line of the street?

58. Are any of the walls common or party walls?

59. Is the vendor/mortgagor aware of any circumstance, lien charge or any secret trust now in existence upon the said property and has the vendor/mortgagor created any?

60. Is the vendor/mortgagor aware of any circumstance other than what may have been disclosed by the requisitions which can or may operate to prevent the vendor from selling the property absolutely and free from all debts, claims, demands and encumbrances? If so, disclose the same.

61. Is the property subject to any process of the Court? If so, please disclose it.

62. Is the property subject or liable to compensation on account of riots? If so, give particulars.

63. Has the vendor or his predecessors in title been surety for any person and produced the deeds relating to properties or either of them to justify his or their stability?

64. Is any part of the properties or either of them within the set back or set forward lines or in any development or town planning scheme or acquisition scheme? If so, please give particulars?

65. Is the property subject to any tax or outgoings other than usual rates and taxes?

66. What is the tenure of the land? Adduce satisfactory proof in support of the answer.

67. Is the mortgagor aware of any settlement deed, fact or omission, affecting the property or properties and not disclosed by the title-deeds?

68. Who are in possession of the property?

The purchaser reserves the right of making such further requisitions and objections as may arise after the usual searches or on the answers to these requisitions or otherwise.

INDEX.

ABSTRACT—

- Agreement not to require an, 401, 402.
- Information cannot be used by purchaser, 412.
- Objection when to be made, 402, 412.
- Perfect, what is a, 402.
- Time to deliver requisitions, 402, 412.

ABSTRACT OF TITLE—

- Contents, 402.
- Delay in delivery of, 402.
- Delivery of, 402.
- Expense of, when deed not in vendor's possession, 402.
- Perfect, 402.
- Proper, 402.
- Purchaser can call for deeds not in, 402.
- Satisfied incumbrance in an, 402.
- Time for delivery not essence of contract, 401, 402.
- Unexecuted deeds in an, 402.
- What must, consist of, 402.

ACCEPTED TITLE REPUDIATED—See "Repudiation of accepted title."

ACCESSION, MORTGAGEE IN POSSESSION—

- Absence of a contract to the contrary, 582.
- Accessions,
 - Capable of separate possession or enjoyment, 582, 583.
 - Made with mortgagor's assent, 585.
 - Not capable of separate possession or enjoyment, 584.
 - To which section 63 applies, 582, 583.
 - What are they, 581.
- Acquisition not necessary for preservation from destruction, etc., 584.
- Alluvion, 582.
- Grove
- Interest on costs, 585.
- Mortgagee not bound to deliver, 586.
- Mortgagor desiring to take, conditions on which mortgagee must deliver accession, 583.
- Mortgagee also a co-owner, 586.
- Must be received during continuance of the mortgage, 581.
- Planting of trees not an accession, 586.
- Profits from accession, 585.
- Profits arising from accession, 585.
- Rates and cesses, mortgagee entitled, to, 585.
- Rebuilding by mortgagee, 587.
- Retrospective effect, 581.
- Rule in section 63 not applicable, 586.
- Section 63 and 72, compared, 587.

ACCESSION WHEN MORTGAGEE NOT IN POSSESSION, 647.

- Freehold, 648.
- Leasehold, 648.
- Mortgagee not entitled when, 648.
- Natural, 648.
- Physical, 648.
- Punjab applies the rule in section 70, 647.
- Scope of the section, 647.
- Second mortgagee making additions, 648.
- Transferee and successors of mortgagor and mortgagee included, 647.
- Warg* lands, 648.
- Waste land, 648.
- What are, 648.
- Zamindari, 648.

ACCRETION—See “Accession.”**ACCUMULATIONS OF INCOME, 157.**

- Accumulation Act, 1800,
- Forbidden, 158, 159.
- Hindu Law, 158, 159.
- Law of Property Act, provisions for in, 163.
- Mahomedan Law, charitable purposes, 159.
- Part of, 158.
- Perpetual, void, 159.
- Wakf Act allows, 160.
- Wills by, 158.
- When permitted, 160.
 - Effect of an invalid direction, 161.
 - For maintenance of property, 160, 161, 162.
 - Disposal of property and income on direction of, 160.
 - Two periods allowed in section, 160, 161.
 - Void to what extent, 160.
 - For payment of debts, 160, 161.
 - What debts are within the exception, 160, 162.
 - For preservation of property, 160, 161, 162.
 - For raising portions, 160, 161, 162.
 - Meaning of portions, 160, 161.
 - Funds settled by a foreign settlement, 163.
 - Keeping up policy on foot, 163.
 - Life-estate, 160, 161.
 - Presumed intention of the Act in restricting, 162.
 - Property situate in foreign lands, 163.
 - Public purpose, 162.
 - Savings of income, 162.
 - Settlor domiciled in a foreign land, 163.
 - Sinking fund for, 162.

ACQUISITION OF MORTGAGED PROPERTY—See “Surplus sale proceeds.”**ACQUISITION—**

- Liability of vendor must be disclosed, 389.

Act—Also see “Applicability to.”

Exhaustive, whether, 5.

Extent, 8, 9, 10.

Commencement, 8.

Short title, 8.

ACT IF EXHAUSTIVE, 5.

ACTIONABLE CLAIM—

Agent fraudulently withholding moneys, 77.

Annuity, arrears of, 940.

Beneficial interest, 940.

Benefits under a contract, 30.

Breach of contract, damages on, 30.

Brewer's lease, 32.

Civil Court, must be cognisable by, 937.

Copyright, 30.

Covenant, personal 32.

Covenant running with land suit on, 77.

Cross transaction adjusted, 30.

Damages, 30.

Debentures—See “Debentures.”

Debt as, 30.

Debt, part of, as, 31.

Decree, 30

Deposit, 30.

Differs from mere right to sue, 76.

Dower debt, 30.

Earnest, 30.

Executory contract, right under, 32.

Insurance moneys, 30.

Interest under section 73, Contract Act, 30.

Lessee contracts for building, 32.

Lessee's liability to pay the lessor, 32.

Licence, moneys due under a, 77.

Life Policy, 30, 939.

Meaning of, 29.

Mercantile document of title to goods—947.

Negotiable instruments—See “Negotiable instruments.”

Part of price, 30.

Partner's right to sue, 30,

Partnership accounts, 77.

Patent, 30.

Profits, mesne, 30.

Provident fund, 30.

Rents, arrears of, 30.

Rents assigned of future leases, 77.

Rents, current, 30.

Rents, future, 30.

Rents prior to Transfer of Property Act, 77.

Reversionary interest, purchase of, 32.

ACTIONABLE CLAIM—*contd.*

Shares—See “Shares.”

Stocks—See “Stocks.”

Transfer of—

Debt dealing with by transferor, 939.

Judicial proceedings by transferee, 939.

Liabilities of transferee, 942.

Life policy, 938, 939.

Marine policy, 938, 939.

Mortgage debt, disposal of, on realisation, 943

Notice on, formalities of, 941.

Persons disqualified from obtaining, 944.

Requisites for a valid, 938.

Vesting of transferor's right and remedies, 939.

Warranty by transferor on, 943.

Unpaid balance of consideration, 30.

ACTUAL DEMISE—

When construed as a lease, 786.

ACTUAL NOTICE—See “Notice.”**ADMINISTRATOR—See “Executor.”****ADMINISTRATOR GENERAL—**

Covenants, 83.

Grant of Letters of Administration to a Hindu estate give power of sale to, 83.

Sale by, 83.

ADVANCEMENT, right to receive, 227.

Out of profits of immoveable property, 227.

Criterion, 227.

Enforceable against a transferee with notice, 227.

Enforceable against gratuitous transferee, 227.

English Law,

Child, 227.

Declaration by parent contemporaneous, 228.

Declaration by parent subsequent, 228.

Wife, 227.

Indian Law,

Child, 227.

Mistress, 227.

Wife, 227.

Not enforceable against transferee without notice or against such property in his hands, 227.

AGENT—

Authority dependent on written mandate, 43.

Concealment of fact by, 43.

Constructive notice, 41, 43.

Director of Company as, 42.

Exception to the Rule—Notice to agent is notice to principal, 42, 43.

For both vendor and purchaser, 43.

AGENT—*contd.*

- Imputed notice, 41, 43.
- Knowledge whence derived material, 41.
- Mortgagor and mortgagee, 41, 42.
- Notice to, notice to principal, 41.
- Ostensible authority, 43.
- Presumption of notice when repelled, 43.
- Solicitor as general, 41.
- Solicitor employed by the mortgagee, 42.
- Undisclosed principal, 43.

AGREEMENT BETWEEN EXPECTANTS, 59.

AGREEMENT FOR LEASE—

- Operates as a lease, whether, 787.

AGREEMENT FOR SALE—See also "Contract for sale."

- Followed by possession but not by registered conveyance whether a valid defence to a suit for ejectment, 379.

AGREEMENT TO MORTGAGE, 469, 470.

AGRICULTURAL LEASES—

- Chapter V not to apply, 908.
- Holding over in case of, 909.
- Horticultural does not differ from, 910.
- Law before the Act, 910.
- Leases construed as, 909.
- Leases construed as not, 909.
- Underground rights, 909.

ALIENATION BY—See also "Transfer."

Coparcener,

- Undivided interest in Hindu coparcenary, 101.
 - Berar, 102.
 - Bombay, 102.
 - Calcutta, 101.
 - Central Provinces, 102.
 - Coparcener, sole surviving, 102.
 - Gift, 102.
 - Immoral purposes, 102.

Crown,

- Covenants, 115.
- Purchase by, 115.
- Sale by, 115.

Drunkard, 91.

Hindu widow,

- Alienee must prove what, 102, 103.
- Benefit of the estate, 105.
- Borrowing mode of, 106.
- Guardian and Wards Act, 94.
- Joint power of two or more, 106.
- Manager, power as, 102, 103.

ALIENATION BY—See also “Transfer.”—*contd.*

Hindu widow—*contd.*

- Mismanagement of the widow does not affect, 105.
- Mode of, mortgage personal credit or sale, 106.
- Moveables acquired on partition, 103.
- Moveables power of, 103.
- Necessity, 105.
 - Betrothal of daughter, 105.
 - Debts of husband, 105.
 - Defending law suits, 105.
 - Dowry for daughter, 105.
 - Family debts, 105.
 - Gift to son-in-law on marriage, 105.
 - Government Revenues, 105.
 - Gowna* ceremony gift on occasion of, 105.
 - Maintenance of herself, 105.
 - Marriage of daughter, 105.
 - Marriage of deceased owner's uncle's son's daughter, 105.
 - Marriage of son's daughters, 105.
 - Rent decree, 105.
 - Shraddha* of mother, 105.
 - Succession certificate costs, 105.
 - Thread and marriage ceremonies of daughter's sons, 105.
- Pious observances, 102.
 - Bhog* (food offerings), 103.
 - Digging of tanks, 102.
 - Soul of husband, 103.
 - Shraddha* of father, 102.
 - Suphal sankalp*, 103.
 - Temples building, 102.
- Presumption for lapse of time, 104.
- Property must be inherited and in possession, 103.
- Religious acts, a justification for, 102, 103.
 - Discharge of husband's debts, 102.
 - Obsequies of the deceased, 102.
 - Pilgrimage for benefit of husband's soul, 102.
 - Pilgrimage to Pandharpur or Gaya but not Benares, 102.

Joint tenants,

- Alienation, 100.
- Assurance between them, proper form of, 100.
- Corporation and natural person, whether can be, immoveable property cannot be held by, 100.
- Distinguished how, 99.
- Hindu Law under, 99.
- Holding, nature of, 99.
- Musha* of, 100.
- Perishing at one time, 100.
- Severance, 100.
 - Bankruptcy on, 99.
 - Demise on, 100.

ALIENATION BY—*contd.*

Joint tenants—*contd.*

- Disposal by, 100.
- How effected between themselves, 100.
- Marriage on, 99.
- Marriage when not causing, 99.
- Tenancy in common on, 100.
- Tenants in common, how far similar with, 99.
- Undivided share, 100.
- Unequal shares of, 100.
- Unities of, 99.

Judgment debtor, 115.

Lunatic.

- Declaration under the Act how distinguished, from the Contract Act, 92.
- Judge cannot delegate his functions, 92.
- Jurisdiction under the Lunacy Act, 92.
- Lucid intervals, transaction during, 92.
- Person becomes a, after agreement to sell, 93.
- Preliminary inquiry, nature of, 92.
- Purchase by, 93.
- Setting aside adjudication, 93.
- Vendor after contract becomes, 93.
- Who is a, 92.
- Committee of Lunatic, 92.
 - Covenants by, 93.
- Joint family of, 93.
 - Court has no power to interfere, 93.
- Joint managers, 93.
 - Survivor's office terminates on death of co-manager, 93.
- Sale of land of
 - At great undervalue, 93.
 - Court may order when, 93.
 - Fraud to obtain conveyance from, 93.
 - Hindu wife for husband, 93.
 - Manager, by, 93.
 - Security on setting aside, 93.
 - Vendor of feeble intellect, 93.

***Math*—See "Mahant."**

Manager of Hindu family.

- Antecedent debt, what is an, 109, 111.
- Benefit of the estate, 109.
- Consent of coparceners, 111.
- Criteria to be regarded on an, 110, 111.
- Father's power over coparcenary property, 110.
- Legal necessity, 111.
- Powers of, 109, 110, 111.
- Principle same as for an infant heir, 109.
- Purchaser not bound to see to the application of the purchase-money, 109.
- Trading purposes justify, 111.

ALIENATION BY—*contd.***Manager of Hindu family—*contd.***

What is necessity, 110, 111.

Without legal necessity, 110, 111.

Minor.

Agreement for sale by, 94.

Buddhist, 95.

Compensation to purchaser when allowed, 94.

Compensation when refused to purchaser, 94.

Estoppel against, 98.

Guardian of, 94.

Agreement for purchase by a, 94.

Appointment of, 94.

Covenants for title, 97.

De facto, 95.

De hoc, 95.

Effect of disposal without Court's sanction by, 95, 96.

Joint Hindu family, member in, 95.

Managing member can be appointed of minor member by Chartered High Court, 96.

Official Trustee cannot be, 94.

Power of, authorized by Court to sell, 95, 96.

Purchaser, how far protected from, 94.

Purdanashin lady can be, 94.

Right to transfer property of, 95, 96.

Sanction to, exercisable within what time, 96.

Sanction of Court not reciting necessity by condition regulating alienation by, 95, 96.

Indian Christian, 95.

Invalidity plea to whom available, 94.

Mahomedan, 95.

Purchase by a, 97.

Ratification of contract by, 94.

Repudiation by, 94.

Rules of Bombay High Court as to, 97.

Sale of property of, 94.

Security by, 97.

Mortgagee.

Covenants on sale, 90.

Redemption by subsequent mortgagee on agreement to sell by prior, 90.

Sale by mortgagee, 90.

Official Assignee.

Conveyance by, 86.

Insolvent's properties vest in, 86.

Not an agent of the Court, 86.

Not exempt from requirements of section 54, 86.

Stamp duty exempted, 86.

Without vesting order invalid, 86.

Sale of land by, 86.

Before his appointment, 86.

ALIENATION BY—*contd.*

Sale of land by, 86—*contd.*

Code of Civil Procedure, how far applicable, 86.

Discharge of insolvent, after, 86.

Insolvent, of his after acquired property, 86.

Private treaty, 86.

Public auction, 86.

Sanction of Court not necessary for, 86.

Official Trustee.

Notice of suit against, 84.

Officer of the Court, how far, 83, 84.

Sale by, 83.

Person of weak intellect—See "Weak intellect."

Partner.

Acquisition of immoveable property by, 91.

Habendum in conveyance to, 91.

Power of individual, to sign, 91.

Transfer of immoveable property by, 91.

Where subsequent mortgage defective, first mortgage kept alive, 91.

Pujari—See "*Mahant*."

***Purdanashin* lady.**

Protection, how far extended to, 112.

Transfer by, 112.

Receiver.

Agent of party is, is not, 87.

Alienation by, 87.

Conveyance on, execution, 87.

Covenant, 87.

Leave of Court necessary, 87.

Private treaty, 87.

Public auction, 87.

Reserved bid, 87.

Charge by, on property purchased by him, 87.

Delegation of powers, 87.

Discharge, 87.

Executor, a, is not, 87.

Public office, 87.

Purchase for himself, 87.

Regularity of order appointing, cannot be questioned, 87.

Security by, 87.

Suit against, with leave of Court, 87.

Testing the market, 87.

Trustee is not, 87.

Vesting of property in, 87.

Who may be, 87.

Shebait—See "*Mahant*."

Tenant in common.

Covenants by, 101.

Fiduciary relationship between, 101.

ALIENATION BY—*contd.***Tenant in common—***contd.*

- Inequality of share of, 101.
- Joint tenants, presumption rebutted in, 101.
 - Favour of, 101.
 - Joint account clause notwithstanding, 101.
 - Joint speculation purchase, 101.
 - Purchase out of joint funds on, 101.
 - Trade engagements, on, 101.
- Mahomedan heirs, 100.
- Position of each as to his own share, 100.
- Purchaser from coparcener is not a, 101.
- Severance, how effected between themselves, 100, 101.

Trustee.

- Alienation by, without consent of other, 89.
- Appointment of new, 89.
- Contracts by, 88, 89.
- Delegation by, 89.
- Purchase by, of trust property, 89.
- Purchase by way of investment, 90.
- Receipt by, for purchase-money, 89.
- Summary powers under Act XXVII of 1866 exercisable in case of Hindus, 87, 88.
- Summary powers under Act XXVII of 1866 exercisable in case of Mahomedans, 88.
- Two trusts combined by, for one purchase, 88.

ALIMONY—See "Maintenance, future."**ALL THE ESTATE CLAUSE—**

- Easements and appurtenances, 421.
- Not necessary in a conveyance, 420, 421.
- What passes under, 420.

ALLUVION—See "Accession, mortgagee in possession."**AMENDING ACT, RETROSPECTIVE EFFECT OF, 6.****ANOMALOUS MORTGAGE—**

- Amendment of section, 98, 512.
- Iladarawara* and its incidents, 512.
- Lahan-gahan* and its incidents, 513.
- Limitation, 516.
- Otti* and its incidents, 513.
- Redemption of, 516.
- Remedies of a simple usufructuary mortgagee, 516.
- Remedy under an usufructuary mortgage by conditional sale, 516.
- Simple usufructuary mortgage is, 515.
- Union of Usufructuary and mortgage by conditional sale is, 516.
- Various other forms of, 512.
- What is an, 512.
- Zarpeshgi*, 512.

APPLICABILITY OF ACT TO—

- Aurangabad, 9.
- Bangalore, 9.
- Berar, 9.
- Bombay, 9.
- Burma, 9.
- Crown Grants, 10.
- Delhi, 10.
- Madras, 10.
- Mhow, 10.
- Mysore, 9.
- Native States, not extended to, 9.
- Neemuch, 10.
- Nowgong, 10.
- Punjab, 10.
- Secunderabad, 9.

APPORTIONMENT OF BENEFIT OF OBLIGATION—

- Law prior to the Act, 222.
- Moveables, 222.
- Notice, 222.
- On severance of interests, 222.
 - Exception to the rule, 222.
 - Agricultural leases, 222.
 - Contract to the contrary, 222.
 - Transfers by operation of law, 222.
 - Transfer under decree or order, 222.

Rent—

- Arrangement for separate payment of rent, 223.
- Assignee of a lessee, 223.
- Co-sharers, 223.
- Enhancement, 223.
- Frame of suit for rent, 223.
- Liability of tenant acquiescing in arrangement for separate payment, 224.

Value of shares, 223.

APPORTIONMENT OF OBLIGATION—See section 82.

APPORTIONMENT OF PERIODICAL PAYMENTS—

- Annuities given by will, 220.
- Deposit for redemption, 219.
- Dividend on shares declared subsequent to purchase, 219.
- Exception to the rule, 219.
- Extent of the rule, 218.
- Garnishee order, 220.
- Moveables, 219.
- On determination of interest, 218.
- Other periodical payments, 219.
- Payment when due and payable, 218.
- Rent paid in advance, 219.
- The older English Law, 220.

APPORTIONMENT OF PERIODICAL PAYMENTS—*contd.*

- Time limit in, 219.
- To whom the rule applies, 218.
- Transfer by act of parties, on a, 218.
- What payments not in the rule, 219.

AREA—

- Less than that stated in the deed, 388.

ASSIGNMENT BY LESSEE—

- Absolutely, 853.
- Agricultural leases, 856.
- Arbitrary refusal to grant licence for, 855.
- Assignee, liability on, 859.
- Assignee of the lessee, right and liabilities, 860.
- "Assigns," meaning of, 854.
- Contract Act, IX of 1872, section 23, 861.
- Contract to the contrary, 853.
- Covenants by assignee on, 856.
- Covenants by assignor on, 856.
- Covenant of assignee, 859.
- Declaration to stand possessed upon trust, 854.
- Deposit on lease, 860.
- Exceptions to restrictions against—
 - Bankruptcy vesting on, 860.
 - Compulsory purchase of land, 860.
 - Devising of a term, 860.
 - Devolution by operation of law, 860.
 - Execution against property, 860.
 - Executors disposing of the term, 860.
 - Farmer committing default in revenue, 860.
 - Lessee of Court of Wards, 860.
 - Particular individual, 860.
 - Re-entry clause, absence of, 860.
 - Tenant having untransferable right of occupancy, 860.
 - Third party, 860.
- Form of covenant against, 853.
- Lessee's liability on, 857.
- Lessee, mortgage by, 859.
- Lessor's right against transferee, 857, 861.
- Licence—
 - Action, no duty to take, 857.
 - Assignor bound to obtain, 857.
 - Costs of obtaining, 857.
 - Dumpro's* case, 857.
 - Extent of, once granted, 857.
 - Lessor's refusal to give, 857.
 - Vendor must obtain, 857.
- Licence not a breach, 857.
- Licence not to be withheld unreasonably, 855.

ASSIGNMENT BY LESSOR—*contd.*

- Local usage, 853.
- Lodgings, letting of, covenant not to sub-let, 857.
- Mortgage by way of, 853.
- Mortgage by way of sub-demise, 861.
- Mortgagor and lessor, 859.
- Nature of covenant, 854.
- Non-applicability to certain land, 855.
- Notwithstanding refusal by lessor, 855.
- Part interest, 853.
- Parting with possession, 854.
- Partner or dissolution, 860.
- Privities, different kinds of—
 - Privity of contract, 857.
 - Privity of contract and estate, 857.
 - Privity of estate, 857.
- Privity of estate established between transferee and lessor on, 857.
- Prohibition against assignment of whole or part under-lease a breach, 854.
- Re-entry clause absent, 861.
- Refusal "upon advice" not arbitrary, 855.
- Restriction against, under-lease not a breach, 854.
- Sub-lease, 861.
- Term cannot be longer than that of the assignor, 856.
- Title to the freehold in England, 856.
- Title to the freehold in India, 856.
- Transfer by lease, 856.
- Transfer by mortgage, 856.
- Transfer by sale, 856.
- Under-lease, 861.
- Under-lessee, mortgage by, for residue of term, 859.
- Usual covenant, it is not, 854.
- Whole interest, 853.
- "Whole or any part of his interest," meaning of, 856.
- Winding-up order, on, 860.

ASSIGNMENT BY TRANSFEE OF LESSEE—**ATTACHED TO THE EARTH—Also see "Fixtures."**

- Anchor, 26.
- Baling press, 28.
- Distillery, 28.
- Domestic articles, 28.
- Doors, 27.
- Embedded in the earth, 25, 28.
- Factory, 28.
- Fixed machinery, 26.
- Fixtures in English Law differ from, 25.
- Law before the passing of the Act, 25.
- Materials of a house, 28.
- Natural annexation, 25.
- Physical annexation, 25.

ATTACHED TO THE EARTH—*contd.*

Presumption arising from definition rebutted, 25.

Rooted to the earth, 25.

Tiled huts, 28.

Windows, 27.

ATTESTATION—

Not necessary in a conveyance, 422.

ATTESTATION—Also see “Attesting witness.”

Definition retrospective, 521.

Invalid, 520, 524.

Meaning, 520.

Method of, 521.

Purdah lady executant, 522, 525.

Proof of, 524.

Receipt clause, on 520.

Various modes of, 523.

ATTESTING WITNESS—

Effect on, of attestation, 524.

Ignorant of nature of instrument, 525.

Registration, 525.

Scribe, 525.

Signature by itself does not make a person, 524.

ATTORNMENT, 809.**AUCTION-PURCHASER—**

Cases when, 581, 582.

Conditions on which mortgagee bound to deliver, 581.

Construction of valuable building, 587.

Costs of accession, 585.

Costs, 585.

Cutting down trees by mortgagee, 586.

Expenditure incurred by mortgagee, 582.

“BABUANA” PROPERTY—See “Maintenance, future.”

BENEFIT OF PUBLIC—See “Public, benefit of.”

“BHAGBANDAK”—See “Usufructuary mortgage, varieties of.”

“BHOGA BANDUKAM”—See “Usufructuary mortgage, varieties of.”

BHOGYADI—See “Usufructuary mortgage, varieties of.”

BILL, REFERENCE TO, 3.

BOUNDARIES, 416.

BRACKETS, NO PART OF THE ACT, 5.

BUILDING LEASES, 70.

Transfer of benefit of agreement, 70.

BUILDING SCHEME—

- Common, 236.
- Essentials of, a, 237.
- Intention to establish mutual obligations, 236.

BUYER'S DUTY TO DISCLOSE—

- Confined to what, 445.
- Deceit if implied, 445.
- Trespasser's proposal to purchase, 445.

CARE OF PROPERTY—

- Nature of vendor's obligation, 425.
- Vendor must act prudently, 425.
- Vendor's liability ceases on delivery, 425.

CARE OF TITLE-DEEDS—

- Till delivery vendor liable, 425.

CERTIFICATE OF COMMISSIONER OR MASTER, 676.

CESSATION OF INTEREST—

- Interest on the principal money, 707.
- Moment when interest ceases to run, 707.
- Notice before payment or tender, 707.
- Previous tender, 707.
- Requisites valid for cessation of interest, 706.
- Service of notice, 707.
- "Tender or deposit," meaning of, 707.
- Withdrawal by mortgagor, 707.

CHAMPERTY AND MAINTENANCE—

- Defence of existing possession of property, 192.
- English Law differs, 191.
- Equity of redemption, purchase of, 192.
- Gambling in litigation, void if, 192.
- Inadequacy of price, 192.
- Present transfer by vendor, 191, 192.
- Public policy contrary to, void, 191.
- Supplying money, to suitor, 191.
- What are, 191.

CHANCE—See "Spes successionis."

CHARGE—See also "Charge of purchaser," "Charge of sub-purchaser," "Charge of vendor."

- Agreement to mortgage, 758.
- Annuity, 758.
- Attachment, 757.
- Attestation, 760.
- Changes in section 100, 743.
- Common incidents of mortgage and, 751.
- Contingent, 755.

CHARGE—contd.

- Co-sharer's right to, 758.
- Created by act of parties, 744.
- Description of property essential, 744.
- Distinction between mortgage and, 749, 750.
- Escheat, 758.
- Floating, 755.
- Further, 474, 756.
- How enforced, 751.
- Intention how far essential, 747.
- Interest how far a, 746.
- Instances of no charge, 753, 754.
- Invalid mortgage whether a, 757.
- Limitation for enforcement of, 752.
- Maintenance whether a, 757.
- Meaning of, 743, 744.
- Must not amount to a mortgage, 748.
- Nature of, 743.
- Operation of law created by, 747.
- Other varieties of lien, 756.
- Personal liability, 747.
- Registration, 760.
- Release of, 760.
- "So far as may be," meaning of, 751.
- Stamp, 760.
- Transferee without notice, 753.
- Transferee for consideration and without notice, rights of, 753.
- Trustee having charge for expenses exempted from the operation of the section, 752.
- Unsecured debts, 758.
- Unsecured creditor, 758.

CHARGE OF PURCHASER—

- Contract of sale with delivery, 449.
- Earnest, 449.
- Enforceable against whom, 455.
 - Balance how recoverable, 455.
 - Court may declare on summons, 451.
 - Discharging an encumbrance by purchaser, 456.
 - How enforced, 455.
- Extinction of, 451.
- Forfeiture, 452.
- Lien when given, 450.
- Nature of, 451.
- Property to which it attaches, 449.
- Purchaser must be entitled to the return, 449.
- Time when, comes into existence, 451.
- Seller has no personal interest, 450.

CHARGE OF SUB-PURCHASER, 455.

CHARGE OF VENDOR—See "Lien of unpaid vendor."

- Against whom enforceable, 440.
- Assignee's rights, 440.
- Contract to the contrary how affects, 441, 442.
- Co-purchasers, 443.
- Embodied in purchaser's suit, 440.
- Extinction of, 441, 442.
- How effected,
 - Agent, payment to, 443.
 - Agent, unauthorized to receive, 443.
 - Instalment bond taken, 442.
 - Mortgage accepted, 442.
 - Nominee to receive, 442.
 - Payment to creditor, 442.
 - Promissory note taken, 442.
 - Third person to receive, 441.
- Injunction against purchaser, 443.
- Interest on, 444.
- Limitation for enforcement, 443.
- Meaning of, 439, 440.
- Nature of, 439, 440.
- Personal remedy against purchaser 443.
- Premium under lease, 443.
- Realisation of, 444.
- Receipt of consideration how affects, 441.
- Registration of, 443.
- Transfer of, 443.

CHARITY—See "Public, benefit of."

CLASS—

- Bequests and devises to a, 182.
- Canons of construction, 183.
- Child *en ventre sa mere*, 185.
- Eldest of, as shall attain a particular age, 182.
- Gift controlled by other provisions, 182, 183.
- Gift to a, 155.
- Gift to a contingent class and a gift to a class upon a contingency, distinction between, 182.
- Gift to a, except one, 155.
- Gift to take effect on death of lineal descendants, 156.
- Gift upon attaining a specified age and a gift to such member of a class as attain a specified age, distinction between, 182.
- Hindu Disposition of Property Act, 156.
- Meaning of, 155.
- Member of, dying under, 182.
- Youngest of, as shall attain a particular age, 182.
- Wills, 156.

COLOG—See "Redemption."

CODE OF CIVIL PROCEDURE, 1908—

- Section 60, how different from section 6 (a), 55.

COLLATERAL SECURITY, 474.

COMMISSIONER'S CERTIFICATE—See "Certificate of Commissioner."

COMMISSIONER'S REPORT—

Exceptions allowed, as to title, 404.

CO-MORTGAGOR'S EXPENSES—See "Expenses of co-mortgagor."

COMPULSORY ACQUISITION—See "Surplus sale proceeds."

COMPUTATION OF TIME IN LEASES—See "Term, computation of, in a lease."

CONCURRENT LEASES—See "Lease."

CONDITION—

Agreements on, 191.

Bequests on, 191.

Capricious withdrawal of consent, 191.

Charitable gift, 191.

Compensation for deficiency, 388.

Compliance after act or event, 191.

Conditional conveyance, 188.

Consent generally, 191.

Defeat the provisions of the law, 189.

Distinguished from election, 188.

Forbidden by law, 189.

Fraudulent, 189.

Ignorance of condition, 188.

Immoral, 189.

Impossible, 189.

Involves or implies injury to person or property of another, 189.

Precedent, 187.

Continuing or abiding, 187.

Distinguished from subsequent, 187.

Lunatic, Court acts for, 188.

Must be substantially complied with, 187.

No general rule for computing time, 187, 188.

Time for performance when period prescribed, 187, 188.

Time for performance when no period prescribed, 187, 188.

When in doubt Court prefers condition subsequent, 187.

Presumption, 188.

Public policy opposed to, 190.

Vesting of legacy, 191.

CONDITION OF LEASEHOLD PREMISES—

Action on the covenant, 872.

Agricultural leases, 864.

Assignee's liability as to, 867.

Breaches, whether contrary or not, 872.

Covenant to build and covenant to repair, 871.

Covenant for repair how construed, 870.

Covenant runs with the reversion, 867.

CONDITION OF LEASEHOLD PREMISES—*contd.*

- Covenants separate and distinct, 868.
- Covenant as to, instances of, 866.
- Defect in, 869.
- Distribution of liability for, 864.
- Entry to view state of, 869.
- Express covenant to keep, as at date of possession, 864.
- Fixture of landlord, 870.
- Form of covenant, 864.
- Implied contract to maintain, 864.
- Implied obligation of tenant, 864.
- Inside repairs not included, 864.
- Irresistible force exception, 863.
- Landlord's collateral agreement, effect of, 871.
- Landlord's obligation, extent as to, 871.
- Lessee's liability as to, on expiration of term, 863.
- Lessee's liability as to, during the term, 863.
- Lessor's right to enter, 863.
- Lessor's right to inspect, 863.
- Lessor's right to give notice of defect, 863.
- Lurcott v. Wakely & Wheeler* (1911) 1 K. B. 905 (review^o of authorities), 865.
- Maintain same, subject to reasonable wear and tear, 864.
- Measure of liability for repairs, 869.
- Nature of covenant, 867.
- Nature of covenant, as to, 867.
- Notice to agent or servant, 869.
- Notice to repair, 869.
- Notice to tenant, 869.
- Original structure defective, 867.
- Paint, not included, 865.
- Phrases on, judicially interpreted, 865.
- Remedy, defects, 863.
- Remedies for breach, 872.
- Runs with the land, the covenant, 867.
- Specific repairs, covenant to do, 870.
- Standard of repair, 866.
- Sub-lessee, 867.
- Under-lessor, 867.
- "Wear and tear," reasonable meaning of, 863.
- Wind and water-tight, 864.

CONDITION OR LIMITATION MAKING INTEREST ON TRANSFER DETERMINABLE—

- Attempted alienation, determinable on, 137.
- Evasion of the rule, 139.
- Exemption, 138.
- Insolvency, determinable on, 137.

CONDITION SUBSEQUENT—

- Alienation against, 201, 202.
- Considerations applicable differ from conditions precedent, 196.
- Contingency cutting down or divesting gift, 201.

CONDITION SUBSEQUENT—*contd.*

- Contingency on which a limitation is to take effect must be definite, 203.
- Defeasance must fit the condition, 203.
- Gift over cannot be implied, 203.
- Gift over, when void, 202.
- Ignorance of, 198.
- If void, how gift affected, 204.
- Infant not bound for residence, 201.
- Invalid, 206.
- Limitation to the rule in section 31, 205.
- Marriage, 203.
- Must be strictly fulfilled, 203.
- Must be subsequent to actual enjoyment and possession, 197.
- Odious and not given a favourable construction, 203.
- Operates in defeasance of an estate vested, 197.
- Preferred when in doubt whether it is precedent or subsequent, 197.
- Religion, change of, 202.
- Repugnant, effect of, 201.
- Residence, 200, 201.
- Revocation clause, 204.
- Rule, of perpetuities does not affect, 207.
- That transfer shall cease, 205.
- Time for performance, 198.
- Validity of, 198.
- Void, contrary to public policy, 197, 198.
- Void, if impossible, 198, 199.
- Void, if uncertain, 198.
- When dispensed with, 199.

CONDITIONAL SALE, MORTGAGE BY—

- Alteration in the law, 480.
- "Certain date," meaning of, 488.
- Difference between a mortgage by conditional sale and a sale with an option to purchase, 483.
- Essential ingredients of a, 480, 486.
- Indicia of a mortgage by, 485.
- Intention of parties the test whether mortgage or sale, 481, 482.
- Limitation, 488, 489.
- Mortgagee taking possession without foreclosure proceedings, 490.
- Onus, 489.
- "Ostensibly," meaning of, 480.
- Personal covenant, 488.
- Possession, 489.
- Presumption, 489.
- Proviso and its construction, 481.
- Punjab rule, 490.
- Regulations governing redemption of a, 486, 487.
- Rights of the parties, 490.
- "Such payment," meaning of, 488.
- Waiver on acquiescence, 489.
- What is a, 480.

CONDITIONAL TRANSFER—

- Acceleration of remainder on failure of life estate, 195.
- Bequests and devises, 196.
- In what manner the prior disposition should fail, 195.
- Presumption of simultaneous death, 196.
- Takes place if the precedent estate is out of the case by any means, 195.
- To one person coupled with transfer to another on failure of prior disposition, 195.
- Where owing to inadvertent circumstances the event does not literally take place, 195.

CONDITIONALLY LIMITED—

- Agricultural leases, 885.
- Defeating the provisions of law, 885.
- Forbidden by law, 885.
- Fraudulent, 885.
- Happening of event, 885.
- Immoral, 885.
- Impossible, 885.
- Involve or implies injury, 885.
- Public policy against, 885.
- Sections 31, 32 and 33 other examples, 885.

CONSIDERATION—See "Price."

CONSOLIDATION—

- Changes in section 61, 568, 569.
- Charge applicable to, 576.
- Clog in the equity of redemption, 572.
- Conditional redemption gives rise to, 572.
- Contrary intention, how affects, 570.
- Definition of, 569.
- Doctrine applicable with in certain limits, 574.
- Doctrine applicable against certain persons, 574.
- Doctrine of, overthrown, 570.
- Election doctrine does not affect, 573.
- English Law of, how differs, 569, 570.
- Loss of right of, 573.
- Marshalling, conflicting with, 572, 573.
- Mortgage to one of two or more co-mortgagees, 571.
- Mortgage by one of two or more co-mortgagors, 571.
- Mortgagee not entitled to the benefit of, 576.
- Mortgagee holding two mortgages on the same property, 574.
- Puisne mortgagee, 572.
- Rule not applicable, instances of, 575.
- Undivided shares 572.
- Union of mortgages on different estates after assignment of the equity of redemption on one of them, 572.

CONSOLIDATION ; RULE IN SECTION 67A—

- Ingredients of, 610.
- Mortgagee within, 611.

CONSOLIDATION ; RULE IN SECTION 67A—*contd.*

Retrospective, not, 611.

Same or different properties, 611.

Statutory charge outside the scope of, 611.

CONSTRUCTIVE NOTICE—See “ Notice.”

“ Ought ” as defined in section 3, 37.

Wilful abstention from inquiry, 33, 36.

“ Charges ” affect the property, 36.

Contradictory recitals in respect of different portions of the same property, 37.

Facts learnt upon investigation of title, 36.

Failure to investigate title, 37.

False answer given to inquiry, 36.

Nature of duty to inquire or search, 36.

Not wilful or fraudulent turning away, 36.

Occupation of land by tenant affects a purchaser, 37.

Omission to investigate title of a portion, 37.

Reasonable answer given to inquiry, 36.

Rents received inconsistent with vendor's title, 37.

Section 55 (1) (a) of the Act cannot be pleaded when there is wilful abstention, 37.

Secrecy in the transaction, 37.

What is wilful abstention from inquiry and search, 36.

CONTINGENT DEVISES AND BEQUESTS—

Condition subsequent and condition precedent, 179, 180.

Description definite of the devisee, gift by, 180.

Description not definite, 180.

Discretionary power to trustees, 181.

Gift on attainment of particular age, 179.

Words importing contingency do not prevent vesting, 179.

CONTINGENT INTEREST—

What is a, 178.

CONTRACT ACT—

Registration Act, 47.

Regulating transactions under this Act, 47.

CONTRACT OF SALE—See also “ Agreement for sale.”

Agreement contemplating execution of a formal, 376.

Assignment by purchaser of rights, 374.

Attachment on property subject to a, 375.

Contract to sell, distinguished from, 375.

In possession of a Mahomedan widow for dower 375.

When vendor had delivered possession, 375.

Where by award property was transferred to the wife, 375

Co-sharer cannot assign or transfer, 375.

Creates no interest, 374.

Damages against vendor, 374.

Definition, 364.

Delivery of documents not a, 366.

CONTRACT OF SALE—*contd.*

- Devised property, of, 375.
- Indian Law differs from English Law, 374.
- Loss or destruction of property under, 375, 376.
- Obligation, benefit of, purchaser entitled to, 374, 375.
- Prepared by, whom, 365.
- Purchaser's rights under, 374.
- Registration, 375.
- Registration unnecessary, 375.
- Representatives of contracting parties bound by, 374, 375.
- Sale differs from a, 375.
- Specific performance not the only remedy of the purchaser, 375.
- Specific Relief Act section 13 differs how, 375.
- Vendor personally liable, 374.

CONTRIBUTION TO MORTGAGE DEBT—

- Amendment of the section, 689.
- Analysis of the section, 690.
- Assignment subject to prior charge, 696.
- Being an equitable right can be exercised on equitable grounds, 699.
- Charge created by, 698.
- Claim for, how arises, 690, 691, 692.
- Covenant for further assurance how affects, 695, 696.
- Distribution disturbed, 695.
- Exclusion of rule in section 82, 700.
- "Incumbrance" meaning of, 695.
- "In the absence of a contract to the contrary," meaning of, 696.
- Marshalling in conflict with, 698.
- Modification by introduction of extrinsic principle, 692.
- Mortgagee becoming purchaser of part of the property, 699.
- Not allowed in execution proceedings, 699.
- Partial redemption how affects, 693.
- Principle of assessment, 690.
- Release by mortgagee, 691.
- Shield of the mortgagor, 694.
- Value for purposes, 697.

CONVEYANCE—

- Consideration—See "Price."
- Cost of perusing and executing on behalf of vendor's mortgagee, 418.
- Cost of preparation of, 418.
- Covenants—See "Covenants generally."
- Date of, 418.
- Description in a, of property sold, 419, 420.
 - Abutments in a, 419.
 - More or less, expression, meaning of, 419.
 - More or less by estimation, 420.
 - Old and new, how reconciled, 419.
 - Parcels, different conveyance, separate, 419.
 - Purchaser's right to prepare, 418.
- Form of, 418.

CONVEYANCE—*contd.*

General words—420.

Farm-houses, 420.

Fixtures do pass and when not, 420.

How construed, 420.

How restricted, 420.

Looms, 420.

Not necessary in a conveyance, 420, 421.

Threshing machines, 420.

What do they consist of, 420.

What passes under, 420.

Operative part, 419.

Parties to a, 418.

Plan—

A definite delimitation of the land, 419, 420.

Decides the extent, 419, 420.

Grant and not the plan must be looked at, 419, 420.

Recitals in a, 418.

Introductory, 418.

Narrative, 418.

Rules which govern when they differ from the operative part, 419.

Setting aside after execution, 398.

Tender to vendor, 418.

Vendor not bound to tender, 418.

What passes on a, 418.

Who should prepare, 418.

Witnessing part in a, 419.

COPARCENER—See "Alienation by."

COURT OF WARDS—

Established in different provinces, 82.

Wards incompetency to alienate, 83.

COVENANTS—Also see "Covenants generally," "Covenants varieties of," "Persona covenants."

Affirmative, 236.

Affirmative in form negative in substance, 230.

Assigns of covenantor, 238.

Benefit runs with the land, 227.

Burden of, runs with the land in equity but not at law except between landlord and tenant, 229.

Definition of, 431.

Form of, 230.

Inter-dependent, 233.

Negative, 230.

Production, for runs with the land, 403.

Re-entry by covenantor, 239.

Running with the land, 231.

Trustee by, 239.

Unless there be a to produce, purchaser is not bound to complete, 403.

Varities of, 230.

COVENANTS GENERALLY—Also see “Covenants,” “Covenants, varieties of,”
“Personal covenants.”

Acts and omissions reducible to four heads, 422.

Framed how, 421.

Freedom from encumbrance, 421.

Further assurance, 421.

Good right to convey, 421.

Indian Law implies what covenants, 422.

Mortgagees, absolute warranty of title, 422.

Quiet enjoyment, 421.

Run with the land, 421.

Seizin, 421.

Seisin may be omitted, 421.

Title see “Covenant for title.”

Trustees, executors and others in a fiduciary capacity giving, 422.

Lessees, 422.

Lessors, 422.

Mortgagees, 422.

Vendors, qualified, 422.

What words necessary to form a, 421.

COVENANTS, VARIETIES OF—See also “Covenants,” “Covenants generally.”
“Personal covenants.”

Affirmative, 801.

Alternative, 801.

Collateral, 804.

Concurrent, 800.

General principles relating to, 804.

Implied in law, 800.

Mutual, 800.

Negative, 801.

None but fair and usual—See “Usual covenants.”

Personal, 804: see also “Personal covenant.”

Real, 804,

Renewal—See “Covenant for renewal,” 804.

Restrictive, 801: see also “Restrictive covenant.”

Restrictive user of premises, 801.

Running with the land, 803.

Running with the reversion, 805.

Title for: see “Covenant for title.

Usual—See “Usual covenants.”

Varieties of, in a lease, 800.

With all usual or reasonable—See “Usual covenants.”

COVENANTEE—

Who is a, 431.

COVENANTOR—

Who is a, 431.

COVENANT FOR QUIET ENJOYMENT—See “Quiet enjoyment.”

COVENANT FOR RENEWAL—

- Assignability, 805.
- Breaking up, 805, 806.
- Construed strictly, 805.
- Execution of, how carried out, 805, 806.
- Exercisable by whom, 805.
- Form of, 807.
- Insolvency, effect of, on, 805.
- Laches, 807.
- Limits of, 805.
- Notice of intention to renew, 807.
- Perpetual or otherwise, 805.
- Perpetuity rule does not trench on, 805.
- Qualified persons, right to, 805.
- Runs with the land, 805.
- Specific performance by lessee, 806.
- Usual, it is not, 805.
- What is a, 804.

COVENANT FOR TITLE—

- Defect known to purchaser, 433.
- Express, 431.
- Fiduciary owners excepted from, 435.
- Framing of, 431.
- Implied on sale, 431.
- Indemnity, covenant for, distinguished, 432.
- Indemnifying clause in sale deed, 433.
- Joint tenants covenantors, 432.
- Nature of, 432.
- Possession, not implied on, 433.
- Purchaser's remedy on breach, 434, 435.
- Quiet enjoyment not a, 432.
- Rebuttal of presumption, 432.
- Reducible to four heads, 432.
- Runs with the land, 431, 435.
- Tenants in common covenantors, 432.
- Varieties of 432.
- Waiver of right under, 433, 434.

COVENANTS IMPLIED BY MORTGAGOR—

- "Accruing due," meaning of, in section 65, 596.
- Amendment of section 65.
- Devolution of benefit of, 599.
- Distinction between covenant in law and, 593.
- Excluded by express contract to the contrary, 593.
- Freedom from encumbrance, 596.
- Further assurance, 595.
- Good title, 593, 595.
- Jus tertii*, defence of, 595.
- Leaseholds, 597.
- Land revenue, 596.

COVENANTS IMPLIED BY MORTGAGOR—*contd.*

- Mortgagee purchaser finding title defective, 595.
- Mortgagee's liability to the lessor on, 598.
- Mortgagee's security not enhanced by, 594.
- Obligations imposed on mortgagor for, 596.
- Operation of, 593.
- Original mortgagor purchasing from revenue sale, purchaser effect on, 597.
- Partition, result of, on, 594, 595.
- Public charges, payment for, 596.
- Puisne mortgage's right to, 595, 599.

CROPS—

- Agricultural, 893.
- Bamboo clumps are standing, 24.
- Code of Civil Procedure, 1908, under, 24.
- Default, in case of, 853.
- Determination of lease, on, 853.
- Future, 24.
- "Goods" include, 24.
- Growing, mortgage of, 24.
- Growing, not immoveable property, 24.
- Indian Forest Act, under, 24.
- Indigo, 24.
- Ingress and egress, free, 853.
- Lac, 24.
- Legal representation, 853.
- Lessee's right to, 853.
- Limited nature of, 853.
- Meaning of, 853.
- Moveable property, 24.
- Pan* creepers, 24.
- Planted, 853.
- Section 108 (e), 853.
- Section 111 (b), 853.
- Servants and agents, 853.
- Sown, 853.
- Standing, 24.
- Sugar cane, 24.

CROWN—See "Alienation by."

DAMAGES, ASSIGNMENT OF—See "Right to sue."

DAMAGES FOR—

- Attachment and sale, 76.
- Breach of contract, 76.
- Negligence of agent, 76.
- Specific performance for breach, 76.
- Unliquidated, 76.

"DAMDUPAT"—

- Capitalisation of interest, 48.
- Conditions necessary, 48.
- Hindu Law rule, 48.
- Mortgagee in possession, 48.
- Moveable or immoveable property secured, 48.
- Usury Laws do not repeal the rule of, 48.
- Where in force, 48.

DEBATE ON THE BILL, 3.**DEBENTURES—**

- Not actionable claim, 946.

DEBT—See "Transfer of mortgage debt and property."**DEBUTTAR PROPERTY—See "Mahant."**

- Transfer of, 113, 114.
- What is, 113.

DEED, BEFORE REGISTRATION—

- Destroyed, 403.
- Lost, 403.

DEED AND ITS CONTENTS—

- Covenants in a lease, 35.
- Lease, 35.
- Leasehold title, 35.
- Recital, 35.
- Sales by auction, 35.
- Settlement, 35.
- Under-lease, 35.
- Will, 35.

DEFECT IN PROPERTY—See also "Material defect."

- Material, 384, 388, 391.
- Omission when fraudulent, 399.
 - Building purposes what is a, for, 384
 - In one set of circumstances may not be in another, 384.
 - Meaning of in section 55 (a), 384.
 - Open contract for sale when, 396, 397.
 - Purchaser how affected, 396, 397.
 - Residential purposes what is a, for, 384.
 - Vendor's liability to disclose, 384, 385.
 - Agent of, 386, 387.
 - Cannot be excused by employment of agent, 386, 387.
 - Consequences of omission to disclose, 386.
 - Discharged when purchaser has knowledge, 385.
 - Extent of, 385.
 - Highway across the land, 385.
 - Invisible matters, 385.
 - Latent *q. v.*
 - Not discharged by leaving purchaser to inquire, 385.

DEFECT IN PROPERTY—*contd.*Vendors liability to disclose—*contd.*

- Onerous and unusual covenants, 390.
- Patent, *q. v.*
- Quality of land as to, 385.
- Rents and business particulars, 385
- Ruinous condition of house, 385.
- State and condition of property, 385.
- Title to property as to, 385.

DEFECTIVE TITLE—

- Alienee from a Hindu widow, 291.
- Belief in validity of title, 294.
- Compensation amount of, 297.
- Court sale purchaser not included, 297.
- Crops right to, when, 303.
- Defeasible title is not a, 298.
- Eviction of transferee with, right of, 289.
 - Alternative remedies, 289.
- Equitable estoppel, 298.
- Improvements,
 - What are, 301.
 - Compensation when Act does not apply, 290.
 - Costs, 303.
 - Disregarded, 302.
 - Holder right to, by, 301.
 - Injunction, 302.
 - Lis pendens* doctrine, 302.
 - Removal of materials for, 302.
 - Revaluation in execution proceedings, 302.
 - Secured, 302.
 - Severance of, made in good faith, 301.
 - Vendor purchaser, 303.
- Invalid transfer, 297.
- Lessee is not a *bona fide* holder under, 292.
- Lien not created, 297.
- Limitation of interest, 291.
- Limited owner, 291.
- Marketable title differs, 297.
- Meaning of , 297.
- Mesne profits and Improvements Act, 290.
- Mortgagee, 292.
- Option not to holder of, 296.
- Persons not entitled to the benefit of the section, 295.
- Possession when to be delivered by holder of, 298.
- Rent paid under defective title—
 - Assignee's rights—against tenant paying in advance, 287.
 - Auction-purchaser's right against tenant paying in advance, 287.
 - Compensation or damages instead of rent, 287.
 - Defective title—Payment under, 288.
 - Good faith as to payment and holding, 288.

DEFECTIVE TITLE—*contd.*

Rent paid under defective title—*contd.*

Joint discharge, 288.

Mortgagee failing to make inquiries, 287.

Mortgagee's right—when rent paid in advance, 287.

Notice by tenant, 288.

Paid before due date, 286.

Paid under compulsion of law, 288.

Suit for rent paid in advance, 287.

Tenant paying to mortgagor after the mortgage, 287.

Transfer or assignment by lessor during the tenancy, 287.

Transferee with, evicted—

Believe in good faith to be absolute owner, 289.

Subsequent to improvements made, 289.

Transferor as evictor, 296.

Want of title, how, 297.

Who are not transferee in good faith, 295.

DELIRIOUS—See "Alienation by drunkard."

DELIVERY—

What is and when it takes place, 373.

DELIVERY BY LESSEE ON DETERMINATION—

Absolute possession necessary, 878.

Accidental retention of key, 879.

Agricultural leases, 878.

Breaking of locks, 878.

Dispossession by third party, 879.

Ejectment proceedings for, 879.

Forceful entry, 878.

Goods of tenants left behind, 879.

Holding over tenant dispossessed, 879.

Ineffectual, cases of, 879.

Limitation for suits for, 879.

Locking the door, 879.

Possession of premises, 877.

Prospective tenant, 878.

Rent payable till, 878.

Servant using premises, 879.

Sub-lessee in occupation, 878.

Under-lessee in occupation, 878.

Vacant possession essential, 878.

DELIVERY ON SALE—

Various modes of, 425.

DEMISE—See "Actual demise."

DEPOSIT IN COURT—

Amendments of section 83, 701.

Cost of litigation, 701, 702.

Court in which deposit should be made, 705.

Dispute as to legal representative, 704.

DEPOSIT IN COURT—*contd.*

- Effect of deposit, 703.
- Interest deposited, 701.
- Interest for the day of deposit, 701.
- Instalments deposit, 702.
- Minor mortgagee, 704.
- Mortgagee accepting deposit which does not include revenue, 702.
- Nature of deposit, 702.
- Payment to credit of mortgagee, 703.
- Penalty payment not included, 701.
- Person entitled to deposit, 704.
- Premature tender, 702.
- Revenue paid by mortgagee, 702.
- Section prescribes summary redemption, 701.
- Second appeal question of sufficiency cannot be raised, 705.
- Stage of deposit, 702.
- Sum to be deposited, 701, 702.
- Withdrawal of deposit by mortgagee, 704.
- Withdrawal of deposit by mortgagee's agent, 705.
- Withdrawal of deposit by mortgagor, 704.

DEPOSIT OR EARNEST MONEY—

- Forfeiture of, 452.
- Interest on, 455.
- Nature of, 451.
- Rate of interest on, 455.
- Return of, grounds for, 452.
 - Both parties in default, 454.
 - Contract not binding, 452.
 - Delay by vendor, 453.
 - Lunatic purchaser, 455.
 - Misdescription and misrepresentation, 453.
 - Non-disclosure, 453.
 - Power of sale defective, 453.
 - Title of vendor defective, 453.
- When both parties in default, 454.

DEPOSIT OF TITLE-DEEDS—See "Equitable mortgage."

DESCRIPTION OF PROPERTY—

- Errors in, 388.

DESTRUCTION OF LEASEHOLD—

- Agricultural leases, 837.
- Avoidance of lease, 837.
- Breach of covenant to insure, consequences of, on, 840.
- Default of lessee, resulting in, 838.
- Earthquake, 838.
- Eviction by title paramount, 840.
- Excepted risks, 838.
- Exception to rule in section 108 (d), 837.
- Fire, 837.

DESTRUCTION OF LEASEHOLD—*contd*

- Fire near end of term, 838.
- Flood, 837.
- Frustration, doctrine of, 841.
- Insurance against fire, 838.
- Insure covenant, form of, 839.
- Insurance covenant, nature of, 839.
- Insurance of two properties, 839.
- Insurance on an option to purchase, 839.
- Irresistible force, 837, 838.
- Limited right of avoidance, 837.
- Option of lessee, 838.
- Rent payable on, 840.
- Rent wholly paid in advance, 838.
- Repair, reinstate, covenant to, distinction between, 841.
- Tempest, 837.
- Tenant when liable to restore on, 840.
- Vacant possession on, 838.
- Violence of an army, 837.
- Wrongful act of lessee causing, 842.

DESTRUCTION OF PROPERTY—

- After ownership has passed, 446, 447.
- Before ownership has passed, 446, 447.

DETERMINATION OF LEASE—

- Agricultural leases, 885.
- Amendments by Act 20 of 1929 not retrospective, 885.
- Death of lessee does not cause, 885.
- Effluxion causing, 885.
 - Holding over regulated by section 106, 885.
 - Notice to quit not necessary, 885.
 - Time limit expires, 885.
- Enumeration in section 111 exhaustive, 885.
- Servant in occupation, 885.

DISCLAIMER—

- Authority for sale on death or disclaimer, 89.
- Exchange does not include power of sale, 88.
- Express prohibition against, 89.
- Power, coming into operation on death of tenant for life, 89.
- Power of, 89.
- Private treaty, 88.
- Public auction, 88.
- Subject to existing tenancies, 89.
 - easements, 89.
 - prior charges, 89.
 - restrictive covenants, 89.
- Subject to reserve, 88.
- Together or in lots, 88.
- Under depreciatory conditions, 88.

DISCLOSURE—

- Agricultural lease, 862.
- Contract to the contrary, 862.
- Duty of, 862.
- Local usage, 862.
- Nature and extent of the property, liability for, 861.

DISCLOSURE BY LESSEE—See “Lessee, disclosure by.”

DISCLOSURE BY VENDOR—

- Affirmative covenant, 387.
- Landlord's notice to repair, 387.
- Agreement preventing statutory period of prescription for running, 387.
- Drains existence of, 386.
- Easements which are inchoate, no duty, 387.
- Intimation by tenant to vacate, not duty of, 387.
- Leases and tenancies, 386.
- Way round and across a meadow not seen by purchaser, 386.
- Facts and circumstances affecting value, 386, 387.
- Fact material to title, distinguished from quality of land, 385.
- Highway across, 385.
- Quality of land, 385
 - Business particulars, 385.
 - Estimated annual value of £400, 385.
 - Rents and business particulars, 385.
 - Rent particulars, 385.
- Ruinous condition of house, 385.

DISPOSITION—

- Prior not enlarged, 204.
- Prior when void, 204.
- Ulterior when void, 205.

DOUBLE POSSIBILITY, RULE OF, 141

DOUBTFUL TITLE, 404, 405, 406.

DRUNKARD—See “Alienation by.”

DURATION OF A LEASE—See “Term, computation of, in a lease.”

EARTHQUAKE—See “Destruction.”

EASEMENT—

- Cannot be transferred apart from the dominant heritage, 65.
- Creation of differs from transfer of, 65.
- Profit a prendre*, 65.
- There must be two tenements of different owners, 65.

ELECTION—

- Actual election and duty to elect differ, 211.
- Application of rule of, 211.
 - Hindus, 211.
 - Interests, of different kind, 211.
 - Mahomedans, 211.

ELECTION—*contd.*

- Belief of transferor, 213.
- Benefit, 212.
 - Cannot both retain property and, 212.
 - Essential basis of the rule, 212.
 - Must be higher in value, 212.
 - Transfer for man's, 212.
 - Two or more, 212.
- Cancellation of deed, 216.
- Cannot take under and against the same instrument, 211.
- Compensation on dissent, 213, 216.
- Co-owners, 216.
- Dealing with both properties, 216.
- Death of owner of property before election, 216.
- Death of transferee, 216.
- Death of transferor, 216.
- Derivative title, person having need not elect, 213.
- Disposition by same instrument, 212.
- Disposition by separate instrument, 212.
- Double portions, 217.
- English Law, 214.
- Equitable charge to secure compensation, 212.
- Equivocal acts performed in ignorance of necessity of electing, 211.
- Equivocal acts performed in ignorance of value of funds or properties, 211.
- Forcing the, 215.
- Forfeiture, 217.
- Gift under a will and claim *de hors* the will, 212.
- Ignorance of value, 214.
- Information necessary for decision, 214.
- Knowledge not to be imputed as a matter of legal obligation, 214.
- Lunatic, 215.
- Minor, 215.
- Misapprehension of value, 214.
- Not a rule of positive law, 214.
- Option of one of two claims, 212.
- Owner, meaning of, 212.
- Parallels of, 211.
- Persons under disability, 215.
 - Court making election for, 215.
- Powers, 217.
- Property to which the rule applies, 211.
- Purdanashin* woman making, 214.
- "*Quit sentit commodum sentire debet et onus*" maxim, 211.
- Remaining in possession of two estates under inconsistent title, 215.
- Remainderman, 217.
- Reversionary interest, 217.
- Time limit, 215.
- Time within which election should be made in case of disability, 215.
- Transfer and benefit must be part of the same transaction, 212.
- Undivided moieties, 217.

ELECTION—contd.

- Value of property for compensation to be taken at date of transfer, 213.
- Void disposition, 217.
- What constitutes, 214.
- What is, 214.
- When not put to election, 218.

ELECTRIC FITTINGS, REMOVAL BY TENANT OF—See “Fixtures.”

ENACTMENT—See “Savings of enactment,” “Reasons for enactment.”

ENCROACHMENTS ON LEASEHOLD, 873.

ENCUMBERED PROPERTY—

- Purchaser's remedies when buying, 446.

ENCUMBRANCES—

- Interest on, 447.
- Liability for, on sale, 447.
- Purchaser making inquiry as to, 408.
- Sale free from, 447, 448.
- Sale subject to, 448.

ENCUMBRANCES ON SALE—

- Amount to be deposited, 464.
- Discharge of, 464.
- Investments, 464.
- Powers of the Court, 464.

ENGLISH MORTGAGE—

- “Absolutely” meaning of, as used in the section, 498.
- Form of, 497.
- Personal covenant of, 497.
- Requisites of, 497.

EQUITABLE MORTGAGE—

- Advances secured, 498.
 - Future, 498, 506.
 - General, 498, 506.
 - Past, 498, 506.
- Companies Act, requires registration, 499.
- Definition, 498.
- Delivery by whom made, 500.
- Deposit before passing of the Act, 502.
- Deposit of deeds, 499, *et. esq.*
 - Do not relate to the property, 504.
 - For special purpose, 504.
- Deposit with a memorandum, 499.
- Deposit without a memorandum, 499, 500.
- Deposit with whom to be made, 502.
- Equitable sub-mortgage by deposit, 510.
- Hindu Land, 506.
- Intention to create a security, 504, 505.
- Leasehold instead of freehold, 499.
- Lessee, deposit by, 500.

EQUITABLE MORTGAGE—*contd.*

- Limited owner, 500.
- Limitation, 512.
- Losing the deeds, 507.
- Mohamedan Law, 506.
- Mortgagee's duty to examine the title-deeds, 507.
- Mortgagee parting with or loss of title-deeds, 507.
- Nature of the security, 505.
- Other than in the memorandum, 501.
- Parting with the deeds, 507.
- Part performance, 498.
- Personal covenant, 508.
- Places where it can be effected, 501, 502.
- Priority with subsequent legal mortgage, 507.
- Property charged by, 506.
- Punjab, whether could be made in the, 511.
- Receiver—
 - Appointment of, 511.
 - Mortgage by, for preservation, 511.
- Recovery of title-deeds by mortgagor, 507.
- Registration of, 508, 509.
- Release or reconveyance, 512.
- Remedy of the equitable mortgagee, 511.
- Requisites of a valid, 500.
- Show no title, 500.
- Solicitor, 500, 502.
- Stamp duty, 512.
- Tenant for life, 500.
- Various forms of equitable mortgage, 499.
- What property charged, 506, 507.
- What title-deeds should be deposited, 503.

EQUITY OF REDEMPTION— See also "Redemption."

- Conveyance of the, 430.
 - Less than Rs. 100, 430.
 - Sale by mortgagor, 474.
 - Stamp duty on, 430.

ERECTION OF PERMANENT STRUCTURE—

- Agricultural leases, 877.
- Maxim "*quicquid in ædificatur solo solo cedit*," 877.
- Prohibition against, 877.

ESTOPPEL—

- Civil Procedure Code, para. 11 of third Schedule, 272.
- Common law principles of feeding the, 260.
- Consideration essential, 258.
- Court sales outside the rule of, 272.
- Covenant character of as creating, 259.
- Defect in title no bar to feeding, 259.
- Duration of—
 - Lessor and lessee, 259.
 - Mortgagor and mortgagee, 259.

ESTOPPEL—*contd.*

- Equitable principles of feeding the, 260.
- Erroneous or fraudulent representation a question of fact, 262.
- Exchange on same footing as sale, 272.
- Feeding the, by subsequently acquired interest, 259.
- Fraudulent intention not necessary, 261.
- Hindu conveyances within the rule of, 258.
- Illegal alienation, 267.
- Implied cannot be construed, 258.
- Inquiry as in section 41 unnecessary, 272.
- Insolvency, 272.
- Lessor and lessee as between, 270.
- Mortgagor and mortgagee as between, 271.
- Motive immaterial, 262.
- Moveables within the rule of, 259.
- No feeding where there is no, 261.
- Nothing to feed the, 261.
- Operation of transfer, 269.
- Option of transferee, 269.
- Persons claiming under person estopped, 258.
- Personal character of, 258.
- Personal equity not within the rule of, 264.
- Plea of *non est factum*, 270.
- Prohibited alienation, 267.
- Public policy transfers opposed to, 267.
- Reasonable care as in section 41 unnecessary, 272.
- Reciprocal nature, of, 258.
- Recital character of as creating, 259.
- Recital general and particular, 259.
- Representatives bound, 258.
- Representative character of as creating, 259.
- Reversioners, 268.
- Specific Relief Act, section 18 differs from the rule of, 264.
- State of knowledge immaterial, 262.
- Subsequently acquired interest of mortgagor how far within rule of, 264.
- Transactions void or forbidden by law create no, 260.
- Transferee in good faith protected, 258.
- Truth known to both parties negatives, 262.
- Unfed, 261.
- Want of title, 271.
- When automatically fed, 269.
- When does the subsequently acquired interest attach, 266.
- Who can set up transferor's fraud, 258.

EXCEPTION—

- What is an, 421.

EXCHANGE—

- Amendment of section 119, 913.
- Charge whether created, 914.
- Completion of, 912.
- Cross-transfers, 911.

EXCHANGE—*contd.*

- Currency note, 915.
- Definition of, 911.
- Different between sale and, 911.
- Easement, grant of, not an, 911.
- Eviction, remedy on, 913.
- Family arrangement, 911.
- Forbearance to take proceedings, 912.
- Form of conveyance on, 912.
- Hindu Law, 914.
- Implied covenant for title, 914.
- Joint owners transfer between, 911.
- Lessee surrendering lease, 912.
- Limitation, 914.
- Lunatic's property, 912.
- Money forming subject of, 915.
- Money how far consideration, 911, 912.
- Ownership should be transferred, 911.
- Part performance doctrine, 912.
- Partition, 911.
- Pre-emption, 912.
- Property forming subject of, 912.
- Remedy for breach of contract, 912.
- Rights and liabilities of the parties *inter se*, 914.
- Setting off one decree against another, 911.
- Stamp duty, 912.
- Third persons cannot be substituted, 914.
- Title on exchange, 913.
- Transfer by husband of land in lieu of maintenance to wife, 911.
- Two persons mutually transfer, 911.
- Vendor and purchaser summons, 912.
- Warranty on exchange of money, 915.

EXECUTION—

- Donee of power, 422.
- Has not revoked, 422.
- Must be alive, 422.
- Of sound mind, 422.
- Power-of-attorney for, 422, 424.

EXECUTOR—Also see "Alienation by."

- Alienation by inquiries as to necessity, 84.
- Bankrupt, 85.
- Grant to, when unnecessary, 84.
- Insolvency of, no ground for refusing probate, 85, 86.
- Insolvent's property not divisible amongst creditors, 85.
- Legal representative of deceased, 84.
- Power of disposal, 84.
- Powers, cessation of, 85.
- Powers of several exercisable by one, 85.
- Powers, survival of, on death, 85.

EXECUTOR—*contd.*

- Probate, effect of, 84.
- Purchase by, 85.
- Receiver appointed on bankruptcy of, 85.
- Receiver not necessary on bankruptcy where co-executors willing to act, 85.
- Right as, when established, 84.
- Surviving executor, 85.
- Vesting of property in, 84.

EXPECTANCY—See “*Spes successionis.*”**EXPENSES OF CO-MORTGAGOR—**

- Changes in section 95, 740.
- Limited right of subrogation for, 741.
- “One of several mortgagors,” meaning of, in section 95, 741.
- Redemption by him, 740.
- What is included, 740.

EXPRESS SURRENDER—

- Act of parties, 887.
- Agricultural leases, 887.
- Consideration, 887.
- Damages, 888.
- Inter esse termini* no bar, 888.
- Mutual agreement, 888.
- Reconveyance not necessary, 887.
- Remainder a bar, 888.
- Under-lease not prejudiced, 888.

“FALSA DEMONSTRATIO NON NOCET”—

- Boundaries loosely described, 416.
- Dimensions inaccurate, 415.
- Error in the description of the principal thing, 415.
- Freehold land described as such included a strip of copyhold, 416.
- No error in the addition, 415.
- Parcels made up of more than one part, one true and the other false, 415.
- Plan inaccurate, 415.
- True description precedes the false, or *vice versa*, 415.
- What is meant by, 415.

FIRE—See “Destruction.”**FIRE POLICY—**

- English Law, 285.
- Indemnity contract of, 285.
- Lessor and lessee, 286.
- Moneys actually received by transferor, 285.
- Mortgagee's priority over garnishee, 286.
- Mortgagor and mortgagee, 285.
- Reinstatement, 284.

FIRE POLICY—*contd.*

- Subrogation, 285.
- Transferee's rights under a, 284.
- Unpaid vendor, rights of, 285.
- Vendor and purchaser, 285.

FIXTURES—Also see "Attached to the earth."

- Building when, 29.
- English Law of has limited applicability to India, 25.
- Exceptions to the rule of, 28.
- Hire purchase system chattels when, 29.
- Lessee's rights of removal of—
 - Agricultural lease, 845.
 - Attached to the earth, 845.
 - Changes in the law, 845.
 - Compensation for, 851.
 - Contract to the contrary, 845.
 - Damages, 831.
 - Determination on, of lease, 845.
 - Ejusdem generis doctrine*, applicability to, 849.
 - Electric fittings, 852.
 - English Law of, 846.
 - Exercisable without detriment, 845.
 - Express covenant for, construction of, 848.
 - Failure to exercise, consequences of, 851.
 - Gas fittings, 852.
 - Holding over, on, 846.
 - Indian Law, not uniform, 846.
 - Injury to the freehold, 852.
 - Instances of, 849.
 - Lessee other than original, 852.
 - Local usage, 845.
 - Mortgage of lease, right of, 851.
 - Permanent, 848.
 - Possession, during only, 845.
 - Proviso, 852.
 - Re-entry for exercising the, 851.
 - Reservation, express, for, 850.
 - Retrospective effect, 846.
 - Stipulation in the lease as to, 848.
 - Tenancy, renewal of, effect of, 852.
 - Trustee in bankruptcy, disclaimer of, 850.
- Machine fixed in concrete bed, 27.
- Machinery fixed by screws, 27.
- Maxims on which the law of is based, 25.
- Meaning of, 25.
- Mode or object of annexation regarded as principal factors, 25, 26.
- Onus, rule regarding, 26, 27.
- Ornamental fixtures, 25, 28.
- Chimney-pieces, 27.

FIXTURES—*contd.*

- Electric lamps, 28.
- Gaseliers, 28.
- Grates, 27.
- Hangings, 28.
- Pier Glasses, 28.
- Pumps, 28.
- Stoves, 28.
- Wainscot, 28.
- Relaxation in favour of trade, agriculture and domestic uses, 25.
- Seats in a cinema, 26, 28.
- Trade fixtures, 28, 29.
 - Copper vessels, 28.
 - Engines and boilers, 28.
 - Fire Engine, 28.
 - Lime Kilns, 28.
 - Pipes of a heating apparatus, 28.
 - Sheds, 28.
- When is a chattel a fixture, 25.

FLOOD—See "Destruction."**FORECLOSURE OR SALE—**

- "Absence of contract to the contrary" meaning of in section 67, 606.
- Acquisition, how affects, 609.
- Amendment to section 67, 605.
- "Deposited," meaning of, 606.
- Effect of the amendment on various mortgages, 605.
- Exoneration of one item affects the remedy, 610.
- Foreclosure, meaning of, 605.
- Frame of suit when there are several mortgagees, 608.
- Mortgages to which these remedies apply, 606.
- "Mortgage-money has become due," meaning of, in the section, 606.
- Mortgagor a trustee for the mortgagee, remedy when, 606.
- Mortgagor a legal representative for the mortgagee, remedy when, 609.
- "Paid," meaning of, 606.
- Partition how affects the remedy, 610.
- Personal remedy, effect on, 606.
- Public undertaking against, how far remedies available, 607.
- Security bond not within the section, 610.
- Several mortgagees, one of them cannot pursue the remedy, 606, 608.
- Severance how affects the remedy, 608, 609, 610.

FORFEITURE—

- Agricultural leases, 890.
- Amendments in section 111 (g), 890.
- Approbate and reprobate, a tenant cannot, 895.
- Assignment for benefit of creditors, 894.
- Breach of express condition, 890.
- Claiming title by lessee, 890.
- Clause as to, construction of, 891.
- Co-lessors, 894.

FORFEITURE—*contd.*

- Contract Act, section 74, not applicable to, 890.
- Co-sharer one of several alienating, 894.
- Covenant against assignment, 894.
- Decrees, relief against forfeiture, under, 896.
- Disclaimer of leaseholds, 894.
- Disclaimer by lessee of part, 893.
- Disclaimer by lessee of whole, 893.
- Enforcing the proviso for re-entry, 891.
- Estoppel of tenant, 895.
- Generally as to, 890.
- Insolvency by lessee 891, 893.
- Insolvency of lessee, after assignment, 894.
- Leases excluded from operation of, 890.
- Lessor's entry void without notice in bankruptcy, 894.
- Limitation, 895.
- Notice determining lease, by lessor necessary, 894, 895.
- Notice of intention to determine lease, 894, 895.
- Perpetual lease, 894.
- Re-entry for non-payment of rent, 892.
- Re-entry, proviso for, 891.
- Relief against, 896.
- Renunciation by lessee, 892.
- Setting up title in third person by lessee, 890.
- Sind, law in, 890.
- Transferee's right to enforce, 892.
- Under-lessees, effect on, 895.
- Who can exercise the right of re-entry, 892.

FORFEITURE RELIEVED—**Cases other than non-payment of rent causing—**

- Agricultural leases, 903.
- Defects in section 114A, 903.
- Exceptions in case of covenants against assignment, 904.
- Lessor's right of re-entry, 904.
- Notice by lessor to lessee necessary, 904.
- Notice essential, 904.
- Old lease restored, 904.
- Refusal by less to comply with Court's order for relief, 904.

Non-payment of rent causing—

- Agricultural leases, 900, 902.
- Amends made by lessee at trial, 901, 902.
- Arrears of rents, 901.
- Breaches other than non-payment of rent how affected, 901.
- Costs, 903.
- Ejectment suit by lessor, 901.
- English Law, 900.
- Execution proceedings after, 902.
- Grounds of refusal, 902.
- Judgment after, 902.
- Laches 902,

FORFEITURE RELIEVED—*contd.*

- Mortgagee, 901.
- Rents barred by limitation, 902.
- "Rent in arrear," meaning of, 901, 902.
- Terms on which, 902.
- Trustee in bankruptcy, 901.
- Under-lessee, 903

FORFEITURE, WAIVER OF—

- Acceptance of rent, 897.
- Accrued due after forfeiture, 897.
- Arrears, 897.
- Institution of suit, after, 897.
- Person other than lessor from, 898.
- Protest under, 897.
- Qualified, 897.
- Subsequent demand for rent, 897.
- Without prejudice, 897.
- Agricultural leases, 896.
- Any other act, 898.
- Demand of rent, is not, 898.
- Distress, 899.
- Estoppel, 899.
- Joint lessors, 898.
- Knowledge essential before, 899.
- Lessee's insolvency whether, 898.
- Lessor by, 896.
- Notice essential before, 899.
- Onus, 899.
- Rent accrued subsequent to re-entry, 898.
- Subsidiary covenant, effect of, 899.

FRAUD—

- Conduct in relation to title-deeds, 679.
- Essential features of, 208.
- Expression of opinion not enough, 679.
- How proved, 679.
- Mortgagee postponed if guilty of, 678.
- Motive immaterial, 679.
- Must be substantially proved, 679.
- Nature of, 208, 209.
- Need not be made to the injured party, 679.
- Remedies for, 209.
- Representation capable of two meanings, 679.
- Representation not operating on the mind, 679.
- Silence is not, 679.
- Statement must be false of the person making, 679.
- Time being specified, 209.
- Time not specified, 209.
- What transfers effected, 208.
- When a transfer is conditional on performance of act, 208.
- Who must commit, 209.

FRAUDULENT TRANSFER—

- Amendments to section, 53, 321.
- Arrangement with creditors is not, 323.
- Assets removed from reach of creditors, 325.
- Avoidance, by whom, 321.
- Bona fide* purchase from fraudulent transferee, 329.
- Chattels gifts of, 341.
- Consideration, 323, 330, 339.
- Consideration fictitious, 323, 331.
- Consideration inadequate or illusory, 322, 330.
- Consideration, instances of, 329, 330.
- Conversion of land into cash, 322, 329.
- Conveyance for value following voluntary settlement, 341.
- Conveyance voluntary, 339.
- Costs, 338.
- Creditor if only one may impeach, 324.
- Creditors protected under the section, 324.
- Creditors trust void when, 327.
- Cumulative not individual effect of incidents regarded 322.
- Debtor choosing a creditor, 325.
- Debtor reserving benefit, 326.
- Debts provided in voluntary transfer, 323, 324.
- Decree by which transfer effected, 319.
- Decree form of, 338.
- Defeat, fraudulent attempt, 335.
 - Accomplishment of fraudulent object, 336.
 - Presumption of English law differs, 336.
 - Resulting trust on, 336.
 - Transferee when may, 336.
 - Transferor when may, 335.
- Defeat of one creditor, 324.
- Deposit of title-deeds, 320.
- Distinguished from section 56 of **the** Presidency Towns Insolvency Act, 332.
- Equities conflicting, 331.
- Essential ingredient to avoid, 321.
- Exchange, 320.
- Forbearance as consideration, 330.
- Fraudulent preference in bankruptcy different from, 325.
- Gift, 323.
- Good faith, 328, 330.
- Impeach who may, 340.
- Incidents rebutting a, 322.
- Injunction, 338.
- Insolvency after, 332.
- Intent to defeat or delay a question of fact, 321.
- Intention merely to defeat creditors is not, 321.
- Intention to delay creditors, 319.
- Knowledge of impending execution, 324.
- Laches, 323, 337.
- Law of Property 1925, section, 172 & 173,—321.

FRAUDULENT TRANSFER—*contd.*

- Lease of mortgaged property, 320.
- Limitation for suit by creditor, 327.
- Mahomedan Law, 320, 323.
- Marriage settlement, 331.
- Mesne profits, 338.
- Mock assignments, 323.
- Mofussil, law prior to the Act, 318.
- Moveable property, 319.
- Notice of prior grant, 340.
- Notoriety rebuts, 321.
- Onus, of good faith and consideration, 329, 331.
- Onus to avoid,
 - Voluntary transfer, 320.
 - When transfer for consideration, 320.
- Partition, 320, 338.
- Partners, 322.
- Possession how far evidence in, 321.
- Preference of one creditor to another, 325.
- Presumption of fraud in, 334.
- Principle of justice, equity and good conscience apply, 319.
- Proceedings to set aside, 332.
- Proviso, 329.
- Punjab, 318.
- Purchaser not bound to see to application of purchase-money, 324.
- Purchaser' title, 340.
- Purchaser's position on a, 325, 339.
- Revocation, power in a deed, 327.
- Sale of property for good consideration, 330.
- Savings, 318.
- Secrecy of transfer badge of, 321.
- Second appeal, 337.
- Security by debtor and another is not a, 323.
- Separation deed, 332.
- Settlement, 324, 329, 331.
- Shielding a particular property, 319.
- Specific performance, 340.
- Subsequent creditors impeachment by, 324.
- Suit to set aside, 327.
- Surety, 337.
- Third Parties, 337.
- Tort, plaintiff in an action in, is not a creditor, 330.
- Transfer for value how differs from a voluntary, 329.
- Transfer in the section includes, 318, 320.
- Transferee's knowledge material 321, 329.
- Transferee's rights under section, 53, 336.
- Transferor's intention, 329.
- Transferor possessed of other properties, no ground for, 336.
- Transferor's want of good faith, 328.

FRAUDULENT TRANSFER—*contd.*

- Trust deed by debtor unable to pay debts, 327.
- Twyne's* case rule in, 319.
- Valid until impeached, 324
- Value of property transferred grossly in excess of debt, 323.
- Voidable when, 328, 332.
- Voluntary conveyance, 339.
- Voluntary deed not a, 323, 341.
- Voluntary deed providing for debts, 324.
- Wakf*, 320.
- What is a, 318.
- Who may impeach, 340.
- Wife in divorce proceedings is a creditor, 330.

FREE FROM REASONABLE DOUBT TITLE, 404, 405, 406.

FREEHOLD—

- Meaning of, 389.

FRUSTRATION, DOCTRINE OF—See “Destruction of leasehold.”

FUND OUT OF WHICH CONSIDERATION PAID—See “Joint transfer.”

FURTHER CHARGE, 474.

FUTURE LEASES—See “Lease.”

FUTURE MAINTENANCE—See “Maintenance.”

GAS FITTINGS, REMOVAL BY TENANT OF—See “Fixtures.”

GIFT—

- Acceptance of, 916, 918.
- Banazar Parwarish, 923.
- Barrister and client, 920.
- Buddhist Law, 925.
- Consideration for a, 917.
- Corporation, 921.
- Dan*, 920.
- Debt release of as, 917.
- Delivery, 916, 918.
 - By whom made, 916.
 - How made, 916.
 - Moveables necessary, 916.
 - Oral gift, 921, 926.
- Deposit in bank, 922.
- Description of property forming subject of, 916.
- Dharam*, 920.
- Dharmarth*, 920.
- Dharamsala*, 920.
- Donatio mortis causa*, 934.

GIFT—*Donutio mortis causa*—contd.

- Condition, 930, 931, 934.
- Essentials of a, 916, 922.
- Lex Situs*, 934.
- Varieties of, 934.
- Equitable mortgagee following, 921.
- Execution of deed of, 916.
- Fiduciary relations, 920.
- Fraudulent transfer, 922.
- Future property, 916, 924.
- God, 920.
- Hindu Law, 922.
- Idol, 919.
- Immoveable, 916.
- Imperfect, 921.
- Income of, 923.
- Incomplete, 921.
- Instances when Chapter VII does not apply, 926, 935.
- Intangible, 916.
- Joint property, 925, 928.
- Liabilities of donor, 925.
- Limitation, 925.
- Mahomedan Law, 923.
- "*Malik*," meaning of, 923.
- Math*, 919.
- Mosque, 920.
- Moveables, 916.
- Nibandha*, 923.
- Onerous, 918, 919, 932.
 - Book debts, 932.
 - Disqualified donee, 932.
 - Separate or independent transfer, 932.
 - Single transfer, 932.
- Part of immoveable property, 924.
- Part performance, 922.
- Parties not lawfully married, 925.
- Parties to a, 916.
- Possession, 924, 928.
 - Not necessary under section 123.
- Property, subject of, 916.
- Registration, 916, 926, 927.
 - Deed dates from execution, 927.
 - Donor's consent unnecessary for, 927.
 - Donor's death does not affect, 927.
 - Effect of, 927.
 - Failure of gift if no, 927.
 - Immoveables necessary, 927.
 - Moveables optional, 916.
 - Mortgage debts, 926.
 - Nullity when, 927.

GIFT—contd.Registration— *contd.*

Promissory notes, 926, 924.

Revocation no, prior to, 927.

Samparan, 922.*Sankalap*, 927.

Section 123, mandatory, 927.

Want of ; does not render title incomplete, 927.

Requisites of a valid, 916.

Restraint on alienation, 925.

Revocation, 927, 929.

Attachment of subsequent, 930.

Condition operating on, 930.

Exceptions to, 929.

Heirs of donor may exercise, 930.

Hindu Law, 930.

Mahomedan Law, 930.

On the happening of an event, 930.

Personal to donor, 930.

Possession how affects, 930.

Recommendatory condition, 930.

Registration, no ground, 930.

Rescission of contract ground of ; affording, 930.

Transferor's for value, 930.

Will subsequent to gift inoperative for, 930.

Will of donor, on, 930.

Sankalap, 923.

Savings under Chapter VII, 926, 934.

Several donees, 928.

Shares in limited company, 922.

Solicitor and client, 921.

Specific performance, 922.

Suspension, 930.

Universal donee, 933.

Extent of liability, 933.

Liabilities, 933.

Unborn person, 919.

"Voluntarily," meaning of, in section 122, 917.

Widow to reversioner, 922.

GOLD IN SPECIE, MORTGAGE TO BE PAID FOR BY, 474.**GOOD TITLE, 404, 405, 406.****GRASS—**

Goods within the Sale of Goods Act, 24.

Interest in land, 24.

GROSS NEGLIGENCE—See also "Title-deeds."

Meaning of, 681.

No general duty for custody of deeds, 681.

"HABENDUM"—

- How cured when void as limiting a freehold estate in future, 421.
- How distinguished from the grant, 421.
- How worded, 421.
- Not necessary to a deed, 421.
- Restrains the operative part, 421.

HAPPENING OF EVENT—

- Agricultural leases, 885.
- Lessor's interest ceases on, 885.
- Lessor's power to lease dependent on, 886.
- Lessor with limited interest, 885.
- Lessor holds till volition of third party, 886.

HEADINGS OF PARTS, IMPORTANCE THEREOF, 5.**HINDU WIDOW—See "Alienation by."****HOLDING OVER—See "Lessee holding over."****HYPOTHECATION—**

- Actionable claim does not include, 471.
- Bottomry bond, 471.
- Chapter VIII does not apply, 471.
- Definition of, 471.
- Distinguished from mortgage or pledge, 471.
- Form of, 471.

IDOL—See "Mahant."**ILADARWARA, 512, 513.****ILLUSTRATION, THEIR VALUE, 4.****IMMOVEABLE PROPERTY, —Also see "Property."**

- Definition not exhaustive, 20.
- Ferry, 21.
- Fishery, 21, 22.
- Hat*, 21.
- Interpreted in various enactments, 21.
- Jalkar*, 21.
- Karch-i-pandan*, 21.
- Malikana*, 22.
- Market dues, 22.
- Mortgage of, 22.
- Nibandha*, 22.
- Pala* or term of worship, 21.
- Priest, right to officiate, 21.
- Registration of purchaser's name in revenue records, 21.
- Rents and income bequeathed by will, 21.
- Rents of shops or houses, 22.

IMMOVEABLE PROPERTY—*contd.*

Sale of—See “Immoveable property.”

Saranjams, 21.

Tolls or rents, 22.

Varhasana, 22.

Way, right of, 21.

Yajman vritti, 21.

IMPLIED COVENANTS—See “Covenants implied by mortgagor,” also “Vendor and purchaser.”

IMPLIED SURRENDER—

Acceptance of, in ignorance of forfeiture incurred, 889.

Agricultural leases, 888.

Assign releasing part, 889.

Consideration necessary, 889.

Effect of, 889.

English Law differs, 889.

Equitable mortgagee defeated by, 890.

Intention not material, 888.

Small portion yielded is not, 889.

Term should be whole, 889.

Term should cease immediately, 889.

Under-lease how affected, 889.

Various modes of, 888.

IMPROVEMENTS—

Costs to which mortgagee is entitled, 588.

English Law, 589.

Law prior to the section, 588.

Made during continuance of mortgage, 588.

Present law on the subject, 589.

Profits arising from improvement, 589.

Property must be in possession of mortgagee, 588.

Section 63 (a) newly added, 588.

IMPROVEMENTS BY “BONA FIDE” HOLDER—See “Defective title.”

IMPUTED NOTICE—See “Notice.”

INCOME TAX, 479.

Mortgagor rendered liable to pay for mortgagee, 479.

INDEMNITY TITLE WITH—404, 405, 406.

INSOLVENT—See “Official Assignee.”

INSPECTION OF—

Matter of agreement between parties as to, 401.

Seller bound to give, 401.

When should purchaser take, 401.

INSPECTION OF DOCUMENTS BY MORTGAGOR—See “Mortgagor's right to inspection.”

INSTRUMENT—

Defined by Stamp Act, 24.

Meaning of, 24.

INSURANCE—

- Application of insurance money, 668.
- Joint insurance, 668.
- Liability for, 668.
- Receiver effecting insurance, 668.

INSURANCE BY MORTGAGEE—See “Liabilities of mortgagee in possession.”

INTANGIBLE THING, 364.

“INTER ESSE TERMINI”—

- Meaning of, 827.
- Rights of lessor and lessee under an, 827.

INTEREST—

- Implied agreement to pay, on taking possession, 417.
- On unpaid purchase-money, 444.
- Rate of, 444.
- When possession given before completion, 444.

INTERFERENCE WITH LESSOR'S RIGHTS, 873.

INTERPRETATION CLAUSE, MEANING OF, 5.

INVESTIGATION—Also see “Title.”

- Generally, though willingness expressed to accept title if a particular object be removed, 416, 417.
- Possession, how it affects, 416.
- Waiver, of, 416.

INVALID LEASES—See “Lease.”

JOINT TENANTS—See “Alienation by.”

JOINT TRANSFER—

Joint tenancy—

- Conveyance to two or more, 280.
- Husband and wife, 280.
- Incidents of, 279.
- Receiver appointed of, in, 280.
- Severance of, 280.
 - Alienation by, 280.
 - Conduct by, 280.
 - Declaration not a, 280.
 - Demise by one to the other a, 280.
 - Gift not a, 280.
 - Marriage how far a, 280.
- Presumption, rule of, on, 279.
- Revenue sale on, 279.
- Share or shares transferred by several co-owners, effect of—
 - When shares are equal, 282.
 - When shares are unequal, 282.

JOINT TRANSFER—*contd.*

Tenancy in common—

- Conveyance by a, 280.
- Fiduciary relation none between, 280.
- Injunction, 280.
- Joint lease, 280.
- Possession of one, 280.
- Profits received by one, 280.
- Rateable contribution to purchase-money, 280.
- Repairs, contribution for, 280.
- Waste, liability for, 280.
- Will in a, 280.

Transferee's interest in,

- Modification of rule in section 45, 279.

Two or more transferees—

- Common fund, out of, 279.
- Presumption joint fund out of, 279.
- "Proportion" a word of severance, 278.
- "Respectively," a word of severance, 278.

Two or more transferors

- Consideration, how shared, 281.
- Consideration on transfer by, 281.
- Co-widows under Hindu Law, 281.
- Distinct interests of, 281.
- Volunteers, 281.

Volunteers, 279.

JUDGMENT DEBTOR—See "Alienation by."

"KABULIYAT," 791.

"KANAM," 514.

"KARCH-I-PANDAN"—See "Maintenance, future."

"KAVIDU OTTI," 514.

KEEPING A MORTGAGE DEBT ALIVE, 423.

LACHES—

- Mortgagee guilty of, when postponed, 679.

"LAHAN GAHAN," 513, 514.

LATENT—

- Compensation when awarded to purchaser for defect, 388, 389.
- Defect known to vendor, 385.
- Defect, meaning of, 385.
- Rescission not granted for defect, 388, 389.
- Vendor unaware of defect, 385.

LEASE—

- Agreement to—See "Actual demise."
- Assignment of, 791—Also see "Assignment by lessee."
- Component parts of a, 782.

LEASE—contd.

- Concurrent, 790.
 - Consideration for a, 781.
 - Conveyance distinguished from a, 781.
 - Costs, 809.
 - Counterpart, custody of, 783.
 - Covenant for quiet enjoyment—See “Quiet enjoyment.”
 - Covenant in a—See “Covenants.”
 - Determination—See “Determination of lease.”
 - Distress, remedy by, in, 809.
 - Duplicate, custody of, 783.
 - Execution of, 783.
 - Expenses of—by whom payable, 782.
 - Future leases, 790.
 - Generally as to powers of a mortgagor, 601.
 - Generally made by mortgagor and mortgagee, 602.
 - Immoral object, 801.
 - Invalid leases, 791.
 - Licence—See “Licence.”
 - Lands other than those mortgaged included in the, 602.
 - Made prior to the mortgage, 602.
 - Mortgagor's power to make, 600.
 - Notice determining—See “Notice determining leases.”
 - Oral agreement constitutes a, 782.
 - Original custody of, 783.
 - Part performance, 784.
 - Parties to a, 783.
 - Permanent tenancy, 783, 784.
 - Perpetual, 783, 784.
 - Premium—799.
 - Preparation, by whom, 782.
 - Re-entry, power of, 808.
 - Registration, 789.
 - Renewal—See “Covenant for renewal.”
 - Rent—See “Rent.”
 - Requisites—See “Leases when made.”
 - Restrictive user of premises, 801.
 - Retrospective effect of section 65A, 601.
 - Reversion on a, 781.
 - Reversionary lease, 790.
 - Stamp duty, 789.
 - Term, computation of—See “Term, computation in a lease.”
 - Three years, with option to renew, 790.
 - Under-lease—See “Under-lease.”
 - Usual covenants—See “Usual covenants.”
 - Validity of lease by mortgagor containing option to determine, 602.
 - What is a, 781.
 - Will, statement in of nature of, 809.
 - Writing, when necessary, 782.
- LEASE, EXPIRATION OF TERM—See “Determination of lease.”**

LEASEHOLD—

Accession—See “Accession.”

Assignment—“See “Assignment.”

Condition—See “Condition of leasehold premises.”

LEASEHOLD MORTGAGE RENEWED—See “Renewal of mortgage lease.”

LEASES WHEN MADE—

Agreement to, registration of, 818.

Agricultural leases outside section 107, 817.

Hindu calendar, 818.

Invalid under section 107, may be valid under section 106, 818.

Possession under an unregistered, 820.

Registration—

Effect of non, 818.

Exempted from, 817.

Option for renewal, 820.

Oral, 819.

Varieties of the terms, 819, 820.

Written, 818.

Requisites of a valid, 816, 817.

Section 107, changes in, 817.

“Term” of a, meaning of, 818.

Varieties of, under section 107—

As long as tenant continues to pay rent or perform service, 820.

Exceeding one year, 819.

For a year, 819.

For life, 819.

Indefinite term, 819.

Reserving annual rent, 819.

LEGAL AND EQUITABLE ESTATES, 365.

“LEKHA MUKHI”—See “Usufructuary mortgage, varieties, of.”

LESSEE—See “Lessor and lessee.”

LESSEE HOLDING OVER—

Acquiescence by lessor in, 906.

Assent of lessor if necessary, 906.

Assignee of, liability of, 908.

Compensation not rent, when lessor objects to, 907.

Co-tenants as between, 908.

Holding over, what is, 906.

Incidents of—

Commencement from expiration of old lease, 906.

Rule in section 106 applies, 906.

Terms of expired lease, 906.

Limitation against, 907.

“Otherwise assents,” as used in section 116, meaning of, 907.

Position of, 906.

LESSEE HOLDING OVER—*contd.*

- Representative's heirs and assigns, 908.
- Trespasser whether, 906.
- Under-lessee, 908.

LESSEE RELIEVED AGAINST FORFEITURE—See "Forfeiture relieved."

LESSOR AND LESSEE—

Accession to leaseholds—

- Agricultural, 836.
- Alluvial land, 837.
- Comprised in the lease, 836.
- Continuance of the lease during, 836.
- Contract to the contrary, 836.
- Cost of, 837.
- Encroachment by tenant, 836.
- Landlord's rights, 836.
- Local usage, 836.
- Maxim "*quicquid plantatur-solo solo cedit*," 837.
- Parental estate, 836.
- Presumption during tenancy, 836.
- Tenant's rights, 836.
- Waste land, 836.

Agricultural leases, 825.

Disclaimer—See "Disclaimer."

Disclosure—See "Disclosure."

Obligations—

- Agricultural leases not within the rule, 824.
- Defect in building, 824.
- Disclosure of material defects, 824.
- English Law differs as to fitness of building 824.
- Possession as to, 824.
- Quiet enjoyment guaranteed, 824.

Onus of proving, 827.

Possession, obligation for—

- Actual, 826.
- Constructive, 826.
- Shifting boundaries, 826.
- Symbolical, 826.
- Tenants being in occupation, 826.

Remedy for non-possession, 827.

Waste—See "Waste by lessee in possession."

LIABILITIES OF MORTGAGEE IN POSSESSION—

- Amendment of section 76, 662.
- Best endeavour to collect rents and profits, 665.
- Cesses, 666.
- Charges of a public nature, 666.
- "Continuance," meaning of, 663.
- Disrepair of wear and tear, 667.

LIABILITIES OF MORTGAGEE IN POSSESSION—*contd.*

Government revenue, 666.

Interest on Government revenue, 666.

Limitation, 667.

Management must be as prudent owner, 664.

Marginal note defective, 663.

Mode of taking accounts—

Assignee bound by state of accounts, 669.

Clause (h) provides the footing on which accounts must be rendered, 669.

Deposit by a mortgagor how affects, 669.

Expenses incurred for collection of rents and profits, 672.

Government revenue, 671.

Interest on items enumerated in the section, 671.

“Just allowances,” meaning of, 674.

Mortgagee cannot contract out of his liability, 669.

“Mortgage-money,” meaning of, in clause (h), 671.

Occupation rent, 670.

Payment of balance, 672.

Personal service, charge for, 671.

Receipts and disbursements must be shewn, 669.

Redemption suit necessary for taking accounts, 669.

Rents and profits uncollected, 672.

Tender by mortgagor how affects, 669, 672.

Vouchers must be produced, 673.

No duty to repair, 667.

Property must be liable to be summarily sold, 666.

Rent, 666.

Rent of leasehold properties, 666.

Repairs, 667.

Salary paid cannot be claimed, 671.

Surplus rent and profits for repairs, 667, 672.

Tagavi advance by Government, 666.

LICENCE—

Assignment of lease, for—See “Assignment by lessee.”

Assignability, 792.

Creates a personal right, 792.

Difference between lease and, 791.

Illustrations of, 793.

Instances of, 793.

Revocability of, 792.

LIEN—

Building contractor has none, 473.

Definition of, 473.

Sale of Goods Act applies, 473.

LIEN OF PURCHASER—See “Charge of purchaser.”

LIEN OF UNPAID VENDOR—See “Charge of vendor” also.

Differs from charge, 439, 440.

Where the Act does not apply, 439.

LIMITED ESTATE HOLDER—See "Transferor."

LIMITED OWNERS—Also see "Alienation by."

Transfer by, 224.

Administrator General, 83.

Committee of a lunatic, 92.

Coparcener in Hindu Law, 101.

Executor, 83.

Guardian of a minor, 98.

Mahant, 113.

Manager of Hindu family, 109.

Official Assignee, 86.

Receiver, 86.

Trustee, 86.

Widow under Hindu Law, 102.

LIMITATION—

Subsequent, 157.

Depending upon a prior void estate, 157.

Exception when transfer for public, 157.

Independent and alternative limitations, 157.

Limitation in default of appointment which is void, 157.

LIMITATION FOR SUIT—

Mistake as to amount in pledgee's notice, 473.

Possession essential, 473.

Priority, 473.

Receiver may be appointed, 473.

Right of pledgee on default, 473.

"LIS PENDENS"—

Administration suit, 309.

Adoption *pendente lite*, 309.

Agricultural lease, 310, 313.

Alienee how far bound, 314.

Amendments in pleadings not retrospective, 305.

"Any other party," meaning of, 314.

Attached property, 309.

Auction purchaser, 309.

Bellamy v. Sabine, doctrine explained in, 305.

British India, meaning of as used in section 52, 308.

Caveat, 309.

Changes in section 52, 305.

Charge or lien not created by, 310, 316.

Claim proceedings in a decree, 309.

Co-defendants where there is no contest, 307, 314.

Code of Civil Procedure, section 47, 314, 316.

Code of Civil Procedure, O. 22, r. 10, 315.

Collusion must be absent, 308.

Commencement, continuance and termination of any suit or proceeding, meaning of, 305, 315.

Contribution, doctrine affected by, 315.

Co-operative Societies Act, II of 1912, 310.

Court sales, how far within the rule, 317.

"LIS PENDENS"—*contd.*

- Decree, consent, 308.
- Decree, *ex-parte*, 308.
- Dismissal of suit as affecting the rule of, 315.
- Doctrine of, as explained in *Bellamy v. Sabine*, 305.
- Doctrine of, differs from the doctrine of notice, 306, 315.
- Dower debt, 310.
- Exception to the doctrine, 304.
- Execution proceedings, extension of the doctrine to, 316.
- Immoveable only within the doctrine, 308.
- Immoveable property must be directly and specifically in question, 308.
- Implied notice, *lis pendens* is not, 306.
- Jurisdiction, 315.
- Lease, 310.
- Lien of purchaser, 310.
- Lien of unpaid vendor, 310.
- Maintenance, 310.
- Misdescription of property in pleadings renders rule inapplicable, 316.
- Mortgages, 310.
- Moveable property outside the doctrine, 308.
- Non-applicability of doctrine, examples of, 306.
- Notice, rule independent of, 306.
- Official Assignee not affected by the rule, 310.
- Onus in, 308.
- Ostensible owner, transfer by, 310.
- Partition, 310.
- Permitted alienation, 315.
- Pleadings when amended, 317.
- Pledgee, 310.
- Pre-emption, application of the doctrine to, 310.
- Proper forum for application of rule, 308.
- Property must be sufficiently described in the pleadings, 316.
- Receiver, alienation by, 310.
- Registration of, 308.
- Rent suit, 310.
- Revenue sales how far within the rule, 317.
- "Rights" as used in the section, meaning of, 304.
- Specific performance, rule not a ground for resisting, 316.
- Suit to recover moneys lent, 310.
- Surrender, *pendente lite*, 310.
- Transfer by defendant to himself, 313.
- Transfer of property, meaning of, 313.
- Transfer pending suit or other proceeding, 308.
- Trust to administer, 310.
- Void or voidable, nature of the transfer, 314.
- Wills, suit to establish, 310.

LOSS OF MORTGAGOR—

- Remedy for, 673.

LOSS OF PROPERTY—See "Destruction of property."**LUNATIC—See "Alienation by."**

"MAHANT"—Also see "Alienation by."

- Alienation by, 113.
- Definition of, 113.
- Lease valid during term of office, 113.
- Legal necessity, 113, 114.
- Manager of infant heir akin to, 113.
- Presumption of dedication, 114.
- Private temples unknown in Malabar, 114.
- Pujari*, 114.
- Sale valid during term of office, 114.
- Trustee is not, 114.

MAINTENANCE—See "Champerty and maintenance."

MAINTENANCE, FUTURE—

- Alimony, 73.
- Allowances out of income 72.
- Annuity, 72.
- Assignable not, 72.
- Attachment, 73.
- Babuana* property, 73.
- Karch-i-pandan*, 73.
- Property given in lieu of maintenance, Residence, 73.
- Restriction on alienation, 73.
- Surrender of life interest, 72.

MAINTENANCE, RIGHT TO RECEIVE—

- Out of profits of immoveable property, 225.
- Arrears of, 226.
- Charge created, validity of, 227.
- Created by act of parties or by law, 225.
- Enforceable against gratuitous transferee, 225.
- Enforceable against transferee with notice, 225.
- Excommunication does not entail loss of, 226.
- Hindu widow, 226.
- Intention to defeat, not a decisive factor, 226.
- Interference in the amount, 227.
- Mother, 226.
- Must give way to family necessity, 227.
- Not a charge under Hindu Law, 226.
- Not enforceable against transferee without notice or against such property in his hands, 225.
- Notice—See "Notice under section 39."
- Official Assignee, liability of transferee from, 227.
- Remarriage on forfeiture, 226.
- Unchaste widow's right revived, 226.
- Unchaste widow's right suspended, 226.

MANAGER OF HINDU FAMILY—See "Alienation by."

MARGINAL NOTES, HOW USEFUL, 4.

MARKETABLE TITLE, 404, 405, 406.

MARRIAGE EXPENSES—

Out of profits of immoveable property, 228.

Enforceable against a gratuitous transferee, 228.

Enforceable against a transferee with notice, 228.

Females of, 228.

*Griha pravasa*m, 228.

Males of, 228.

Not enforceable against a transferee without notice or against such property in his hands, 228.

Ruthusanti, 228.

Second marriage, of, 228.

MARSHALLING BY PURCHASER—

Auction sale, 461.

Contract by parties to the contrary, 460.

Court sales, 461.

Essential ingredients of, 460.

Limits of the rule, 460.

Leases, 461.

Mortgages, 461.

Mortgagee's right not to be prejudiced, 461.

Notice immaterial, 461.

Portion of mortgaged property purchased, 461.

Presumption, 461.

What is, 460.

MARSHALLING SECURITIES—

Both claims must be against the same debtor, 688.

Both funds must be in existence, 688.

Equitable mortgagee's right, 688.

Execution proceedings, right to, in, 689.

Limitations of the doctrine of, 688.

Must not involve the prior mortgagee in litigation, 688.

Must not prejudice third parties, 687.

Must not prejudice priorities of securities, 688.

Notice by puisne encumbrancer not necessary, 687.

Partition of mortgagee's estate, 687.

Principal and surety, 687.

Puisne encumbrancer entitled to, 689.

Purchaser for value, 688.

Purchaser of a portion of mortgaged property, 688.

Rule relating to, 686.

Separate second mortgages are outside the rule, 688.

Time for, 688.

Two properties not on the same footing, 687.

MASTER'S CERTIFICATE—See "Certificate of Commissioner."

MATERIAL DEFECT—See also "Defect in property."

- Compensation when awarded, 388.
- Concealment, 389.
- Construction of doubtful import, 389.
- Freehold means unencumbered freehold, 389.
- Innocent non-disclosure, 389.
- Latent defect, 385.
- Leasehold covenants, 390, 391.
- Liability confined to vendor's knowledge, 388.
- Limitation on purchaser's rights, 389.
- Mere non-disclosure no ground, 389.
- Mistake in description, 388.
- Onerous covenants in a lease, 390, 391.
- Party wall, 389.
- Patent defect, 385.
- Presumption of suppression, 388.
- Public auction, rule as to, 388.
- Restrictive stipulation, 389, 390.
- Right of non-disclosure of, 389.
- Suppression of knowledge, 389.
- Unusual covenants in a lease, 390, 391.
- Vendor's duty to disclose, 390, 391.

MAXIMS—

- "*Expressio unius exclusio alterius*," 54.
- "*Falsa demonstratio non nocet*," 415.
- "*Omne quod inædificatur solo cedit*," 122.
- "*Quicquid in ædificatur solo solo cedit*," 877.
- "*Quid quid plantatur solo solo cedit*," 837.
- "*Quid sentit commodum sentire debet et onus*," 211.

MAXIMUM—See "Priority maximum secured."

MERCANTILE DOCUMENT OF TITLE TO GOODS—

- Not actionable claims, 947.
- Documents included in the phrase, 948.

MERE RIGHT TO SUE—See "Right to sue."

MERGER—

- Act does not apply, when, 886.
- Agricultural leases, 886.
- Amendments in section 101, 761.
- "Becomes absolutely entitled," meaning of, 765.
- Conduct controlling the deed, 773.
- Doctrine of, 762, 763.
- Doctrine of, what is, 886.
- English Law, 886.
- Form of conveyance, 777.
- Intention how far material, 886.
- Interest of the owner to continue, 767.
- Limited owner, 775.

MERGER—contd.

- Lower security, how far affects, 765.
- Mesne encumbrances, effect of, on, 774.
- Mortgagor after discharge purchasing the equity of redemption, 774.
- Mortgagor keeping alive paid off mortgage, 775.
- Necessary implication, 765.
- One term in another, 886.
- Point of time to be regarded, 776.
- Pre-emption, 774.
- Presumption strengthened, 770.
- Prior encumbrance of attached property, 772.
- Puisne mortgagee, 773, 774.
- Purchase by trustee in bankruptcy, 776.
- Purchaser discharging first mortgage, 768, 769.
- Rebuttable nature of presumption, 770, 771.
- Remainderman discharging a mortgage, 775.
- Requisites of a valid, 886.
- Retrospective effect of section 101, 761.
- Sale decree, 777.
- Saving the charge, 762.
- Section applies to the Punjab, 777.
- Tenant for life discharging a mortgage, 768, 775.
- Term and reversion held in same right, 887.
- Tests of, 764.
- Toulmin v. Steere*, rule in, 762, 763.
- Two sets of title must meet in one person, 887.
- Whole property must be involved, 887.

MESNE ENCUMBRANCE—

- Foreclosure the right of a, subsequent mortgagee, 739.

MESNE PROFITS, 73, 75.

- Accrued before sale, 75.
- Alienability of, 75.
- Assignment of—See "Right to sue."
- Decree, dealing, 76.
- Past, transfer of claim to, 75.
- Sale of land with incidental rights to, 75.

MINOR—See "Alienation by."**MISDESCRIPTION—**

- Annulment of the contract for, must go to the essence, 391.
- Area overstated, 392.
- Area understated, 392.
- Condition of sale, incorrectly stated, the effects of a trust, 391.
- Defect known and not disclosed by vendor, 391.
- Easements not disclosed, 392.
- Existence of a right of way, 394.
- Footpath not disclosed, 394.
- Fraud unnecessary, 391.
- Immaterial, of no consequence, 394.
- "Land tax redeemed" when it was not, 392.

MISDESCRIPTION—contd.

- Mala fide* exaggerated by vendor of the property, 392.
- Neighbour's right to overhang not disclosed, 394.
- Occupation rent erroneously stated, 392.
- Onus on the vendor, 394.
- Property in occupation of a most desirable tenant, 394.
- Property offered to be conveyed different, 392.
- Public sewer not disclosed, 394.
- Question depends on view of the Court and importance of, 391.
- Restrictive covenants concealed, 392.
- Ripe for immediate development, 391.
- Sale conditions incorrectly stated, effect of trusts, 391.
- Set-back, 392.
- Sub-purchaser's rights, 393.
- Substantial part of the property non-existent, 392.
- Underground culvert not disclosed, 394.
- Unintentional and without fraud, 391.
- "Well supplied with water" when property was supplied with water from water-works, 394.

MISREPRESENTATION—

- Condition providing for errors, mis-statements or omissions, 395.
- Costs, 395.
- Expression of opinion, 396.
 - "Fertile and improveable" when it was abandoned as useless, 396.
 - "Substantial and convenient" when too small, 396.
 - "Uncommonly rich meadow" when it was imperfectly watered, 396.
- Freehold turned out to be copyhold, 398.
- General statement, 395, 396.
- Indefinite representation by vendor, 396.
- Innocent, entitles purchaser to rescind, 394.
- Innocent representation of fact, 680.
- Lease described as for a certain time when lessor had option to determine, 394.
- Leasehold described as freehold, 394, 396.
- Lots, on a sale in different, 392.
- Portion under a lesser term, 391.
- Postponement by estoppel, 680.
- Puffing by auctioneer, 396.
- Purchaser believing term longer than what it was, 393.
- Quality as to, 391-394.
- Remedy of purchaser for, 396, 397.
- Rescission clause, effect of, when, 394.
- Statement of opinion involving a statement of fact, 396.
- Sub-purchaser's rights, 393.
- Tied public house described as free, 393.
- Under-lease described as a lease, 393.
- What is a, 391, 394.
- What constitutes, 680.

MISTAKE—

- Both parties under, as to a matter of fact, 399.
- Property by, omitted or added, 399.

MONEY—

Exchange of—See “Exchange.”

MORTGAGE—

Agreement to—See “Agreement to mortgage,” 469, 470.

Anomalous—See “Anomalous mortgage.”

Charge differs from, 469.

Charge not created when not attested or registered, 518.

Conditional sale—See “Conditional sale, mortgage by.”

Costs of preparing a, 469.

Date of, 469.

Debt, 468.

Debt, keeping alive, 423.

Deed of, not a title-deed, 467.

Description of the property, 467.

English—See “English mortgage.”

Equitable—See “Equitable mortgage.”

—Failing for want of registration is not equitable mortgage, 508, 509.

Gold in specie, mortgage to be paid for by, 474.

Interest, 468.

Loan, 468.

Mortgagee's right to possession, 536.

—Performance of an engagement, etc., 468.

Person other than real owner executing, 537, 538.

Possession, 468.

—Principal money, 468.

“Principal money,” meaning of, 518.

Purpose of a, 467, 468.

Registration under Indian Companies Act, 467.

—Registration of, 517.

—Second mortgage, 474.

Signature of mortgagor, 517, 518, 519.

Mark as, 519.

Method of, various, 519.

Scribe may make, 520.

What is and how made, 517.

Simple—See “Simple mortgage.”

Stock, 474.

Sub-mortgage, 624; also see “Sub-mortgagee.”

Title-deeds lost by mortgagee, 562.

Title-deeds, mortgagor entitled, 535, 536.

Transfer of interest, 467.

Two mortgagees taking one, 548, 549.

Usufructuary—See “Usufructuary mortgage.”

—What is a, 467.

MORTGAGE BY CONDITIONAL SALE—See “Conditional sale, mortgage by.”

MORTGAGE DEBT AND PROPERTY, TRANSFER OF—See “Transfer of mortgage debt and property.”

MORTGAGE BY DEPOSIT OF TITLE-DEEDS—See “Equitable mortgage,” 498.

MORTGAGEE—See "Alienation by."

MORTGAGEE—

- Acts wrongful, 620.
- Acts not wrongful, 620.
- Certificate of administration, 619.
- Concurrent remedies, 626.
- Covenant for possession in lieu of interest, 623.
- Covenant for quiet enjoyment, right to, 621.
- Covenants on sale, 90.
- Default—See "Wilful default of mortgagee."
- Defect of security, right to, 617, 618.
- Defective title, 624.
- Deprived of security by wrongful conduct of mortgagor, 619, 620.
- English mortgage, 623, 624.
- Failure of mortgagor to deliver possession, 622.
- Heir of a mortgagor, 620.
- Heir of deceased mortgagor, 624.
- Includes person deriving title from, 526.
- Lesser amount paid, by, 624.
- Liability of purchaser on covenant after assignment of the equity of redemption, 625.
- Limitation for suit for mortgage-money, 625.
- Personal remedy not to be resorted to in the first instance, 625, 626.
- Possession—See "Mortgage."
- Protection of security, right to, 617, 618.
- Purchasing the equity of redemption, 555, 562.
- Remedy not exclusive but alternative, 625, 626.
- Rests—See "Rests, mortgagee's liability to account with."
- Right of mortgagee to sue for sale or foreclosure, 624.
- Superior title making the claim, 622.
- Sub-mortgage, 624.
- Suit for mortgage-money—See "Personal covenant."
- Void mortgage, 624.
- Waste—See "Waste, mortgagee not liable."

MORTGAGEE, LIABILITIES OF—See "Liabilities of mortgagee in possession."

MORTGAGEE NOT LIABLE TO ACCOUNT—

- Exception to section 76, clauses (b), (d), (g) and (h), 677.
- Exemption from general liability to account, 677.
- Failure to pay fixed surplus, 677.
- Government revenue, 677.
- Interest equal to profits, 677.
- Interest out of rents and profits, 677.
- Malikana*, 677.
- Mortgages before the Act, 677.
- Part of interest paid out of usufruct, 677.
- Part of principal out of rents and profits, 677.
- Sub-mortgagee's liability, 678.
- Usufructuary mortgagee's liability, 677.

MORTGAGEE, RENEWAL OF LEASEHOLD BY—

- Amendment of the section, 589.
- Constructive trust, 591.
- Costs and expenses of, 591.
- Difference between section 64 and 72 (e), 589.
- Doctrine of equity as to foundation of, 590.
- Effect of, 589, 590.
- Fiduciary relation when subsisting, effect of, 590, 591.
- Forfeiture, 591.
- Fraud, 591.
- Indemnity to which mortgagee is entitled on, 591.
- Joint tenants on obtaining, 591.
- Mortgagor's right absolute on, 590.
- Presumption of renewal rebuttable or otherwise, 590.
- Renewal for benefit of all, 590.
- Sections 64 and 71 compared, 589.

MORTGAGEE, RIGHTS OF—

- Whether in possession or not, 651.
 - "*Asmani*," "*sultani*," expenses on account of, 656.
- Changes in section 72, 652.
- Claim must be within the section, 652.
- Clause (b) controlled by proviso, 652.
- Compound interest, 655.
- Conditional decree for possession satisfied by mortgagee, 655.
- Correspondence costs, 654.
- Costs of litigation to defend mortgagor's title during the continuance of a prior mortgage, 654.
- Costs of negotiating loan and preparing mortgage deed, 653.
- Costs may be added to the mortgage debt, 655.
- Defending mortgagor's title, 653.
- Defending mortgagee's title against mortgagor, 653, 654.
- Equitable mortgagee applying for leave to bid, 656.
- Improvements and additions governed by section 63 (a), 652.
- Insurance to what extent allowed, 655.
- Interest on money spent, 655.
- Letters of Administration, cost of, 656.
- Mortgagee's title disputed by third party, 656.
- Mortgagee proving debt in administration, 656.
- Power of sale—See "Power of sale."

MORTGAGEES WHEN JOINT—

- Discharge how effected, 539.

MORTGAGOR—

- Implied covenants—See "Covenants implied by mortgagor," 593.
- Includes person deriving title from, 526.
- Purchaser, from, not included, 526.
- Quiet enjoyment, 593, 595.
- Remedy on breach of, 595, 599.
- Title based on estoppel, 594.

MORTGAGOR—*contd.*

- Transferee of the equity of redemption bond, 594.
- Transmutation of security, how affects, 594.
- Varieties of, 593.

MORTGAGE OF THE EQUITY OF REDEMPTION, 474.**MORTGAGE FOR PAYMENT OF GOLD IN SPECIE, 474.****MORTGAGOR AND MORTGAGEE, 469.****MOVEABLES, MORTGAGE OF, 471.**

- Good-will included, 471.

MOVEABLES, MORTGAGE OF, NON-EXISTING—

- Contract to give after-acquired chattels, 472.
- Transferee without notice not liable, 472.

NEGLIGENCE—

- Different kinds of, 681.
- Gross, 681.
- Gross neglect—See "Gross neglect."
- What is, 681.

NEGOTIABLE INSTRUMENTS—

- Not actionable claim, 938, 946.

"NIRMUTAL," 514.**NON-DISCLOSURE OF MATERIAL DEFECT IN TITLE—See "Defect in property."****NOTICE—**

- Advertisement, 32.
- Casual conversation, 32.
- Rumours, 32.
- Statement by strangers, 32.

Actual

- Auction purchaser not bound by mortgagee informing the Court of the mortgage, 33.
- By whom to be given, 33.
- Inaccuracy in particulars, 33.
- To whom to be given, 33.

Constructive.

- Answer to inquiry, 33.
- Bank, relating to, 34.
- Commercial and mercantile transactions, non-applicability, 34.
- Companies, reluctance to extend to, 34.
- Imputation of, 33.
- Limitations on, 33, 34.
- Must be in the same transaction, 33.
- Possession as, 33.
- Principal and agent as between, 33, 41.
- Registration, 33, 38, 39.
- Searches, 33.
- Structure on adjoining ground is no notice of agreement relating thereto, 34.

NOTICE—*contd.*

Constructive—

- Sub-divisions of, 32.
- Turning away from information, 34.
- Usual inquiries, 33, 37.

Constructive notice.

- Wilful abstention from inquiry, 33, 36.
- “Charges” affect the property, 36.
- Contradictory recitals in respect of different portions of the same property, 37.
- Facts learnt upon investigation of title, 36.
- Failure to investigate title, 37.
- False answer given to inquiry, 36, 37.
- Nature of duty to inquire or search, 33.
- Not wilful or fraudulent turning away, 36.
- Occupation of land by tenant affects a purchaser, 37.
- Omission to investigate title of a portion, 37.
- Reasonable answer given to inquiry, 34.
- Rents received inconsistent with vendor’s title, 37.
- Secrecy in the transaction, 37.
- Imputed, 33.

NOTICE DETERMINING LEASES—

- Advertisement in paper as medium, 813.
- Agricultural leases, 810.
- Appeal Court may not deal with sufficiency of, 813.
- Business premises, service on, 815.
- “By” held to include day named, 812.
- “Clear days,” meaning of, 813.
- Construction of, 813, 814.
- Contract contrary to section 106, 810.
- Custom or usage, 810.
- Dispensed with in certain cases, 811.
- Duration of, 811, 812.
- Ejectment suit, service of, condition precedent, 815.
- Expiration of, in various cases, 813, 814.
- Form of, 815.
- Holding over—form on, 816.
- Inaccuracies in, 813.
- Insolvency of landlord, 816.
- Irregular, tenant vacating on, 816.
- Joint tenants, 812, 815.
- Landlord, death of, 815.
- Lessee holding over, 816.
- Lessors, joint, 816.
- Licensee, 816.
- “Month,” meaning of, 811.
- Nature of, 814.
- Post as medium of, 815.

NOTICE DETERMINING LEASES—*contd.*

- Presumption in various cases, 811.
- Receiver, 816.
- Representative's right to, 815.
- Section 106, changes in, 810.
- Section 106, rule in, 810.
- Service, mode of, 815.
- Sunday service on, 815.
- Tenancy, monthly, 811.
- Tenancy, no period specified, 811.
- Tenancy, recognition of, 810.
- Tenancy, yearly, 811.
- Tendered or delivered, how, 812.
- Trespasser, addressed as, 811.
- Vendor and purchaser, 815.
- Who may give—
 - Co-lessors, 816.
 - Lessor or lessee, 811.
 - New tenant accepted by landlord, 811.
 - Person holding power-of-attorney, 811.
 - Person holding power to sue, 811.
 - Tenancy at will, 811.
- Who may receive—
 - Joint tenants, 812.
 - Solicitor of tenant, 812.
 - Tenant addressed as trespasser, 811.
 - Tenant holding annual tenancy, 813.
- Year—meaning of, 811.

NOTICE, SERVICE OF, UNDER CHAPTER IV—

- Agent holding general power-of-attorney, 778, 779.
- Agent otherwise authorized to accept, 778.
- Amendment of section 102, 778.
- Court to give directions when no person or agent found or known, 779.
- Person to be served not residing in the district, 779.
- Person incompetent to contract, see section 103.
- Scope of section 102, 778.
- Sufficiency of, 778.

NOTICE TO QUIT, WAIVER OF—

- Act shewing intention to treat lease as subsisting, 900.
- Acceptance of rent, 900.
- Consent by, 900.
- Demand of rent not, 900.
- Second notice, 900.
- Withdrawal, except by consent, 900.

NOTICE UNDER SECTION 39—

- Constructive, 228.
- Gratuitous transferee's liability with or without, 228.
- Onus, 228.

NOTICE UNDER SECTION 39—*contd.*

Purchaser with, 228.

Purchaser without, 228.

Purchaser when with notice not liable, 228.

Purchaser with notice for purchaser without notice, 228.

NOTICE UNDER SECTION 40—

Burden of proof of payment, 240.

Constructive, bar to defence under section 40, 240.

Gratuitous transferee liable, 240.

Obligation how affected by, 240.

Property in hands of transferee without notice, how far bound, 240.

Transferee of property subject to expense, 241.

OBJECTS AND REASONS, REFERENCE TO, 3.**OBLIGATION—See also “Restrictive covenant.”**

Agreement for sale, 239.

Annexed to ownership of land, 239.

Attachment conflicting with agreement for sale, 242.

Burden of, imposing restriction in case of land, 229.

Judicial sales, 241.

Notice—See “Notice under section 40.”

Pre-emption, 240.

Property in the hands of transferor without notice, 229.

OFFICE—See “Religious office.”**OFFICIAL ASSIGNEE—See “Alienation by.”****OFFICIAL RECEIVER—See “Official Assignee.”****OFFICIAL TRUSTEE—See “Alienation by.”****OMISSION TO DISCLOSE BY VENDOR—Also see “Defect in property.”**

Fraudulent, 388, 389.

ORDINARY CARE—

Meaning of, in section 55 (a) in sale of land 384.

OSTENSIBLE OWNER—

Transfer by

Acquiescence, 244.

Attestation as an estoppel on, 245.

Auction sale, 252.

Civil Procedure Code, section 66, 253.

Conditions requisite for validity of, 243.

Conduct of real owner, 244.

Conflict between sections 41 and 52, 253.

Consideration necessary, 243.

Due inquiry by transferee, 243.

Exception to the General Law, 243.

Extent of consent, 243.

Fiduciary owners, 246.

Fractional interest, 254.

Fraudulent intention unnecessary, 243.

OSTENSIBLE OWNER—*contd.*

Transfer by—

- Good faith of transferee, 243.
- Involuntary transfer, 254.
- Meaning of, 246.
- Meaning of "to make it," 249.
- Mesne profits, 253.
- Minor owners, 246;
- Mutation of names, 250.
- Nature of consent, 244.
 - Express consent, 244.
 - Fraud vitiating, 244.
 - Implied consent, 244.
 - Must be intelligent and free, 244.
 - Silence as estoppel, 244.
 - When based on mistake, 244.
- Non-representative in interest not affected, 243.
- Onus, 252.
- Pleadings and issue, 254.
- Proof required of transferee claiming protection, 243.
- Real owners remedy against transferee, 248.
- Reasonable care, what is, 249.
- Revenue sales, 253.
- Right of real owner on, 248.
- Scope of section 41, 243.
- Second appeal, 254.
- Silence of reversioners, 245.
- Subsequent purchasers, 254.
- Transferee, inquiry by, 249.
- Transferee's obligations, 249.
- Transaction to which relates, 246.
- Voidable nature of in whole or in part, 248.
- Voluntary transfers, 254.
- When protection will be refused, 252.
- Who are entitled to the benefit of section 41, 254.
- Who are persons interested on, 246.
- Who is, 243, 246, 247.
- Who is not, 246, 247.

"OTTI"—See "Usufructuary mortgage, varieties of," 491, 513.

"OTTIKAMBARAM," 514.

"OUGHT" as defined in section 3, 37.

OUTGOINGS, VENDOR LIABLE FOR—

- Amount due of encumbrances subsisting at date of sale, 428, 429.
- Buyer's remedies for vendor's failure, 429.
- English Law differs, 428.
- Insurance not, 248.
- Interest on encumbrances due to date of sale, 428.
- Municipal taxes, 428.
- Public charges, 428.
- Purchaser not a trustee, 430.

OUTGOINGS, VENDOR LIABLE FOR—*contd.*

Reconveyance or release must be valid for, 430.

Rents on sale of leasehold, 428.

Rent accrued due to date of sale, 428.

Transferees for value not liable for, 430.

OWNER—See “ Limited owner,” “ Ostensible owner.”

OWNERSHIP—

Non-payment of price does not prevent, 439, 440.

When passes, 439, 440.

PARTNER—See “ Alienation by.”

PART PERFORMANCE—

Acts which constitute, 359.

Any person contracts to transfer, 358.

Classification of division of opinion prior to section 53A, 355.

Consideration, 358.

Contracts, 359.

Contracts to which it is applicable, 358.

Damages, 363.

Defect in written agreement, 362.

Doctrine of, what is, 353.

Ejectment suit, agreement for sale no defence, 379.

Enactment with its additional legislation, 342.

Essential elements of the doctrine, 358.

Grounds and established limits of the equitable doctrine of, 344.

Growth in India of the doctrine of, 351.

How defined by the section, 357

Instances of the doctrine, 353.

Knowledge and objection, 363.

Law of Property Act, 1925, section, 40, 344.

Limitation, 362.

Maddison v. Alderson, different in principle from *Walsh v. Lonsdale*, 349.

Part performance, 357.

Possession necessary, 359.

Proviso, 357, 361.

Registration, 361.

Sale by order of the Court, 358.

Section 53A not exhaustive, 343.

Section 53A whether retrospective, 343,

Section 53A how conflicts with *Walsh v. Lonsdale*, 355.

Specific Relief Act, Section 27A, 363.

Statute of Frauds, 344.

Title of the transferee, 361.

Transfer incomplete, 361.

Transferee must perform or be willing to perform his part of the contract, 360.

Transactions outside the scope of the section, 343.

Voluntary transfers, 358.

Walsh v. Lonsdale, principle in, 348.

Walsh v. Lonsdale, rule in, 354.

Writing necessary, 358.

PARTIAL REDEMPTION—

- Allowed in what cases, 560, 561, 562.
- Allowed on fusion of both rights, 561.
- Charge of redeeming mortgagor, 562.
- Contribution, right of, 561.
- Coparcener cannot claim, 561.
- Deposit made under section 83, 561.
- General rule as to, 560.
- Invalid, mortgage when, 561.
- Mortgagor of share cannot claim, 560.
- Purchaser from a mortgagor of a share cannot claim, 560.
- Release by mortgagee of a portion, 561.
- Sub-mortgage does not destroy integrity of the mortgage, 561.

PARTY WALL—

- Existence of covenant to repair, 389.

PATENT—

- Carelessness in not inquiring, 385.
- Defect, what is a, 385.
- Misrepresentation of some fact, 385.

PAYMENTS—

- Agricultural leases, 844.
- Contract to the contrary for, 844.
- Covenant and its form, 845.
- Income-tax, 845.
- Interest on, made by lessee, 844.
- Interest rate, 844.
- Lessee's rights on lessor's failure, 844.
- Local usage, 844.
- Neglect by lessor to make, 844.
- Recoverable against the property, 844.
- Recoverable from the lessee, 844.
- Reimbursement by lessee, 844.
- Remedy under clause (g), section 108, 845.
- Taxes, 844.
- Usual covenant, 845.

PENSION—

- Bonus is not, 79.
- Covenant by coroner to pay percentage, 79.
- Definition of, 78.
- Grant of royal share of the revenue is not, 79.
- Immoveable property granted is not, 79.
- Land revenue grant is not, 79.
- Land revenue grant made in certain circumstances may be a, 79.
- Money paid to retired military officer for commutation of pension is not, 78.
- "Pay" or "allowance" synonymous with, 78.
- Pensioners of Government, paid to, not transferable, 78.
- Percentage received by *khot* is not, 78.
- Political—See "Political pension."
- Zemindari granted is not, 78.

PERIOD OF LEASE HOW COMPUTED—See “Term, computation of, in a lease.”

PERPETUITIES—See “Rule against perpetuities.”

PERSONAL COVENANT—

- Appeal Court may allow personal decree, 615.
- Charge within the rule in section 68, 613.
- Circumstances under which mortgagee may proceed on, 612, 613.
- Conditional promise, 615.
- Costs and expenses, liability on, for, 617.
- Decree, for, when implied, 614.
- Demand on, necessity for, 615.
- Fiduciary-holder's liability of, 615.
- Invalid mortgages as affecting, 617.
- Joint mortgagee's right on, 615.
- Loss of right to sue on, 617.
- Meaning of, 614.
- Mortgage by a person not owner, 615.
- Mortgagee contracting to buy from the mortgagor another estate, 617.
- Mortgagee suing after purchase with leave of Court, 617.
- Plaint not praying for, 614.
- Principal payable by instalments, 615.
- Proviso at variance with, 616.
- Public undertaking, 616.
- Punjab Alienation of Land Act, 617.
- Qualifying the, 615.
- Rate of interest on liability for, 616.
- Section 68, amendments of, 612.
- Tenant for life, 616.
- Void mortgages, 616.
- When date is fixed in the mortgage, 616.

PERSONAL REMEDY—

- Vendor against purchaser, 446.

“PERUARTHAM,” 514.

PLAN INACCUATE—See “*Falsa demonstratio non nocet.*”

PLEDGE—

- Chapter VIII does not apply, 471.
- Contract Act, section 172 governs, 473.
- Distinguished from a mortgage, 473.
- Good-will included, 471.
- Invalid, cannot take effect as a mortgage, 473.

POLITICAL PENSION—

- Attachment, exempt from, 79.
- Foreign state making arrangement for payment with the Government of India, 79.
- Jagir*, no presumption that it is a, 79.
- Unpaid at the time of prisoner's death, 79.
- What is a, 79.

POSSESSION—See “Possession by mortgagee” and Possession by purchaser.”

Adverse—

- Against mortgagee, not necessarily against mortgagor, 542.

POSSESSION—*contd.***Adverse—**

- Agent, 542.
- Both parties have uncertain possession, 542.
- Manager, 542.
- Mortgagee holding, 541.

POSSESSION BY MORTGAGEE—

- Attornment clause, 664.
- Calling upon tenant to pay rent, 664.
- Date from which mortgagee is entitled to, 663, 664.
- Ejectment against mortgagor, 664.
- Entry on part sufficient, 663.
- Mortgage accompanied by lease, 663, 664.
- Mortgagee right to, 536.
- Mortgagee taking, 663.
- Mortgagor retains, 663.
- Mortgagee could avoid by section 69A, 663.
- Mortgagee must take in his capacity as such, 663.
- Mortgagee when entitled to, 663, 664.
- Question of, how determined, 664.
- Relinquishment of, 663.
- Rents what recoverable on taking, 664.
- Right relates back on taking, 663.
- Second mortgagee how can take, 664.

POSSESSION BY PURCHASER—

- Before payment of price, 426.
- Co-owner, 428.
- Decree conditional on payment of price, 428.
- Entering the property for, 427.
- Purchase-money whether condition of, 426.
- Suit for, 427.
- Vacant, 428.
- Vendor under obligation to give, 426.

POSSESSION TO BE GIVEN BY LESSEE—See "Delivery by lessee."**POSSIBILITY—**

- Agreement between expectants not a, 59.
- Alternative promise one of which is illegal for, 63.
- Assignment of rent of future lease, 58.
- Bare, what is a, 58.
- Cannot be assigned, 58.
- Hindu reversionary interest of, 59.
- Mahomedan Law, rule against, 62.
- Meaning of "any other" in the section, 58.
- "More," meaning of, 58.
- Naked, what is a, 58.
- No interest in, 58.
- Offerings to a temple, 58.
- Punjab, how far applies the rule of, 63.
- Right to receive offerings from pilgrims resorting to a temple, 58.
- Vendor's right to purchase-money, 58.

POWER—

Revocation of—

- Deprecated in what cases, 255.
- Exercise subject to same rules as transfers, 256.
- Express, 257.
- Irrevocable, 256.
- Nature of, 255.
- Not necessary in a settlement, 256.
- Rectification for inclusion, 256.
- Third person's consent required, 256.
- When forced, 256.

POWER OF SALE—

- Absolutely vested in mortgagee, 639.
- Advertisement unnecessary, 631.
- Agreement lapse causing loss, 631.
- Assignment of, 640.
- Assignment of part of debt, effect on, 640.
- Auction sale conditions, 638.
- Auctioneer refusing to accept bid of mortgagor, 640.
- Bombay limits, 631.
- Changes in section, 69, 628.
- Conditions for exercise of, 628, 630, 632.
- Default of payment of mortgage-money 630.
- Deposit received in cheque, 632.
- Depreciatory condition, 635.
- Destruction of, 640.
- Different estates, 631.
- Donee of power of appointment, 630.
- Duties of mortgagee exercising, 631, 642.
- Effect of exercise of, on equity of redemption, 642.
- English mortgages, 630.
- Express, 630.
- First and second mortgagee may combine, in, 631, 636.
- Generally, 631.
- Injunction to stay of sale, 639.
- Interest due, 632.
 - Clause 2 (b) ineffective, unless principal due, 634.
 - Sale for interest only after calling for principal and interest, 634.
- Irregularity in exercise of, 636.
 - No protection to purchaser, 636.
 - If aware of invalidity or, 636.
 - Till completion of sale, 636.
 - When aware of sale without notice, 636.
 - Purchaser protected against, 636.
- Laches of mortgagor, 642.
- Lis pendens* doctrine does not affect, 639.
- Mistake as to amount, 633.
- Mortgage deed retained by mortgagee on, 642.
- Mortgagee exercising, how far trustee, 641.
- Mortgagor cannot purchase, 639.

POWER OF SALE—*contd.*

- Motive of mortgagee immaterial, 636.
- Notice, how served, 633.
- Notice of three months, 634.
- "Or part thereof," meaning of, 633.
- Obligation of a mortgagee exercising, 636.
- Outgoings previous to sale, 642.
- Parties cannot dispense with notice, 632.
- Possession of auction-purchaser, 639.
- Price realized, 631.
- Principal in default, 633.
 - Delay in sale after notice, 633.
 - Fresh notice, 633.
 - Irregularity in notice, 632.
 - "Such a power," meaning of, 633.
 - Waiver of notice by mortgagor, 633.
- Professed exercise of, 634, 635.
 - Damages the only remedy of mortgagor against, 636.
 - Damages how measured, 640.
 - Exhaustively dealt in *Dicker v. Angerstain*, 634.
- Promise to postpone, 639.
- Puisne mortgagee restraining a prior mortgagee, 641.
- Punjab, 631.
- Purchase-money left on security of property, 642.
- Rights of mortgagee conducting, 636, 637.
- Sale before expiry of notice, 634.
- Scaring bidders, 635.
- Secretary of State mortgagee, 630.
- Statutory, 629.
- Surplus to whom paid, 642.
- Surprise no ground for, 636.
- Territorial limits for, 631.
- Three months' default from service, 632.
- Undervalue no ground for, 640.
- Who may exercise the power, 629.
- Who may purchase, 638.

PREAMBLE, 3.

PRECEDENT—

- Condition—See "Condition."

PRE-EMPTION—

- Cannot be made the subject of sale or bargain, 71.
- Claim to, must be made without delay, 71.
- Custom, need not be asserted or proved, 71.
- Decree for pre-emption cannot be transferred, 71.
- Hindus of Bihar adopt the law, 71.
- Inalienable, 71.
- Incident to the ownership of one land and burden on the other, 71.
- Mortgage, no claim to, 71.
- Mortgage by pre-emptor is not destructive of the right, 71.

PRE-EMPTION—*contd.*

- Object, exclusion of stranger, 71.
- Official Assignee, sale of bankrupt's property, 71.
- Official Receiver, sale of bankrupt's property, 71.
- Peculiar to Mahomedan Law, 71.
- Perpetual lease, no claim to, 71.
- Pre-emptor Mahomedan, vendor and purchaser Hindus, 71.
- Purely personal right, 71.
- Release of dower, no claim to, 71.
- Relinquishment by reversioner, 71.
- Right of substitution, 71.
- Sale in exchange for maintenance right, no claim to, 71.

PREMIUM, 799.**PREMIUM, PAYMENT OF—See "Rent."****PRICE—**

- Acknowledgment of receipt of, false, 368.
- Discharge of future maintenance is not, 367.
- ✓ Essence of contract of sale, 367.
- Fixed by arbitrators, 367.
- How and when ascertained, 367.
- ✓ Inadequacy, 367, 369.
- ✓ Money due on a prior debt is, 366.
- Money partly and partly forbearance to take proceedings, 367.
- Non-payment of, 367.
- Onus on non-payment, 368.
- Paid or promised or part paid and part promised, 367.
- Part consideration paid, 368.
- Payment of, subject to conditions, 367.
- Recital of false, 368.
- Service rendered or to be rendered not, 367.
- Solicitor for the party giving discharge when entitled, 417.
- ✓ Third party or stranger cannot attack sale deed for want of consideration, 368.
- ✓ Time of valuation essence of contract, 367.
- To be fixed by valuers, one subsequently refuses to allow his valuer to fix, 367.
- Trustee selling, to whom to be paid, 417.
- Trustee's solicitor not entitled to, 417.
- Vendor entitled to receive, 417.
- ✓ What is, and what it includes. 366.

PRIOR ENCUMBRANCE, 739.**PRIORITY, LOSS OF—See "Fraud," "Misrepresentation" and "Gross neglect."**

- General rule as to, 678.
- Not applicable to mortgagee and subsequent purchaser, 678.

PRIORITY MAXIMUM SECURED—

- Mortgagee lending further advances, 684.
- Rule in *Hopkinson v. Rolt*, 685.
- Rule in section 48 of the Act, 684.

PRIORITY MAXIMUM SECURED—*contd.*

Rule in section 93 applies when no maximum expressed, 685.

Subsequent mortgagee, his right when maximum expressed in the prior mortgage, 685.

PRIORITY ON TRANSFERS—

Abrogation of, 283.

Applicable to what cases, 283.

As between competing auction purchasers, 284.

Concurrent leases, 284.

Date of execution and not registration the decisive factor, 283.

Date of transfer and not possession the determining factor, 283.

Equitable mortgage within the rule, 283.

Essence of, 282.

Essential ingredients, 283.

Maxim applicable, 282.

Rival documents need not be executed by the same person, 283.

Rival instruments must conflict, 283.

When competing documents executed on the same day, 284.

PRODUCTION OF DOCUMENTS BY MORTGAGEE—See "Inspection of documents by mortgagor."

PROFITS—

Meaning of, on transfer, 438.

Sale goes off after purchaser takes possession, 439.

When purchaser takes possession before completion, 439.

PROPER TIME AND PLACE, 423.

PROPERTY, CARE OF—See "Care of property."

PROPERTY, DEFINITION OF, 366.

PROPERTY, TRANSFER OF—Also see "Immoveable property."

Actionable claim, 50.

Compromise, 51.

Convertible term with alienation conveyance and assignment, 50.

Corporation, 52.

Corporeal and incorporeal, 52.

Definition, 51.

Delivery of title is not, 51.

Easement, 51.

Exchange, 51.

Future, 32.

Himself, 53.

Hindu idol, 52.

Hypothecation, 52, 471.

Living person by, 52.

Moveables : See "Pledge," "Hypothecation," "Mortgage of moveables."

Partition, 51.

Real and personal, 51.

Recitals,

Records public entry in, 51.

Tangible, 369.

What amounts to, 51.

PROPERTY, TRANSFERABLE, 56.

- Bare expectation of future right, 57.
- Contingent remainder, 55.
- Contingent right in corpus, 55.
- Document by Hindu widow to reversioner, 55.
- Equity of redemption, 55.
- Grove, 55.
- Hat*, 55.
- Heir-apparent's chance of succeeding to an estate, 57.
- Hindu idol, 55.
- Hindu religious endowment, 55.
- Ingredients which form, 54.
- Insolvents claim in dispute, 55.
- Lease from year to year, 55.
- Legacy on death of kinsmen, 57.
- Maha Brahmin's* remuneration, 55.
- Mahomedan shrine, 55.
- Mortgage of chargee's rights, 56.
- Mortgagee's rights of his mortgagor, 55.
- Offerings made at a temple, 55.
- Offerings to a deity, 55.
- Reversion expectant on the determination of a lease, 55.
- Transferable, 57.
- Vested or contingent interest whether, 56, 57.
- Vested remainder, 57.
- Vested right in income, 57.
- What is, 55.
- Worship, right of, 55.

PROVISO, WHAT IS A, 4.**PUBLIC, BENEFIT OF, 165.**

- "Charity," definition of, 165.
- Charity, private, excluded, 165.
- Christians, 166.
- Hospitals, 166.
- Cy pres* doctrine, 168.
- Dharam* is void, 168.
- Transfer in perpetuity for, 164.

Hindu.

- Alms for testator's spiritual benefit, 167.
- Deity, worship of, 166.
- Distribution of ascertained sums among the poor, 166.
- Education of the poor, 166.
- Feeding the poor, 166, 167.
- Hospitals, 167.
- Idol, endowment of, 166.
- Image, establishment of an, 166.
- Marriage expenses of daughters, 166.
- Pujahs, Durga and Lakshmi*, 167.

PUBLIC, BENEFIT OF—*contd.*

Hindu—

- Religious purposes, 166.
- Sadavarat*, establishment of, 166.
- Sradhs*, 166.
- Sivratni*, feeding poor on night following, 166.
- Travellers, feeding of, 166.
- Well and cistern for animals, 166.
- Idol, not moveable, 168.
- Kherat* is void, 168.
- Language, 169.
- Limitation over of property from one charity to another, 168.
- Masses, trust for, 167.

Mahomedans—

- Ali Murtaza, celebration of birth of, 168.
- Anniversaries of death ceremonies, 168.
- Fateha*, 168.
- Imambara*, repairs of, 167.
- Kadam Shariff, 168.
- Koran, reading of, 168.
- Lamps, burning of, in a mosque, 168.
- Marriages, 168.
- Pilgrimages, 168.
- Section not applicable by reason of section 2 of this Act, 168.
- Tazias*, expenses of keeping, 168.
- Tomb, private, as opposed to that of a saint, 167.
- Wakf*, 167.
- Objects under English Law, 165.
- Objects under the Indian Succession Act, 165.

Parsis, 167.

- Muktad, Baj, Yejushni*, 167.
- Religion, 169.
- Resulting trust when not wholly executed, 165.

Statutes—

- 43 Eliz., c. 4, 165.
- Mortmain, 165.
- Charitable Uses Act, 165.
- Such charitable or public purposes as trustees may think proper, 166.
- Superstitious uses, 169.

PUBLIC OFFICE—

- Governed by Statute in England, 78.
- Government of India Act defines "office," 78.
- Pay must come out of national fund, 78.

PUBLIC OFFICER—

- Cantonment Committee, 78.
- Defined in the Code of Civil Procedure, 78.
- Indian Army Officer, 78.
- Judge, assignment by, 78.
- Not transferable, 78.

PUBLIC OFFICER—*contd.*

Receiver in insolvency, 78.

Receiver in suit, 78.

Salary not liable to attachment and sale, 78.

Staff Officer, 78.

PUNCTUATION, NOT A PART OF THE ACT, 5.**PUJARI—See "Mahant."****PURCHASER—**

Affected with notice of defect, 385, 386.

Benefits on completion, 448.

Erroneous description, 388.

Meaning of, 383.

Oral contract for sale, right of, in, 365.

Remedy after completion, 396.

Rents and profits on completion, 449.

Rescission right of, 385, 386.

Restrictive stipulations discharge a, 384, 390.

Rights of, for

Defect discovered after conveyance, 396, 398.

Defect discovered before conveyance, 398.

Unacquainted with locality, 386.

Vendor and purchaser, *q. v.*

PURCHASER'S CHARGE—See "Charge of purchaser."**PURCHASER'S LIABILITY—**

When ownership has passed, 447.

Interest on encumbrances, 447.

Minor, 448.

Moneys due on encumbrances, 447, 448.

Public bodies do not apportion, 448.

Public charges, 447.

Rent, 448.

PURCHASER WITH NOTICE OF PRIOR CONTRACT—

Cannot plead prior decree against vendor as bar to suit against him, 377, 378.

Decree against, form of, 378.

Onus, that he is without notice, 377.

Possession under original contract a notice, 378.

Registration of original contract how far notice, 378.

Specific Relief Act, under section 27 (b) of, 377.

That he is *bona fide*, 377.

Transfer of Property Act under section 40 of 377.

Trust Act, under section 91 of, 377.

PURCHASER'S REMEDIES—

Cancellation, 457, 459.

Damages, 456, 459.

Rectification, 457, 459.

Repudiation, 456, 458.

Rescission, 456, 459.

Return of deposit, 456, 458.

Specific performance, 456, 457.

PURCHASER'S RISK—

While completion pending, 425.

"PURDANASHIN" LADY—See "Alienation by."

QUIET ENJOYMENT—

Absolute or qualified, nature of covenant, 829.

Acts held to be breaches, 834.

Acts held not to be breaches, 834.

Agreement for lease, absence of, in, 833.

Agricultural leases, not extended to, 828.

"Any person claiming under the lessor," meaning of, 830.

Bond of covenant sued against, 831.

Contract, exclusion of, by, 829.

Covenant in a lease, 827.

Covenant runs with the land, 833.

Damages for breach of covenant, 835.

"Demise" whether imports, 828.

Derogate from his grant, a lessor cannot, 835.

Disturbance under authority before lease, 832.

Entry not necessary, 834.

Eviction by title paramount, 828.

Extent of covenant for, 835.

Express covenant for, 830.

Form of covenant, 830.

"Granted and demised," whether import, 828.

Implied contract relates to estate not condition of property, 835.

Implied covenant, 829.

Implied covenant when excluded, 832.

Incident of the covenant for, 828.

Knowledge at date of lease, how affects, 834.

"Lawfully" occurring in the covenant, meaning of, 830.

Nature of, covenant for, 828.

Omission as much a breach as commission, 834.

Participation must be active, 832.

"Paying and performing," meaning of, 830.

"Peaceably and quietly," meaning of, 831.

Premises let in floors, 832.

Purchase by lessor of adjoining property after date of lease, 831.

Re-entry for rent is not a breach, 832.

Rent and covenant for, independent, 834.

Rent, payment of, not a condition precedent, 833.

Restrictions on the covenant, 829.

Statutory powers, act done under, 834.

Stranger, disturbance by, no breach, 835.

Title paramount, person claiming by, interruption by, 830.

Trespasser, disturbance by, no breach, 835.

Under-lease, 829.

Warranty of fitness differs from covenant for, 829.

Words raising the covenant, 828.

REASONS FOR ENACTMENT, 3.

RECEIPT, 423, 424.

Attested, 423.

RECEIPTS IN LIEU OF INTEREST—See “Mortgagee not liable to account.”

RECEIVER—Also see “Alienation by.”

Agent of the mortgagor, 646.

Application of moneys received, 646.

Costs, charges and expenses incurred by, 646.

Costs of application for payment of, 645.

Insurance by, 646.

Liability of person dealing with, 644.

Modification or variation of section 69 (a), 645.

Mortgagee's power under section 69 (a), 643.

Powers of, 646.

Removal of, 646.

Remuneration of, 646.

Residue after defraying expenses, etc., to whom payable, 645.

Stage at which the mortgagee may appoint, 646.

Suit not necessary, 647.

Vacancy how filled, 646.

Who may be appointed, 646.

RECITAL—

No evidence, 403.

REDEMPTION—See also “Partial redemption,” “Equity of redemption.”

Acquisition a mode of extinction of, 643.

Amount repayable on, 535.

Clog on, 550

Anomalous mortgage within the rule of, 558.

Call for moneys before expiry of period, 556.

Condition restraining alienation, 557.

Collateral bargain, 552.

Covenant to pay under both mortgages, 555.

During life of mortgagor, 547.

Foreign lands, 558.

Interest heavy rate, 557.

Long term, 558.

Option to purchase by mortgagee, 555.

Postponement of redemption, how far, 558.

Particular day in the period, 546.

Pre-emption, 554, 556.

Perpetual renewal, 556.

Sell premises to mortgagee, 556.

Void undertaking, 557.

Code of Civil Procedure, O. 2, r. 2., 549.

Decree in suit, 544.

Dismissal of action for, 544.

Equity of, purchased by mortgagee, 562, 563.

REDEMPTION—*contd.*

- Equity of, not to be sold, 562.
- Equity of, equity to redeem, 545.
 - Acquisition, 543.
 - Act of parties, 541.
 - Adverse possession, 541.
 - Decree of the Court, 544.
 - Exchange of lands, 562.
 - Extinction of—
 - Forfeiture, 543.
 - Merger, 541.
 - Other cases, 541.
 - Release to mortgagee, 541.
- Forfeiture extinguished, 543.
- Indefeasible and invariable, 545.
- Jurisdiction as to minors and lunatics, 538.
- Limitation for, 542.
- Loss of right by mortgagee to notice, 559.
- Merger extinguishes, 541.
- Mortgage divided, how, 548, 549.
- Mortgagee refusing, 537.
- Mortgagor counter-claiming, mortgagee seeking possession, 530.
- Mortgagor cannot be precluded from, 550.
- Notice of, 558, 559.
- Period of, 528, 546.
- Personal right, is not, 544.
- Privileges, 544.
- Proviso for, 546.
- Revival of, 543.
- Right not a liability, 544.
- Title, proof of 550.
- Title-deeds, lost by mortgagee, 562.
- Terms of, same whether suit for redemption or foreclosure, 528, 529.
- Withdrawal of, action for, 544.
- Who may sue for, 709.
 - Attaching creditor, 715.
 - Auction-purchaser, 710.
 - Chargee for maintenance, 714.
 - Co-mortgagor, 709, 711.
 - Co-owner, 709.
 - Creditor who has obtained a decree for sale of the mortgaged property, 715.
 - Contract for sale, 710.
 - Convict, his administrator, 711.
 - Crown, 714.
 - Donee from Hindu widow, 709.
 - Foreclosure prejudicing person, 713.
 - Insolvent, 711.
 - Joint tenants, 709, 711.
 - Mahomedan widow, 714.
 - Mortgagor as unpaid vendor, 714.

REDEMPTION—*contd.*

Who may sue for—

- Mortgagor with foreclosed interest, 713.
- Mortgagor's heir, 713.
- Person having an interest in, 709.
- Person having a charge upon, 710.
- Purchaser, and effect thereon, 710.
- Purchaser of different properties consolidated by a mortgagee, 710.
- Plaintiff in a creditor's suit, 715.
- Prior mortgagee, 712.
- Puisne mortgagee, 712.
- Purchaser of part of equity of redemption, 710.
- Reversioner, 714.
- Sale prejudicing person, 710.
- Sub-mortgagee, 709.
- Specific legatee, 713.
- Subsisting interest or charge essential, 710.
- Subsequent mortgagee, 710, 712.
- Surety for the mortgage-debt or part, 715.
- Tenants in common, 711.
- Tenant for life, 713.
- Whole property, 548, 550, 560.

RESIDENCE—See "Maintenance, future."

RE-ENTRY, PROVISIO FOR—

- Actual re-entry or issue of writ necessary, 64.
- Cannot subsist without an estate, 64.
- Effect of, not to avoid, 64.
- Forfeiture clause essential for enforcement, 64.
- Lease executed before the Act, 64.
- Legal owner of reversion can exercise, 63.
- Lessor's assignee can exercise, for breach before assignment, 63.
- Lessor's right to determine lease by, 63.
- Mortgagee in possession subject to a lease has no right of, 63.
- Non-observance of covenant, on, 64.
- Non-performance of covenant, on, 64.
- Notice inoperative, 64.
- Severance of reversion, on a, 64.
- Usual covenant in a lease confined to non-payment of rent, 63.
- Usual covenant, in a lease not, 64.

REGISTRATION—

- Abstention from inquiry or search, 39.
- Date from which notice operates, 39.
- Distinction between tangible and intangible property, 370.
- Document not duly stamped of, 39.
- Duty of mortgagee, 39.
- Duty of mortgagor, 39.
- Entry in a wrong book, 39.
- Failure to give proper description and, 39.
- Fictitious inclusion of property for, 371.

REGISTRATION—*contd.*

- Mutation entry, 39.
- Necessary when value less than Rs. 100 if delivery not possible, 370.
- Old law, 38.
- Prior transaction of, 39.
- Proves intention not transfer, 370.
- When notice, 38, 39.
- Who is deemed to have notice, 39.
- Wrong index, 39.

‘RELIEF,’ meaning of, in section 2 (c), 15.

RELIGIOUS OFFICE—

- Archaka*, 69.
- Birt-Acharji*, 68.
- Dharam karta*, transfer by hereditary, 69.
- Gift of grant for grantee's *perwarish*, 69.
- Hereditary managers, 69.
- Karima* right in a pagoda, 69.
- Karnam* property, 69.
- Maha Brahmin*, office of, 68.
- Malabar Devaswam, transfer of, 69.
- Mutavali*, office of, 69.
- Pagoda, management of, 68.
- Pala*, 68, 70.
- Poojari*, 69.
- Priest of village, privileges of, 68.
- Religious foundation, transfer of lands with which endowed, 69.
- Religious trust, sale of, 69.
- Res extra commercium*, 68.
- Sacerdotal office, 68.
- Sajjada nashin*, office of, 69.
- Shebait*, characteristics of the office of, 68, 70.
- Spiritual duties and privileges attached to a, 68.
- Temple right of managing, 69.
- Urallars*, 68.
- Vritti*, 68.
- Worship, Hindu, involving performance, 69.
- Worship, Mahomedan, connected with religious duties, 69.

REMAINDER—

- Acceleration of, 183, 184.
- Contingent, 183, 184.
- Vested, 184.
- What is a, 370.

REMOTENESS—See “Unborn person.”

RENEWAL OF LEASE—See “Covenant for renewal.”

RENEWAL OF LEASE BY MORTGAGEE—See “Mortgagee renewal of leasehold by,”

RENEWAL OF MORTGAGED LEASE—

- Accretion to which mortgagee is entitled, 649.
- Annuity, 649.
- Assign of the equity of redemption, 649.
- Confession of judgment to obtain, 650.
- Equitable mortgage of expired lease, on, 650.
- Ex-proprietory tenant relinquishing his holding, 650.
- Fraud of mortgagor in obtaining, 650.
- Implied covenants by mortgagor on, 649.
- Mortgagee may spend money for, 650.
- Mortgagor cannot acquire, discharge the encumbrance, 649.

RENT—Also see “Lease.”

- Abatement of, 795, 798.
- Administration of estates, 794.
- Advance payment and effect of, 795.
- Agricultural produce over cash, 799.
- Alternative, reservation of, 794.
- Apportionment of, 223, 224, 797.
- Assignability, 797.
- Assignment of reversion, how payment effected, 795, 796.
- Assignment no exoneration to tenant, 795.
- Building when under construction, 794.
- Certainty of amount, 794.
- Collection charge, 795.
- Conditional payment, 795.
- Consideration for lease, 794.
- Consist of, 794.
- Covenant to pay, runs with the land, 794.
- Date of payment, 794.
- “Debt” not treated as by the Succession Certificate Act, 797.
- Distress for, 809.
- Difference in amount in *habendum* and *reddendum*, 794.
- “Due payment,” meaning of, 797.
- Fixed not on actual measurement but approximately, 798.
- How payment made, 796.
- Incorporeal hereditaments, 794.
- Insolvency of lessee, 794.
- Interest on arrears, 796.
- Joint lessors, who entitled to, 795.
- Limitation, 798.
- Mortgage by lessor, how liability to pay, 794.
- Not fixed by parties, 799.
- Non-payment, effect of, 796.
- Payable in kind, 795.
- Payment of—
 - Agent to receive, 863.
 - Claim for, 862.
 - Co-lessor may sue for whole, 862.

RENT—*contd.***Payment of—**

- Contract to the contrary, 862.
- Disclaimer by trustee in bankruptcy, 863.
- Eviction of tenant by landlord, 863.
- Eviction of tenant by title paramount, 863.
- Lessor or his agent entitled to, 862.
- Local usage, 862.
- Proper time for, 862.
- Proper place for, 862.
- Transfer does not affect lessee's liability for, 862.
- Period of time when monthly or yearly payable, 795
- Place of payment of, 796.
- Receipt, right to pass by Collector, 796.
- Recovery of, 797.
- Re-entry for non-payment, 795.
- Reduction, agreement for, 795.
- Service, 794.
- Stranger, reservation to, 795.
- Suit for, 826.
- Suspension, when and how, 797.
- To whom payable, 795.
- Usual covenant in a lease, 794.
- Varieties of, 798.
- Voidable lease, acceptance of, 794.

REPAIRS—**Leasehold to—**

- Agricultural, 842.
- Contract to contrary, 842.
- Costs of, 843.
- Covenant for how far implied, 842.
- English Law, 842.
- Expenses, contract for, 842.
- Expenses, of lessee for, 842.
- Form of covenant, 843.
- Interest, allowed on expenses, 844.
- Interest rate of, 844.
- Lessee's right to make, 842.
- Lessor's neglect after notice, 842.
- Local usage, 842.
- "Repairs which he is bound to make," meaning of, 843.
- Tenant, implied contract by, to, 843.

REPAIRS TO LEASEHOLDS—See "Condition of leasehold premises.

REPEAL—

- Acts, 12.
- "Affect," meaning of, in section 2, 12.
- "Be deemed to affect," meaning of, in section 2.

REPEAL—contd.

Construction on, 12.

"Herein," meaning of, in section 2, 12.

Savings of enactments, rules, etc., 11.

REPORT OF COMMISSIONER, 3.**REPORT OF SELECT COMMITTEE, REFERENCE TO, 3.****REPRESENTATION—**

Misrepresentation—See "Misrepresentation."

Must be of a fact present and existing, 679, 680.

Plea of *non est factum*, 680.

What is, 679, 680.

REPUDIATION AFTER ACCEPTANCE OF TITLE, 415.**REQUISITIONS ON TITLE—Also see "Appendix."**

Time within which purchaser should make, 413.

Time within which vendor should make answers to, 413.

RESCISSION—

After judgment no right to, 414.

Costs on, 414.

Good faith in exercising the right of, 414.

May be exercised before judgment, 414.

Notice of, marked "without prejudice," 414.

On discharge of purchaser for misdescription, 414.

Reason for, need not be stated, 414.

Right of, is not arbitrary or capricious, 414.

Right of, lost, 414.

Time within which to withdraw requisitions need not be stated, 413, 414.

Trustees without title, 414.

Usual clause as to, 413.

Construction of a, 413.

How suspended, 414.

Indemnity offered by vendor under this, 414.

Nature of, 413.

Waiver of, 414.

Vendor's right of, co-extensive with that of the purchaser, 413.

When does the right arise, 413, 414.

Without answering requisitions, right cannot be exercised, 414.

RESERVATION—

What is a, 421.

RESIDENCE—

Right analogous to maintenance under section 39, 228.

See "Maintenance, future."

RESTS, MORTGAGEE'S LIABILITY TO ACCOUNT WITH—

Broken period not allowed, 675.

Form of decree, 675.

RESTS, MORTGAGEE'S LIABILITY TO ACCOUNT WITH—*contd.*

- Liability continues when once it has commenced, 675.
- Mortgagee denies mortgagor's title, 675.
- Mortgagee retains possession after discharge, 675.
- Mortgagee of leasehold taking possession to prevent forfeiture, 675.
- Ordinary rule, 674.
- Rents at first less then in excess, 675.
- Rents exceed interest, 674, 675.
- When allowed, 675.
- When not allowed, 675.

RESTRICTIVE COVENANT—

- Consideration, stranger to the, 234.
- Construction of, 233.
- Damages, 237.
- Defect in title, 239.
- General building scheme, as part of a vendor's benefit under, 233.
- Injunction, 237.
- Intention common to establish a scheme of mutual obligation, 235.
- Negative covenant, 234.
- Negative easement, analogy to, 234.
- Public dedication of land subject to,
- Re-entry by covenantee, 239.
- Re-purchase as affecting, 237.
- Requisites for enforcing, 230.
- Sale in lots, 237.
- Sinews of the land, 231.
- Transferee for consideration when liable, 234.
- Ultra vires* the purchaser, 235.
- Vendor may vary, 235.
- When not enforced, 234.
- Who can annex the burden, 238.

RESTRICTIVE USER OF PREMISES—See "Lease."

RESTORATION OF POSSESSION TO LESSOR—See "Delivery by lessee."

RESTRICTION ON TRANSFER—Also see "Transfer."

- Affirmative covenants as, 136.
- Enjoyment in a particular manner, 135, 136.
- Gift on, 135, 136.
- Partition on, 135.
- Repugnant to interest created, 135.

RESULTING TRUST ON DETERMINATION OF A PRIOR INTEREST, 140.

RETROSPECTIVE—

- Act not, 13.
- Exceptions to the rule that the Act is not, 13.
- Mixed procedure and right, 14.
- Procedure, matters of, is, 13.

RETROSPECTIVE—*contd.*

Exceptions to rule that Act is not—*contd.*

Right of appeal is not procedure, 13.

Where the Act declares it is, 13.

Provisions of the Act held not, 14.

REVENUE SALE—See “Surplus sale proceeds.”

REVERSION—

Assignment, 370.

Property in possession of tenants, 370.

What is a, 370

REVERSION ON A LEASE—See “Lease.”

REVERSIONARY INTEREST, 59, 61, 62.

Hindu Law possibility, 59.

REVERSIONARY INTEREST IN HINDU LAW, TRANSFER OF, 59, 60, 61.

REVERSIONARY LEASE—See “Lease.”

REVERSIONER—

Consent of, for legal necessity, 103, 104.

Consent of, without legal necessity, 103, 104.

Election by, 103.

How far bound, 103, 104.

Impeaching validity, 104.

Ratification by, 105.

Without consent of, for legal necessity, 104.

Without consent of, without legal necessity, 104.

RIGHT TO OBTAIN ANOTHER DOCUMENT, 470.

Registration not necessary, 467, 469.

RIGHT TO SUE—

Accounts, right to take, 74.

Actionable claim differs from, 73.

Agent, amount due by, 74.

Agent, amount found due by, 74.

Agent, assigning right of indemnity, 74.

Agent, recovery of definite debt from, 74.

Agreement to lend money enforcement of, 75.

Breach of contract, for, 73.

Chitti of borrowed articles, 74.

Compensation against tenant for use and occupation, 74.

Contribution right to, 75.

Earnest money, recovery of, 74.

Executing contract for future sale of property, 74.

Indemnity of agent, 74.

Interest by way of damages, 74.

Interest due prior to assignment of debt, 75.

Maintenance allowance, remainder, 74.

Not transferable, 73.

Official Assignee, sale by, of lands in possession of alienees, 74.

RIGHT TO SUE—*contd.*

- Official Receiver, sale by, of insolvent's property, 74.
- Personal right, 73, 75.
- Purchase amount due to vendor, 74.
- Reconveyance, contract by purchaser, 74.
- Settlement, rights under a, 75.
- Test of transferability, 74.

RULE AGAINST PERPETUITIES—

- Agreement to sell, 150.
- All possible contingencies, 145.
- All the male heirs of, 142.
- "As near as the rules of law and equity will permit," 142.
- Construction, 142.
- Covenant for pre-emption, 147, 148.
- Covenant in a lease, 151.
- Cy pres* doctrine, 152.
- Difference between sections 13 and 14, 153, 154.
- Difference between sections 14 and 15, 154.
- En ventre sa mere*, 145.
- Equitable interest in land, 144, 145.
- Exceptions to the rule, 145, 146.
 - Agreement to sell land, 146.
 - Corporations, 146.
 - Covenants which run with the land, 146.
 - Easement *in futuro*, 146.
 - Equity of redemption, 146.
 - General powers, 146.
 - Mortgagor giving mortgagee preference of presumption, 146.
 - Option to purchase, 146.
 - Perpetual renewal covenant in a lease, 146.
 - Personal contracts, 145.
 - Pre-emption, covenant for, 146.
 - Restrictive covenant, 146.
 - Revocable licence, 146.
 - Statutory intents, 146.
 - Transfers for public benefit, 146.
- For the longest period allowed by law, 142.
- Future husband or wife, 147.
- Hindu Law, 151.
- Immediate parties, 145.
- Indemnity, contract of, 152.
- Indefinite failure of issue, 152, 153.
- Inter esse termini*, 152.
- Lease in perpetuity, 152.
- "Life in being," 145.
- Limitation following a limitation void, 147.
- Lives chosen, 144.
- Mahomedan Law, 151.
- Minority, 144.
- Moveable property, 143.

RULE AGAINST PERPETUITIES—*contd.*

- Number of lives, 144.
- Origin and growth, 143.
- Particular estate and remainder created at same time, 143.
- Period how computed, 145.
- Period of gestation, 145.
- Powers, 153.
- Presumption against child bearing, 143.
- Remoteness, 146.
- Transaction not amounting to a transfer of interest, 152.
- Transfer for benefit of public, 154.
- Uncertainty, 142, 143, 144.
- Vesting rules, 145, 146.
- Vesting suspended for more than 21 years, 145.
- Void restrictions on valid limitations, 147.
- What is the, 143.
- Wills, 143.

RULES—

- Beyond the powers conferred, 780.
- Framed on the original side, 780.
- Power of the Court to make, under Chapter IV, 780.

SALARY OF PUBLIC OFFICER—See "Public officer."

SALE OF IMMOVEABLE PROPERTY—

- Avoidance of, 373.
- Compromise not a, 366.
- Definition of, 364.
- Easements, grant of, not a, 366.
- Exchange how distinguished, 366.
- How made, 364.
- Offer to give first opportunity to purchaser, 373.
- Perpetuities rules how far applicable, 372.
- Reconveyance, condition of, on, 372.
- Value less than Rs. 100, transfer effected, 371.
- Value more than Rs. 100 how transfer effected, 371.

SALE OF LAND—

- At one time or different times, 88.
- Best price must be obtained on, 88.
- Conjointly with property not subject to trust, 88.
- Court order for, necessary, 88.
- Covenant for production of deeds on, 89.
- Covenant for title, on, 89.
- Directed to dispose of immoveable property, 88.
- Ownership passes to buyer, 438.
- Rents and profits, apportionment of, 438.

SAVINGS OF ENACTMENTS, ETC.

- Budhist Law, 18.
- Division of status, 13.
- Hindu Law, 18.
- Mahomedan Law, 18.
- Partition between co-owners, 13.
- Patni* taluks, 13.
- Rajinama* of unalienated lands, 12.
- Regulation VIII of 1819, 13.

SCHEDULE PART OF THE ACT, 5.

SEAL NOT NECESSARY IN INDIA, 422.

SEARCHING INTERROGATORY BY PURCHASER, 412.

SEASHORE—

- Bombay defined by, meaning of, 416.

SECOND MORTGAGE, 474.

SECTIONS, WHAT ARE THEY, 4.

SELLER—

- Acquisition of land must be disclosed by, 389, 392.
- Liability of, for,
 - Concealment, 384, 385, 386.
 - Misdescription, 384, 385, 386, 391.
 - Misrepresentation, 384, 385, 386, 391.
 - Non-disclosure of defect in title, 385.
 - Vendor and purchaser, *q. v.*
- Meaning of, 383.
- Purchased under a document of doubtful construction,
- Specific performance refused, 386.
 - Failure to give notice of a burden to repair, 386.
 - When guilty of concealment, 386.

SELLER'S TITLE—See "Vendor's title."

"SHEBAIT"—See "Alienation by."

SIMPLE MORTGAGE—

- Attributes of a, 479.
- Charge differs from, 480.
- Concurrent remedies, 480.
- Limitation, 480.
- Nomenclature adopted in different parts of India, 479
- No transfer of ownership, 479.
- Personal covenant, 479.
- Personal obligation may be implied, 479.
- Possession, 479.
- Receiver, 480.
- Redemption, 480.
- Remedies of a, 480.
- Sale, 480.

SIMPLE MORTGAGE—*contd.*

- Security of the property, 479.
- Security of twofold nature, 479.

SERVANT OCCUPYING MASTER'S PREMISES A LICENSEE, 792, 793.

SERVICE TENURES, INCIDENTS OF—

- Abolition of military service, 67.
- Distinction between grant of office and grant of land, 68.
- Ghatwali*, 66.
- Karnam*, 67.
- Palayam*, 67.
- Swastivachakam*, 67.
- Vatan*, 67.

SET-BACK—See “Misdescription.”

SHARES NOT ACTIONABLE CLAIM, 946.

SOUND MIND WHAT IS FOR THE PURPOSE OF CONTRACT, 92.

- What is, for the purpose of contract, 92.

SPECIFIC PERFORMANCE—

- Instances when the Court grants or refuses, 406, 407, 411.

“SPES SUCCESSIONIS.”—

- Cannot be assigned, 57.
- Confers no interest, 57.
- Differs from interest arising, 57.
- Not a title to property, 57.

STAMP—

- After execution, 423.
- Before execution, 423.
- Deed unnecessary for protection of title, 403, 404.
- Purchaser entitled to have it stamped, 403.
- Title-deed unstamped, 403.
- Vendor must bear expense of, on deed being a link in title, 403.
- Under Stamp Act, section 35, 404.

STANDING TIMBER—

- Cutting and removal of, 23.
- Forest produce are not, 23.
- Fruit trees are not, 23.
- Grass, 22.
- Growing crops or grass, *ejusdem generis* with, 22.
- Juice of trees, 23.
- Karuvela*, 23.
- Mahua* grove, 23.
- Mango, 23.
- Not immoveable property, 22.
- Plum, 23, foot-note (a).
- Test for determining whether moveable or immoveable, 23.

STANDING TIMBER—*contd.*

Timber, 22.

Velvela, 23.

Where there is no actual removal, 23.

STIPENDS TO PENSIONERS—See "Pension."

STOCK MORTGAGE, 474.

STOCKS NOT ACTIONABLE CLAIM, 946.

SUB-LEASE—See "Assignment by lessee."

SUB-LEASES ON SURRENDER OR FORFEITURE—See "Under-leases."

SUB-MORTGAGEE—

Accounts between mortgagor and, 477.

Equities of redemption are two, 475.

Incidents of a, 474.

Outside the scope of Chapter VIII, 476.

Powers of sale are two, 475.

Privity between the original mortgagor and, 477.

Right of, to redeem prior mortgage, 477.

Right to foreclose, 477.

Subsequent acquisition by original mortgagee of his mortgagor's equity of redemption, 477.

Substitution of original mortgage by subsequent mortgage, 476.

Takes subject to equities if the original mortgage is fraudulent, 679.

Trustees may be, 476.

SUBROGATION—

Auction-purchaser, 727.

Benami purchase, 734.

Benefit of securities, 722.

Co-mortgagor, 719, 720.

Consolidation, 722.

Contribution, 722.

Conventional, 717, 718.

Doctrine of, 717, 718, 719.

Delivery of securities, 721.

Expectant heirs, 720, 727.

Intention rule exploded, 732, 733.

Interest allowed, 732.

Interest rate, 732.

Legal, 717, 718.

Limitation, 733.

Limited amount of liability, 722.

Marshalling securities, 722.

Nature of liability, 717, 718, 719.

Partial, when permitted, 736, 737.

Partial prohibited, 736, 737.

Prior encumbrance when discharged, 731, 735.

Purchaser, 733.

SUBROGATION—*contd.*

- Purchaser without title, 734.
- Purchaser under invalid sale, 734.
- Principal debtor really surety, 722.
- Really a principal debtor, 722.
- Restriction on his rights in India, 729.
- Retrospective effect of section 92, 717.
- Reversioner, 728.
- Stranger, 730.
- Surety on redemption, 721.
- Subrogated to rights of mortgagee, 733, 734.
- Tacking, 727.
- Volunteer, 730.
- Waiver of right of subrogation, 722.

SUCCESSION MORTGAGEES—See “Mesne encumbrance.”

“**SUDBHARNA**”—See “Usufructuary mortgage, varieties of.”

SURPLUS SALE PROCEEDS—

- Amendment of section 73, 657.
- Change in form of security, 657.
- Charge no longer subsisting on, 659.
- Compulsory acquisition, 659.
- Default of mortgagee causing sale, 658.
- Enforcement of claim though principal not due, 660.
- Hypothecation, 660.
- Judicial sale, 658.
- Limitation, 660.
- Mortgagee purchasing at a sale, 659.
- Partition of undivided share, 659.
- Personal covenant, 660.
- Priorities of claims, 660.
- Restoration of security, effect of, 660.
- Revenue sale, 658.
- Sale must be free from encumbrances, 658.
- Sale of part of the mortgaged property, 658.
- Substituted security, 657.
- Transformation of security, 657.
- What are, 659.

SURRENDER OF LEASE—See “Express surrender” and “Implied surrender.”

SURRENDER BY OPERATION OF LAW—See “Implied surrender.”

SURVIVOR—

- Clause how construed, 185.
- Contrary expression how construed, 186.
- Exception to rule in section, 186.
- Gift over to, 185.
- How determined when gift follows life interest, 185.
- One of three different meanings attached to, 185.
- Others or other when construed in, 185.

SURVIVOR—*contd.*

- Presumption, 186.
- Several tenancies in case of, 185.
- Time of division, 185.
- Wills, how construed, 186.

TACKING—

- Abolished in India, 738, 739.
- Salvage payments entitled to, 739.
- Section 79 allows, 739.
- "Subsequent advance" in section 93, meaning of, 739.
- What is, 738.

TANGIBLE PROPERTY, WHAT IS, 369.**TEMPEST—See "Destruction."****TEMPLES, 114.****TEMPORARY STRUCTURE—**

- Tenancy lands, 586.
- Usufructuary mortgage, 585.
- Waste by mortgagee, 586.
- When the Act does not apply, 585.

TENANTS IN COMMON—See "Alienation by."**TENDER—**

- Currency in which made, 531, 532.
- Improperly rejected does not extinguish the equity of redemption, 534, 535.
- Mortgagee, when dead, 533.
- Of mortgage-money not a condition precedent to a suit for redemption, 534.
- Person to whom made, 534.
- Place of payment, 531.
- Production of money how far necessary, 531.
- Reconveyance demanded on, 533.
- Refusal of, effect, 534.
- Requisites of a valid, 531.
- Time of payment, 531.
- What is, 530, 531.
- Who should make, 534.

TENDER UNDER CHAPTER IV—

- Agent holding general power-of-attorney, 779.
- Agent otherwise duly authorized, 778, 779.
- Made to person not residing in the district, 778.
- No person found or known to the person desiring to make the tender, 779.
- Person incompetent to contract—See section 103, 779.
- Sufficiency of, 778.

TENURE—See "Service tenures."**TERM, COMPUTATION OF, IN A LEASE—**

- Absence of, 883.
- Agreement to lease, time of commencement not specified, 883.

TERM, COMPUTATION OF, IN A LEASE—*contd.*

Commencement—

When date is fixed, 883.

When no date is fixed, 883.

Duration, 883.

First day when excluded, 883.

First day when included, 883.

Habendum, variance with *reddendum*, 883.

Option to determine, 883.

Termination—

Ascertainment of, 882, 883.

Lease for a year or years, 882, 883.

TESTAMENTARY POWER, 103.**TESTIMONIUM, WHAT IS A, 422.****TIMBER—See “Standing timber.”****TIME COMPUTATION IN LEASES—See “Term, computation of, in a lease.”****TIME FOR PERFORMANCE IN—**

Conditional transfer—

Fraud, preventing act of, 208, 209.

Where no time is fixed, 207.

Where time is fixed, 208, 209.

TITLE OF THE ACT, 3.**TITLE—See “Abstract,” “Abstract of title,” “Covenant for title,” “Investigation.”**

Acceptance of, 416, 417.

Acts which amount to, 417.

Co-purchaser not bound by, of joint purchaser, 417.

Inaccurate representation of the vendor no, 417.

Deeds collateral to, purchaser not entitled, 412.

Deduce, meaning of, 404.

Deeds of title, 401, 402.

Goods, 404, 405, 406.

Indemnity with, 404, 405, 406.

Marketable, 404, 405, 406.

Root of, 400.

What title should be adduced, 400, 401.

When deemed to be shewn, 400, 401.

When made, 401.

TITLE-DEEDS—

Benefit of covenant for production extends to assigns of purchaser, 437.

Care of—See “Care of title-deeds.”

Choosing to take a bundle without examining, 682.

Common to two estates and held by third parties, 437.

Costs, 438.

Collateral to title, purchaser cannot demand, 436.

Covenant for production by vendor, 437.

Covenant to produce, runs with the land, 436.

Custody of, by person in possession of estate, 435, 436.

Delivered on whole purchase-money being paid, 436.

Delivery to buyer, 401.

TITLE-DEEDS—*contd.*

- Greatest value purchaser of, 436, 437.
- Largest lot purchaser entitled to, 436, 437.
- Meaning of largest lot, 438.
- Mortgages, purchaser not entitled to, 436.
- Parting with, with instructions to hand over to a third person, 682.
- Purchaser not bound to complete without, 436.
- Reversioner not having, 683.
- Sale in lots who entitled, 436, 437.
- Sufficient reason for non-delivery but not for non-production, 682.
- Successive sale on, who entitled, 438.
- Tenant in common allowing another who has mortgaged his share, 684.
- Trustee allowing to remain with beneficiary, 684.
- Vendor impliedly covenants to deliver, 436.
- Vendor must pay expenses of obtaining, 436.
- Vendor's possession or power, 401.
- Vendor's right to retain, 436.
- What, purchaser entitled to, 436.
- Who should move for them, 401.
- Wills, purchaser not entitled to, 436.

TITLE-DEEDS, CARE OF—See "Care of title-deeds."

TRANSFER—See also "Alienation," "Restriction on transfer."

- Accretion of future interest, 129.
- Agreement by donee not to alienate, 130.
- Annuity, 130.
- Bequests, 131.
- Collector's office, 423.
- Compromise not a transfer, 132.
- Condition restraining, 125.
- Crown, 133.
- Distinction between a contract or an option to purchase and a conditional limitation, 131.
- Exemptions, 129.
- Family settlement, 129.
- General restraint on, 125.
- Gift, 130.
- How made, 124.
- Hindus, 129.
- Involuntary alienation, 134.
- Leases exempted, 125.
- Limitation of descent, 129.
- Limitation how defined, 125, 128, 129.
- Mahomedans, 129.
- Married woman, when exempted, 125, 130, 131.
- Municipal records, 423.
- Necessity for writing, 124.
- Need for registration, 125.
- Partial restraint on, 126.
- Partition, 131.

TRANSFER—*contd.*

- Persons affected by, 126.
- Pre-emption, 131.
- Premium, 131.
- Rents, increase of, 128.
- The rule in Shelly's case, 129.
- Various modes of restricting, 127.

TRANSFER, ACTIONABLE CLAIM—See "Actionable claim."

TRANSFER, CONDITIONAL—See "Conditional transfer."

TRANSFER, FRAUDULENT—See "Fraudulent transfer."

TRANSFER OF INTEREST BY LESSEE—See "Assignment by lessee."

TRANSFER OF LEASEHOLD INTEREST—See "Assignment of leasehold interest."

TRANSFER BY LESSOR—

- Agricultural leases, 880.
- Apportionment on, 881.
- Arrears of rent, lessor entitled, 882.
- Breach prior to, 881.
- Discharge from liabilities by consent of lessee, 880.
- Eviction on partial, 882.
- Liabilities of lessor on, 882.
- Liabilities of transferee, 882.
- Notice to lessee not necessary, 880.
- Quiet enjoyment, covenant not affected by, 881.
- Rents, transferee entitled to, 882.
- Reversion whole or part of, 880.
- Right of transferee, 882.
- Rights of lessor on, 881.
- Severance of reversion, 881.

TRANSFER OF MORTGAGE, 467.

TRANSFER OF MORTGAGE DEBT AND PROPERTY—

- Arrears of rent, 565.
- Attestation not necessary, 565.
- Costs, 565.
- Encumbrancer may enforce, 564.
- Enforced by mortgagor, 564.
- Equitable mortgage, 565.
- Equity of redemption old and new, 565.
- How effected, 565.
- Mortgagee in possession exempt, 564, 565.
- Partial, 565.
- Privity between mortgagor and encumbrancer, 564.
- Stamp duty, 566.
- Separate assignment, 565.
- To third party, 564.

TRANSFER, OPERATION OF—

- All the estate right, title, interest, etc., 116.
- All other estate, if any, treated as surplusage, 117.

TRANSFER, OPERATION OF—*contd.*

- All things attached to earth, 122.
- Debt, 123.
- Different intention, effect of on transfer, 117.
- Easements annexed thereto, 118.
- Fixture as used in English Law, 119.
- Franchise of a ferry, 120.
- Freehold and leasehold property, no distinction, 123.
- General words, what are, 116.
- Grant in India, 121.
- House, 118.
- Interest which the transferor is then capable of passing, 117.
- Joint right, 124.
- Land in a zemindari, 117, 121.
- Law of Property Act, 1925, section 63, 116.
- Leasehold conveyed as freehold, 117.
- Legal incidents are included in a transfer, 118.
- Machinery, 119.
- Maxim "*omne quod inædificatur solo cedit*," 122.
- Mines, 120.
- Mokarari* lease, 121.
- Other property yielding income, 119.
- Passes all interest on transfer in the property, 118.
- Patni* taluk, 121.
- Profits, 118.
- Rents, 118.
- Revenue sale, 120.
- Shells, right to dig, 122.
- Title-deeds, 119.
- Transfer by operation of law, 119.
- Trees, property in, 119.

TRANSFER BY OPERATION OF LAW, 17.

- Apportionment of rents, rule of, not applicable to, 17.
- Covenants for title not implied in a, 17.
- Creditor defeated by debtor, 17.
- Legal practitioner trafficking in, 17.
- Liquidation, sale by, not a, 17.
- Not affected by the Act, 17.
- Official Receiver, sale by, not a, 17.
- Sale in execution is a, 17.
- Security bond given to Court is a, 17.

TRANSFER NOT ALLOWED—

- Estate of a farmer in default, 82.
- Lessee under a Court of Wards, 82, 83.
- Untransferable right of occupancy, 81, 82.

TRANSFER OF PROPERTY—Also see "Property, transfer of."

- Disqualified person, 80, 81.
 - Buddhist monk is not a, 81.
 - Minor is, for obtaining, 81.
 - Person not holding certificate required is not, 81.

TRANSFER OF PROPERTY—*contd.*

Opposed to nature of interest—

Custom, 80.

Decorations, 79.

Impartible raj, 80.

Land burdened with service of public nature, 79.

Married woman's property, 80.

Primogeniture, 80.

Provident fund, 80.

Religious endowments, 80.

Settled property, 80.

Swastivachakam, 79.

Titles, 79.

Restraint on, 80, 135, 136.

TRANSFEROR—

Capacity to transfer, 83.

Limited estate holder, 83.

TRESPASS ON LEASEHOLDS, 873.

TRUSTEE—See "Alienation by."

"UBHAYAPATTOM," 514.

UNBORN PERSON, RULE AS TO—

Absence of present interest in agreement to grant land, 140.

Adopted child, 139.

Child *in gremio matris*, 139.

Double possibility rule, 141.

Extinction of trust created, 141.

Hindu Law, 140, 141.

Limited estate, 140.

Mahomedan Law, 141.

Maintenance and marriage expenses, 141.

Moveables, 139.

Prior interest how affected, 140.

Resulting trust, 140.

Remoteness, 139.

Subsequent interest how affected, 140.

Subsequent interest, who should come into existence on determination of prior interest, 140.

Time for ascertainment of facts, 141.

Transfer for, 139.

When transfer void, 140.

Wills, provisions in, for, 139.

